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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re M.K., a Person Coming Under the Juvenile
Court Law.

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Plaintiff and Respondent,

v.

JANELLE C.,

Defendant and Appellant.

F064075

(Super. Ct. No. 516045)

OPINION

APPEAL from an order of the Superior Court of Stanislaus County. Ann Q.
Ameral, Judge.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and
Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County
Counsel, for Plaintiff and Respondent.

Janelle C. (mother) appeals from orders made at the Welfare and Institutions Code section 336.21, subdivision (e)¹ six-month review hearing, in which the juvenile court found a substantial risk of detriment to return minor to mother's care, but simultaneously authorized an extended trial visit. She also contends the notice requirement of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)) was inadequate. We disagree and affirm.

PROCEDURAL AND FACTUAL HISTORY

Mother has three children. M., now age 9, is her oldest child and the only one at issue in this appeal. M.'s father, Thomas R., is not a party to this appeal. Mother shared custody of her two younger children, twins C. and I., now age 7, with their father Kevin C.

Mother had been receiving voluntary maintenance services since March of 2010, to address substance abuse and domestic violence issues. Mother's boyfriend, Kerry B. had a long history of domestic violence. Voluntary maintenance began after a referral alleged that C. had been thrown across the room by Kerry B. Mother was slow and reluctant to participate in voluntary services. A restraining order was in place against Kerry B., who was on parole for domestic violence, prohibiting him from being in mother's home when the twins were present.

March 7, 2011, Section 300 Petition

In March of 2011, the Stanislaus County Community Services Agency (the Agency) received a referral from C.'s school reporting suspected abuse of C. A responding police officer found C. was having trouble walking. He had bruises under his eye and around his ear, and he told the officer that his mother had "beaten him up" and that his groin area was very painful. According to C., mother sometimes hit him with a

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

spoon and sometimes with her hands. He was told by mother that, if he told anyone, he would be “whipped even harder.”

A social worker interviewed C. at his father’s house. The social worker observed a scabbed laceration on the top of C.’s head and bruising under his ear and eye. During the interview, C.’s father responded to a “toilet accident” on C.’s part, and discovered C.’s genitals were discolored and extremely swollen. C. was taken to a hospital where he reported that his mother had hit him in the eye and her boyfriend, Kerry B., had “pulled his penis.” A child abuse expert at the hospital, Dr. Philip Hyden, opined that the injuries were caused by nonaccidental trauma.

C.’s twin, I., reported that Kerry B. was living in the house with her mother. I. was afraid of Kerry B. because she had seen him hit her mother over the head with bottles. I. also stated that mother made the children stay outside often because mother and Kerry B. “[n]eed their time alone and it gets really cold outside.”

Mother was interviewed and blamed C.’s injury to his genitals on a fall in the shower and his ear and eye injuries on his “continuously” falling off of the sofa and onto the floor. No obstacles were found in the shower and the sofa was only one foot off the ground. Mother denied that she ever hit the children or that she allowed her boyfriend to hit them. According to mother, she believed the current injuries were a result of her ex-husband trying to obtain custody of the twins.

The twins were allowed to remain with their father, who sought, and eventually obtained, sole custody through the open custody case. A section 300 petition was filed on March 7, 2011, by the Agency alleging that M. was at substantial risk of harm due to domestic violence between mother and Kerry B., mother’s failure to keep Kerry B. away from the family despite a restraining order, and the unexplained injuries to C. The petition further alleged that M.’s alleged father, Thomas R., was incarcerated and, according to his mother, had a long-standing methamphetamine addiction.

March 8, 2011, Detention Hearing

M. was ordered detained on March 8, 2011. Mother was present at the hearing, but Thomas R. was not. Mother was given a minimum of two hours per week supervised visits. The court also ordered that M. have no contact with Kerry B.

