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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re I.H. et al., Persons Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.H.,

Defendant and Appellant.

E063451

(Super.Ct.No. SWJ1400995)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge.

Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and
Appellant.

Gregory P. Priamos, County Counsel and James E. Brown, Guy B. Pittman, and
Carole Nunes Fong, Deputy County Counsel for Plaintiff and Respondent.

M.H. (mother) is the mother of three children—I.H., Je.H., and Jy.H., who were ages 10, 9 and 3 on the date of the challenged orders. Mother appeals from the jurisdiction findings and disposition orders of March 11, 2015. She argues the jurisdiction findings are not supported by substantial evidence because they are based on a single incident of domestic violence, in which her husband of 14 years attacked her in front of the children, and which she promptly answered with two reports to the police, a restraining order and a divorce petition. Mother further argues reversal and remand are required because neither the juvenile court nor the Department of Public Social Services (DPSS) complied with the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA). We affirm the court's orders.

FACTS AND PROCEDURE

The Domestic Violence Incident and Social Worker Interviews—December 16-17, 2014

On December 16, 2014, mother and the children's father (father) were arguing at the home. Father told mother not to "push my buttons" and sent 10-year-old I.H. out of the room. Mother asked why father sent I.H. away, and father replied, "Because I'm going to kill you." Mother ran toward the front door, which father closed to prevent her from leaving. Mother stated that father got her on the floor, put his hands around her throat and put a knife at her throat, yelling, "You don't think I could kill you!" Mother's sister (aunt) attempted to intervene but father said he would kill her too, so she ran to a neighbor to call police. Father let mother go when I.H. came back into the room holding one of the parents' two medically fragile foster children and told father "you're going to

kill her.” Father was sitting on the couch when police arrived ten minutes later. Mother asked the responding deputy not to file a report because father was a veteran and an arrest could jeopardize the pending adoption of the foster children.

That same day, father drove himself to a Veterans Administration Hospital in San Diego to seek treatment. Hospital staff evaluated but declined to admit father. They told him to return to taking his previous anti-depressant medication and to seek psychiatric treatment. Father called mother and told her that he had obtained a motel room and that she should pack his things and some for three-year-old Jy.H., whom they had adopted earlier in the year. Father wanted to bring Jy.H. with him to the motel. Mother suspected father was calling from just outside the home instead of from the motel, so she had the aunt call police. Father at some point broke in through the front door and yelled, “I fucking pay the mortgage here.” Father came inside, used the restroom, said hello to the children, and calmed down while mother finished packing. Mother told the social worker that she let Jy.H. go with father because she had no reason to think father would hurt the child, and because she was in fear for her life.

The same deputy returned to the home, but not until after father had left with Jy.H. Mother told the deputy where father said he was staying. She believed the deputy must have contacted father, because father sent her a text telling her he couldn’t believe she had called the police on him again. The next morning, December 17, father texted mother while she was away from the home to see if he could go to the home to pick up some things. Mother gave her permission. Later that day, father picked up the two older children from school without mother’s permission and texted her photos of them eating

and smiling, along with negative comments like “stop being a bitch” and “stop being stupid.” Mother stated she went to the courthouse that day to get a temporary restraining order (TRO), but was too late. She returned the following day, December 18, and was able to get the TRO.

On December 17, 2014, DPSS received an immediate response referral alleging general neglect/domestic violence stemming from the incident on December 16. Social workers came to the home to interview mother. During her interview with the social worker, mother said she and father had been married for 14 years, and that this was the first physical altercation. Mother reported they had argued frequently over the years and that father had threatened to harm her. She stated father constantly accuses her of having an affair and often says threatening things when he is angry, such as, “If you ever get married, I’ll kill you” and “If you ever cheat on me, I’ll kill you” and “If I see you with another boyfriend, I’ll kill you.” Mother disclosed that father “either wants us to be together, or me dead.” Mother stated she would not allow father back into the home and would file for divorce. Father had retired from the Navy in March 2014 after 20 years, and was never the same after serving in the Gulf War. Father was being treated for depression, which manifested itself with symptoms of rage and anger, rather than quiet sadness. His medication had been changed about four weeks prior to the incident, but he was not happy with the change and returned to taking his previous medication without consulting his doctor. At about that time he told mother that he had swallowed 120 pills of his anti-depression medication and hers, and that he would rather die than get a divorce. Father told mother that he had stopped taking his medication at all about two

weeks before the incident. Mother noted that father had seemed irritable over the last few days.