ICWA Notification

Based on a report by the paternal grandmother that there “may be Cherokee” heritage, notice was sent on March 14, 2011, to the three recognized Cherokee Tribes, the Bureau of Indian Affairs (BIA) and the Department of the Interior. On March 28, 2011, the Agency filed the returned certified mail receipts for each of the three Cherokee Tribes, the Department of the Interior, and the BIA, each indicating that notice had been received.

Jurisdiction/Disposition Report

The report prepared in anticipation of the jurisdiction/disposition hearing stated that M. was placed with a paternal aunt, but wished to return to her mother. The report related that, during the “nearly a year” of voluntary family maintenance services, mother was only “minimally compliant” with her case plan; that she required months of prodding to enroll M. in counseling; and that she herself was slow to engage in a parenting program or domestic violence counseling. Mother had maintained her relationship with Kerry B. and, at the time of the report, continued to be fixated on him. Despite Kerry B.’s two felony convictions for domestic violence and several probation violations for domestic violence, mother failed to acknowledge that Kerry B. posed a danger to her and to her children. Although Kerry B. was incarcerated, the social worker verified that mother continued to visit him in jail on a regular basis.

The report recommended that father Thomas R. be denied reunification services as he had been incarcerated for almost M.’s entire life and had never lived with her. M. had been placed with her paternal grandmother, but subsequently moved to a paternal aunt’s. The report recommended services for mother, but that successful reunification would

depend on mother identifying the source of injury to C. and choosing to end her relationship with Kerry B., thereby recognizing that he posed a risk of safety to her children.

May 27, 2011, Jurisdiction/Disposition Hearing

A contested hearing was held on May 27, 2011. By this time, DNA test results indicated that Thomas R. was M.'s biological father. Because M. was placed with the paternal family and had a relationship with them, the Agency recommended that services be offered to Thomas R. The Agency was also willing to provide mother with unsupervised visits with M. on the condition that there be no contact with Kerry B. The court concurred, admonishing mother that contact between M. and Kerry B. would adversely impact return of M. to mother.

The section 300 petition was sustained, with the exception of the section 300, subdivision (g) allegation, since Thomas R. was no longer incarcerated. M. was declared a dependent of the juvenile court and placed in out of home care. Reunification services were offered to both parents.

August 23, 2011, Three-Month Progress Review Report and Hearing

A three-month interim review report stated that father was non-responsive to services and did not request visits. Mother was reported making "steady progress" on her case plan. Kerry B. was still incarcerated, but had an expected release date in early 2012. The social worker requested and was granted the discretion to allow M. overnight visits in mother's home.

November 15, 2011, Six-Month Review Section 366.21 Report and Hearing

The six-month review report addressed the ICWA status. Letters received from the United Keetoowah Band and Eastern Band of Cherokee Indians indicated that M. was not eligible for enrollment in those tribes. A letter received from the Cherokee Nation of Oklahoma on March 23, 2011, requested further information on the middle name and date of birth for M.'s paternal great-grandfather. The social worker responded by email

on March 28, 2011, that no further information was available. A second letter was received from the Cherokee Nation of Oklahoma on May 2, 2011, requesting the same information. This time, the social worker called and left a message again indicating that no further information was available.

The review report also reviewed mother's compliance with her plan; she had completed parenting education and had a "good understanding" of the material presented. In individual counseling, mother failed to provide an explanation for C.'s facial and head injuries, but hypothesized that his groin injury must have occurred at school. Mother's drug tests were negative and she regularly attended her domestic violence program, but no progress report was available at the time of the review. Mother and M. had had successful overnight visits since October. The social worker requested discretion to begin an extended trial visit with M.

At the review hearing, the juvenile court found that ICWA did not apply. M., who was present in court, was anxious to return home to her mother. Counsel for mother had no objection to the social worker's recommendation for an extended visit between M. and mother. The juvenile court then stated that it was willing to follow the social worker's recommendation for an extended visit, but stated, "I do want the mother to understand that the case plan provides that there is not to be any contact of any kind between [M.] and Mr. B[.] ... If that were to occur, the social worker would have the right to terminate the trial visit. So I want to make sure that you're abundantly clear about that." When the court asked mother "Are you clear?" mother replied "Yes." The court then found that return to mother's custody at this time would create a substantial risk of detriment and that M.'s placement was necessary and appropriate. The court ordered that a trial visit would be permitted, the commencement of which was at the discretion of the social worker, as was removal of M. from mother if her safety were at risk. Reunification services for mother were continued and terminated as to father.