The social worker wanted to speak with the children, and so had mother call father. The social worker arranged with father to bring the children to the home, and called to have a sheriff's deputy present. Father wanted to tell the social worker his side of the story over the telephone, although he could not recall many of the details. He stated that on the day of the incident mother was testing him and messing with him, which she had a habit of doing; father stated that mother was constantly "poking" him and blowing things out of proportion when he "gets a little loud with her." Father said that he "snapped" and mother overreacted by running towards the front door "like she was running for her life." Father ran after mother, kicked the door closed to prevent her from leaving, grabbed her by the neck from behind, threw her to the floor and yelled at her. He stated he "went off" on the aunt because he thought she was going to hit him, and that is when the aunt ran out of the house to call police. Father denied punching or choking mother, but stated he was trained in hand-to-hand combat during his 20 years in the military and could have hurt mother if he had wanted. When the social worker questioned father about whether he held a knife to mother's throat, he stated he does keep one in his back pocket, but could not remember whether he used it on mother. He said he could not confirm or deny whether he told mother he was going to kill her, and said he would not incriminate himself without having a lawyer present. Father stated he and mother have had previous arguments, but this was the first one to become violent, and that mother now would not speak with him. He also stated that he would look for a place

to live after speaking with mother to determine what was happening with their marriage. Father confirmed that he stopped taking his medication about two weeks prior to the incident and had begun to feel moody and irritable.

Also on December 17, the social worker interviewed the aunt, who had recently gotten back in touch with mother after 13 years and had been visiting and staying in the home since September 2014. The aunt said that she had seen mother and father arguing daily, and that father is very controlling regarding money, where mother goes, whom she sees or contacts, and what she wears. She stated father always instigates arguments, and the children are often present during arguments and seem to “zone out” and not pay attention to the arguments. The aunt said mother told her she is seeing a therapist and that the arguing has gone on for a long time. She had witnessed father yelling at the couple’s three children, but never at the two foster children. She had not witnessed or heard of father physically harming any of the children. She also stated the incident the previous night was the only time she was aware of that father had gotten physically violent with mother. The aunt’s account of the incident was consistent with that given by mother, including that father slammed mother down on the ground, grabbed her by the throat with one hand and held a knife to her throat with the other, and screamed that he was going to kill mother. She also stated that two of the children witnessed the event and began screaming also.

Father brought the children to the home but remained in his car. I.H. told the social worker that he was present when the argument started, along with his nine-year-old brother Je.H. and one of the foster children. His three-year-old brother, Jy.H. was asleep

in another room. I.H. said that father kept mother from leaving the house by pushing the door closed and holding her by the shoulders. He said his father did not hurt his mother, he did not recall father hitting mother, and said he did not see a knife. He said he was not afraid of either parent.

Je.H. told the social worker that he was also in the living room when his parents started arguing, and that it was “kinda loud.” Je.H. said his father did not slam the door but pushed it shut with his hand to keep mother from leaving the house. He said father did not hit mother or use a knife. He said he was not afraid during the argument.

The police officer present told the social worker that, based on the information he had, he would be unable to make an arrest or issue a restraining order, but that law enforcement would come to keep the peace any time father needed to come to the house.

Before the social worker left that evening, mother told the social worker that I.H. and Je.H. were ready to “come clean” and wanted to speak to the social worker again. Je.H. asked to talk to the social worker privately; I.H. got up and said, “What he says is what I would say.” Je. H. was crying as he told the social worker that “he did choke her; I didn’t want my dad to go to jail. She was on the ground, screaming and kicking, [I.H.] and I were yelling ‘stop choking her.’” Je.H. said he did not see a knife.

Because of the domestic violence incident, the social worker decided to file a Juvenile Court petition asking to remove custody from father and place custody with mother. Father became upset when he was told this, said he did not want to discuss it, and left the home.

Also that evening, father did not agree to the terms of a proposed safety plan for the two foster children or for his three children. He stated he could not stay away from the home because he worked from home and could not move his work equipment. He told the social worker that he loved the foster children and would never hurt them. The decision was made to remove the two foster children; this was done on December 19.

On December 19, 2014, DPSS filed a Welfare and Institutions Code, section 300 juvenile dependency petition regarding all three children. The allegation as to mother was under Welfare and Institutions Code, subdivision (b), “Failure to Protect.” The specific allegation as to mother was “The mother neglects the health, safety, and well being of the children in that she continued to allow father to have unsupervised contact with the children despite his violent behaviors and domestic violence perpetrated by the father against her, in the presence of the children, thereby further placing the children at risk of suffering serious physical harm.” The allegations as to father were also under “Failure to Protect” in that he “perpetrates acts of domestic violence against the mother in the presence of the children” and “has unresolved mental health issues, to include Major Depression, and is not currently taking the appropriate medication . . .”

Detention – December 22, 2014

In the detention report filed December 19, 2014, the social worker reported that neither parent had a criminal record and mother did not have any child welfare history. The only prior child welfare history for the family was a report of general neglect as to father in 2012. The report stated that father was physically abusive to his first wife during their marriage, which had ended almost 15 years earlier. After the separation,

father reportedly attempted to kidnap their three children. The referral was not investigated because the information was “of a historical nature.”

At the detention hearing held December 22, 2014, the juvenile court detained the children as to father and placed them with mother. Father was granted weekly supervised visits.

Jurisdiction and Disposition—March 11, 2015

In the jurisdiction and disposition report filed on January 22, 2015, DPSS explained the basis for the failure to protect allegation against mother as follows: “[M]other allowed the father to take [Jy.H.] from the home when he arrived at the residence after leaving the Psychiatric Hospital. The mother allowed the father to return to the family residence several hours after the domestic violence altercation, and mother then packed a bag for [Jy.H.] to go to the motel for the night with his father. The mother allowed the father to return to the residence the following day. The mother received information that the father had picked up the other children, [I.H. and Je.H.], from school and mother failed to contact law enforcement to retrieve any of the children from the father despite the children witnessing the violence the previous evening, which placed the children’s safety at risk.”

The social worker spoke with the adoption case worker for Jy.H., whose adoption had been finalized on February 28, 2014. The case worker “reported ongoing concerns with [mother] and [father] [The case worker had] referred the parents to marriage and family therapy, and parenting courses before the adoption could be finalized”

Mother was in the process of filing for divorce, and had obtained a permanent restraining order against father, effective January 8, 2015. Mother had previously been diagnosed with depression and ADHD, for which she was taking medication. Since the incident on December 16, she had been referred to therapy for post-traumatic stress disorder, for which she was also taking medication for anxiety as needed. Mother reported there were no previous incidents of domestic violence.

DPSS recommended family maintenance services for mother, family reunification services for father, and a psychological and medication evaluation for both parents. DPSS asked the court to give father supervised visitation, with discretion for DPSS to liberalize visits to overnight and weekends as father progresses.

At the hearing scheduled for January 27, 2015, mother asked for a contested hearing on the allegation regarding her. The children's counsel asked that the social worker be present to testify. The juvenile court asked for an updated report to be prepared to clarify what restraining orders were in effect and whether criminal charges had been filed. The court stated, "I have a concern as to both parties in this case," with which the children's counsel agreed. The court then commented, "I don't think it's just dad's the bad guy and mom's the good guy here. I have a concern about both of these parents, and their mental health stability to be caring for any children."