DISCUSSION

I. FINDING OF DETRIMENT AND VISITATION ORDER

Mother contends that the juvenile court overstepped its jurisdiction when, at the six-month review hearing it found that there was a substantial risk of detriment if M. was returned to her home and simultaneously granted discretion to the social worker to commence an open-ended “trial visit” in mother’s home. We disagree.

Mother bases her argument on three cases: *In re Damonte A.* (1997) 57 Cal.App.4th 894; *In re Andres G.* (1998) 64 Cal.App.4th 476; and *Savannah B. v. Superior Court* (2000) 81 Cal.App.4th 158. All three cases involved findings, at disposition, that there was a substantial danger to the physical and emotional health of the minor or minors and no reasonable means to protect them without removal from the parent’s physical custody, but also a simultaneous order placing the minor or minors back with the parent. (*In re Damonte A.*, *supra*, at p. 896 [children removed from custody but then remained with mother for “temporary placement”]; *In re Andres G.*, *supra*, at p. 479 [minor removed from parents’ custody and ordered placed with a relative but detained in parents’ home]; *Savannah B. v. Superior Court*, *supra*, at p. 160 [child placed with mother for 60-day visit].) As stated in *In re Andres G.*, *supra*, at page 483 “The trial court’s act of finding it necessary to remove physical custody from the parents, place custody with Department and then immediately return the children to the parental home was an act not authorized by the Welfare and Institutions Code and was in excess of the trial court’s jurisdiction,” because the effect of doing so is to “either remove children from the home under circumstances the Legislature did not authorize or to place children in a dangerous setting.” (*Id.* at p. 481.)

We find each of these cases distinguishable from the case here as we are not dealing with disposition, but instead a six-month review hearing. Pertinent to this case, subdivision (e) of section 366.21 provides that “[a]t the review hearing held six months after the initial dispositional hearing, ... the court shall order the return of the child to the

physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment.... The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental.”

Nothing in section 366.21 “requires that the detriment which justifies continued removal of the minor from parental custody must be akin to the detriment which necessitated juvenile court jurisdiction.” (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899.) Section 366.21 governs juvenile dependency status review hearings. By authorizing continued removal of a child based on the risk of detriment, the focus at a review hearing is on the child’s well-being at the time of the review hearing rather than on the initial basis for juvenile court intervention. (*Ibid.*) The decision whether to return a dependent child to parental custody is not governed solely by whether the parent has corrected the problem that required court intervention. (*Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1344.)

We review the entire record for substantial evidence to support the juvenile court’s finding that M. could be at risk of detriment if returned to mother’s custody. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763-764.) In so doing, we consider the evidence favorable to the prevailing party and resolve all conflicts in support of the trial court’s order. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400-1401.) “Substantial evidence” means evidence that is reasonable, credible, and of solid value. (*In re N.S.* (2002) 97 Cal.App.4th 167, 172.) In the absence of a substantial showing of detriment, the court is required to return the minor to parental custody. (*In re Yvonne W., supra*, at p. 1401.)

Here, the court determined that there was still a risk of harm to M. because, as stated in the social worker's report and adopted by the juvenile court, although mother had completed parenting education, an individual counseling program, was attending the domestic violence program, and consistently tested negative for drugs, she still denied any involvement on her or Kerry B.'s part in C.'s injuries. According to her counselor in a November 1, 2011, update, mother was unable to explain the eye and ear injuries incurred by C., and had, in fact, come up with an additional hypothesis, that the remaining injuries must have occurred at school. The social worker emphasized his concern that mother and Kerry B. had not permanently severed their relationship, as evidenced by mother's use of Kerry B.'s last name as her own on her Facebook page and her continued telephone and correspondence contact with him. In making its finding of continued detriment, the juvenile court specifically articulated its concern that mother understand that she was not to allow any type of contact between M. and Kerry B.