In the addendum report filed March 6, 2015, DPSS made no changes to the recommendations, but reported both parents were discussing the dependency case with the children and providing conflicting information to the social worker. The report

indicated the social worker was concerned about both the unresolved marital issues between the parents and with their individual ongoing mental health issues.

At the supervised visit with father on January 20, 2015, father asked the children several times whether anyone else had moved into the family home. On January 21, 2015, father called the social worker to report that a neighbor had contacted him and stated a man had moved into the family home and had his gold truck parked in front of the home. The social worker told father not to interrogate the children about what goes on in their home. The next day, DPSS made an unannounced visit to the home to investigate, but no one was home and no truck was parked in front. Mother returned the social worker's call and stated no one had moved into her home. However, mother believed father was having a female neighbor spy on her, had seen the neighbor "peeking" through the fence, and refused to answer her front door when the neighbor knocked. Mother tested her theory by having someone park their truck in front of her home to see if father would complain.

On February 25, 2015, after a supervised visit with father, the two older boys asked to speak with the social worker. They both stated they wanted to live with father and not with mother. They stated mother had been gone from the home for several days and left them with the aunt. While she was gone, the aunt smacked I.H. in the face for eating cake. Both boys said the aunt was mean to them and did not always provide them with meals while mom was gone. The boys also stated mother told them they might have to go into foster care if they tell the social worker what goes on in the home, and that she would rather they go into foster care than live with their dad. When asked whether they

shared these things with their therapist during sessions, both boys said they were not going to therapy.

On February 26, 2015, father called the social worker to report that mother had contacted him by telephone. Father was concerned because he did not want to violate the restraining order. Father reported mother said to him, “[Father], this is [mother]. I’m not mad at you, I don’t hate you, I’m only doing this to get [one of the foster children] back.”

Also on February 26, 2015, mother came in to the DPSS office to address the concerns raised by the children. She stated she called father by accident. She said she had been gone from home for four days at a business conference. She was aware of the cake incident with I.H., but the aunt had not told her she had slapped him. Mother stated the aunt was “not a kid person” and the aunt had called her while she was away to tell her the kids were out of control. Mother asked the social worker to, “Take it out of my hands, tell me she needs to move out.” The social worker told mother that was not necessary, but mother repeated that she wanted DPSS to tell her the aunt must move out of the home. Mother admitted warning the children about telling their dad things, like about how she dressed and whether she talked to a man, telling them she “might not make it out this time and then you’ll go to foster care.” The social worker told mother not to discuss such topics with the children. Mother admitted the children were not attending therapy as required because she could not afford separate co-payments for her and each of the children. The social worker said that DPSS was supposed to pay for the children’s therapy, and advised mother to check with the provider. Mother stated she had registered for domestic violence classes but had been too busy to attend yet.

The social worker looked into whether criminal charges had been filed against father for the domestic violence incident on December 16, 2014. The district attorney had rejected the case and returned it to law enforcement for further investigation of potential charges of domestic violence (Pen. Code, § 273.5), criminal threats (Pen. Code, § 422), and brandishing a deadly weapon (Pen. Code, § 417, subd. (a)(1)). The responding deputy's supervisor told the social worker in a voice mail that, when the deputy arrived at the home after the incident, mother had told the deputy she just wanted father to leave, and that she would not cooperate with any prosecution, and that is why father was not arrested that night. Mother did not initially tell the deputy that father choked, hit or pinned her to the floor; she apparently reported the incident in more detail the following week at the sheriff's station.

On March 11, 2015, DPSS filed an amended juvenile dependency petition. DPSS deleted the single allegation that mother placed the children at risk by continuing to allow father to have unsupervised contact with them. However, DPSS added mother to the allegation regarding father engaging in acts of domestic violence. That allegation was changed to read "The father and mother engage in acts of domestic violence in the presence of the children" DPSS also changed its recommendation regarding father—that he be provided with family maintenance services rather than reunification, and that physical custody of the children be with both parents.

At the jurisdiction and disposition hearing held on March 11, 2015, both mother and father signed a waiver of rights form and checked the box indicating "submit the petition on the basis of the social worker's or probation officer's report and other

documents, if any.” Mother separately initialed the box indicating “I understand that if I plead no contest or submit the petition on the report, the court will probably find that the petition is true.” At the hearing, mother’s counsel acknowledged the waiver of rights, but stated mother, “continue[s] to enter denials as to the allegations.” Counsel then stated, “I would point out as, as to jurisdiction, the parents did engage in domestic violence. There was an incident of domestic violence. The reports are very strong and clear in that. The only point I would make would be to put it in context that mother was the victim in this domestic violence. She did not perpetrate any acts. It was not mutual combat.” Both parents and the children’s counsel submitted as to jurisdiction and disposition. The court found the allegations true, took jurisdiction of the children, placed physical custody with mother and father, and ordered family maintenance services.

This appeal followed.

DISCUSSION

Mother’s main challenge is to the jurisdiction findings. In the alternative, she argues reversal and remand are required because DPSS did not comply with ICWA.

1. Jurisdiction

Mother argues the jurisdiction findings based on her participation with father in domestic violence should be reversed because she was the victim of father’s domestic violence, rather than a participant, the conflict between mother and father became physical on only one occasion, and there was no current risk of physical harm to the children because father no longer resided in the family home, and mother took immediate

steps to protect the children from harm by calling police, obtaining a restraining order and filing for divorce.

Welfare and Institutions Code, section 300, subdivision (b) provides that a child who has suffered, or is at serious risk of suffering serious physical harm or illness as a result of the parent's or guardian's failure or inability to supervise or protect the child or to provide the child with shelter, food, clothing or medical care, may be adjudged a dependent of the court.

The petitioner in a dependency proceeding must prove by a preponderance of the evidence that a child who is the subject of the petition comes under the jurisdiction of the juvenile court. (Welf. & Inst. Code, § 355, subd. (a).) On review, an appellate court views the record below in the light most favorable to the trial court's order. (*In re Katrina L.* (1988) 200 Cal.App.3d 1288, 1297.) We do not reweigh or express independent judgment on the evidence, but merely decide whether it is sufficient to support the findings of the trial court. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.)

“Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 823.) A jurisdiction finding cannot simply rest on past conduct; there must be something to show that the harm or risk of harm continues to exist at the time the jurisdiction finding is made. (*Id.* at p. 824.)

Mother cites to *In re Daisy H.* (2011) 192 Cal.App.4th 713 (*Daisy H.*), in which the appellate court held that the juvenile court erred in finding jurisdiction over the

children because there was insufficient evidence that the children were at risk of physical harm. (*Id.* at p. 718.) In that case, the mother told the social worker that in 2007, two years before the petition was filed, the father pulled her hair and choked her. The mother's later statements and court records indicated that these events actually occurred in 2002, seven years before the petition was filed. (*Id.* at p. 717.) When interviewed by the social worker, none of the mother's children showed signs of physical abuse, and, more importantly, they denied ever witnessing their father abuse their mother. (*Ibid.*)

The court explained in *Daisy H.* that: "Physical violence between a child's parents may support the exercise of jurisdiction under section 300, subdivision (b), but only if there is evidence that the violence is ongoing or likely to continue and that it directly harmed the child physically or placed the child at risk of physical harm." (*Id.* at p. 717.) *Daisy H.* is distinguishable in that the domestic violence had taken place several years before the Welfare and Institutions Code section 300 petition was filed, did not occur in the children's presence, and did not involve a weapon. (*Daisy H., supra*, 192 Cal.App.4th at p. 717.) Here, the domestic violence occurred days before the Welfare and Institutions Code section 300 petition was filed, two of the children and one of the foster children personally witnessed the incident, and father held a knife to mother's throat and threatened to kill her. The children's presence while father attacked mother in a rage while using a knife did pose a risk of physical harm to the children. I.H. was worried enough to verbally intervene on behalf of mother, telling father, "You're killing her," while holding the couple's medically fragile one-year-old foster child. Je.H. also witnessed the incident, and was yelling at father to "Stop choking her." While there is no