Mother had a lengthy history evidencing her inability to sever herself from Kerry B. – she had allowed him into her home despite two felony convictions for domestic violence, several probation violations for domestic violence, and a restraining order preventing him from having contact with the twins; she failed to acknowledge that Kerry B. posed a danger to her and to her children; and she continued to visit him in jail on a regular basis. While mother had done well in her reunification services, Kerry B. had been incarcerated during this entire time. He had an expected release date of February 2012, and mother's ability to sever her relationship with him after participating in reunification services had yet to be tested. Accordingly, substantial evidence supports the juvenile court's finding of continued substantial risk of detriment.

As for the juvenile court's order of an extended home visit, section 362.1 advises that visitation "shall be as frequent as possible, consistent with the well-being of the child." The juvenile court has the discretion to set the frequency and length of visits and to impose any other conditions on visitation consistent with the child's best interest under

the particular circumstances of the case. (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 757.) M. began having overnight visits at her mother's in October, which were then extended to two- and then three-day overnights. The visits had gone well and M. expressed a desire that they continue. The juvenile court's order of an extended home visit monitored by the agency was a logical extension of gradually reintroducing M. into the home and to ensure her safety.

We next address mother's claim that the juvenile court acted in excess of its authority and violated the separation of powers doctrine by delegating to the agency discretion to "start and end the trial visit." We disagree.

The determination as to whether visitation will occur is exclusively within the juvenile court's authority. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1008-1009; *In re Jennifer G., supra*, 221 Cal.App.3d at pp. 756-757.) Thus, the juvenile court cannot delegate to any third party unlimited discretion to determine whether visitation is to occur. (*In re M.R.* (2005) 132 Cal.App.4th 269, 274 [improper delegation to legal guardian]; *In re S.H.* (2003) 111 Cal.App.4th 310, 319 [order improperly granted the children the right to refuse to visit]; *In re Julie M.* (1999) 69 Cal.App.4th 41, 48 [same]; *In re Donovan J.* (1997) 58 Cal.App.4th 1474, 1477-1478 [improper delegation to children's therapist].)

However, "[o]nly 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., supra*, 50 Cal.App.4th at p. 1009.) Thus, a visitation order validly may delegate to a social agency the responsibility to manage details of the visitation such as the time, place and manner of the visits. (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1374.)

The order under review – the order issued at the November 15, 2011, review hearing – provides that “Child may begin ... a trial visit in the home of ... her mom ... at discretion of Social Worker[.] Trial visit may be terminated at any time by the Social Worker if it is not meeting the best interests of the child. Conditions of the trial visit are as follows: S/W may enter the home at anytime, without warrant, to assess the child’s safety and remove if necessary.” It is clear from the transcript of the November 15 hearing that the visit was to begin that same day. According to the social worker, he had already given notice to the caregiver and M. had been with mother “since Saturday” (three days earlier). This order did not give the agency veto power over whether visitation would occur, it was already occurring. Read in the context of the comments made at the hearing, the order merely allowed the agency to monitor the visit and to ensure that the continued visit was in M.’s best interests. We are unpersuaded by mother’s suggestion that the delegation is inappropriate because it could lead to abuses by the agency.

In sum, the order did not improperly delegate the juvenile court’s authority or violate the doctrine of separation of powers, and we find no abuse of discretion.

II. IS NOTICE UNDER THE INDIAN CHILD WELFARE ACT INADEQUATE?

M.’s paternal grandmother informed the social worker that the family may be Cherokee. After responses were received from the various tribes, the juvenile court found that ICWA did not apply. Mother now contends that the ICWA notification was insufficient because it failed to show that the correct agents for service of ICWA notice had been served; that the agency failed to make inquiries of paternal relatives regarding ICWA issues; and that the agency did not appropriately respond to requests for further information from the Cherokee Nation of Oklahoma. We disagree.