evidence that father ever physically hurt any of the children, substantial evidence exists that the children were at risk of harm should they come between father and mother, whether accidentally or in an attempt to physically intervene. Further, while the parents were in the process of getting a divorce, they would necessarily come into some contact with each other because of the children. Finally, and perhaps most important, the parents' substantial history of marital discord, heated arguments and mental health issues indicates a risk of future violence.

Both parties cite to *In re J.N.* (2010) 181 Cal.App.4th 1010 (*J.N.*), which we find to be particularly instructive. In that case, the appellate court reversed the finding of jurisdiction under Welfare and Institutions Code section 300, subdivision (b), based on the danger to the children from a single incident in which the family was in a car accident while father was intoxicated. When it evaluated whether the single incident constituted a “substantial risk of physical harm” to the children, the court considered the nature of the conduct and the surrounding and present circumstances, including: the parent’s understanding of and attitude toward the endangering conduct, and participation in educational programs or other steps taken to address the conduct and prevent recurrence. (*J.N.*, *supra*, 181 Cal.App.4th at pp. 1025-1026.) Although the appellate court reversed the jurisdiction finding in that case because it found insufficient evidence of a risk of future harm to the children, it did comment that, “The nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending on the circumstances.” (*Id.* at p. 1026.)

Here, the incident itself was not physically harmful to the children, but was potentially so, given that the event took place in the presence of the children, they were distressed enough to intervene verbally, and father used a knife while in a rage. The children appeared to be afraid father would carry out his threat to kill their mother. In addition, the event itself was extremely violent—father told mother he was going to kill her, and physically prevented her from leaving by slamming shut the front door. Father held mother by the throat, forced her to the ground, and held a knife to her while she and the children screamed. Other circumstances indicating a danger of physical harm to the children are that, prior to the incident, father and mother had already received individual counseling, marital counseling and parenting classes as part of the adoption of Jy.H., but did not seem to have benefited from those services. Both parents had ongoing mental health concerns, and a very long history of marital discord that had been an “ongoing concern” of the case worker for Jy.H.’s adoption. Added together, the parents’ long history of marital discord, the fact that the children are often present during the daily arguing, father’s many threats to kill mother, and the failure of both parents to benefit from previous counseling designed to address the parent’s marital discord and prevent the kind of incident that occurred, combine to establish substantial evidence for the jurisdiction finding as to mother, based on a substantial risk of physical harm to the children.

2. *Challenge to Disposition*

The challenge to the disposition orders in mother’s brief appears aimed at an order removing the children from mother’s home. However, the children were never removed

during these proceedings, but rather remained with mother on family maintenance.

Therefore, we will not address this issue.

3. *ICWA Challenge*

Mother contends the juvenile court and DPSS had not yet complied with the notice and inquiry requirements of the ICWA, even though mother stated she believed she had Cherokee Indian ancestry. Any error was harmless.

“When 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. [Citation.]” (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 15.) “By its own terms, the act requires notice *only* when child welfare authorities seek permanent foster care or termination of parental rights.” (*Id.* at p. 14, italics added.) Here, the children remained with mother on a plan of family reunification. DPSS did not seek foster care or termination of parental rights after mother’s disclosure of possible Indian ancestry. Thus, any error in failing to comply with ICWA was harmless. (*In re Alexis H, supra*, at pp. 15-16.)

DISPOSITION

The juvenile court's orders are affirmed.¹

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.

¹ We hereby deny both respondent's request for judicial notice, filed November 9, 2015, and appellant's request for judicial notice, filed April 6, 2016, as not relevant to the issue of whether, on the date of the jurisdiction orders, the children were exposed to a substantial risk of serious physical harm.