The ICWA provides that when a child subject to a dependency proceeding is or may be of Native American heritage (referred to in the ICWA as an “Indian child”) each tribe of which the child may be a member or eligible for membership must be notified of

the dependency proceeding and of the tribe's right to intervene in the proceeding. (25 U.S.C. § 1912(a).) An "Indian child," for purposes of the ICWA, is "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).) "A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe ... shall be conclusive." (§ 224.3, subd. (e)(1).)

"One of the primary 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. [Citation.] The notice must include ... information about the Indian child's biological mother, biological father, maternal and paternal grandparents and great-grandparents or Indian custodians, including maiden, married and former names or aliases, birthdates, places of birth and death, current and former addresses, tribal enrollment numbers, and/or other identifying information. [Citations.]" (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1115-1116, fn. omitted.)

"Substantial compliance with the notice requirements of ICWA is sufficient. [Citation]." (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 566.)

Challenges to the adequacy of the ICWA notice and to the juvenile court's finding that the ICWA does not apply are governed by the substantial evidence standard of review. (See *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430 [substantial evidence review of whether duty to inquire into possible Indian heritage was satisfied]; *In re Merrick V.* (2004) 122 Cal.App.4th 235, 247 [to determine whether notice was adequate, court must review whether sufficient information was provided by agency]; *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 941-943 [record contained sufficient evidence that a proper inquiry was made regarding whether child was an Indian child].) Under this standard, "the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most

favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.’ [Citation.]” (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, abrogated on another ground as noted in *Armendariz v. Foundation Health Psychcare Services Inc.* (2000) 24 Cal.4th 83, 100.) The appellate court does not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) Errors relating to ICWA notice are reviewed under the harmless error standard. (*In re H.B.* (2008) 161 Cal.App.4th 115, 121; *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784.)

The ICWA notice requirement in this case was triggered, as stated in the social worker’s report, by father’s mother’s belief that the family might be Cherokee. The ICWA parentage chart on form ICWA-030 was completed listing mother, mother’s parents, two grandmothers and two maternal grandfathers, none of whom had any known Indian heritage. The chart also listed father and his mother by their full name, included their date and place of birth, current address, and stated that both were of the Cherokee tribe. Father’s father was listed by his full name and included his date of birth, but his current address, place of birth, and whether he had any Indian heritage were unknown. Father’s maternal grandmother included her full name, her date of birth, that she was deceased, and that she was of the Cherokee tribe. Father’s maternal grandfather had little information other than his full name, birth date and state of birth. He had no Indian heritage. Father’s paternal grandmother included her full name, current address, birth date and place of birth, but stated her Indian heritage was unknown. Father’s paternal grandfather gave only a first and last name without further identifying information.²

² It is the information provided about this individual that is at issue in one of mother’s contentions, below.

Notice of the above was sent by certified mail to the three Cherokee tribes, namely the Cherokee Nation of Oklahoma, the United Keetoowah Band of Cherokee, and the Eastern Band of Cherokee Indians, as well as the Department of the Interior and the BIA. Return receipt was received from each. The United Keetoowah Band of Cherokee and the Eastern Band of Cherokee Indians responded that M. could not be traced in the tribal records based on the information provided and the tribes would not intervene in the matter.

The Cherokee Nation of Oklahoma sent a reply on March 21, 2011, requesting the middle name and birth date of father's paternal grandfather. The letter indicated that any additional information could be "mailed, faxed ... , or e-mailed." On March 28, 2011, the social worker sent an e-mail indicating that no additional information was available. A second letter was received from the Cherokee Nation of Oklahoma dated April 28, 2011, requesting the same information as no response had been received. This time, on May 11, 2011, the social worker left a voicemail at the telephone number included in the letter and informed the tribe that no additional information was available.

We find unavailing mother's argument that notice to the Cherokee Nation of Oklahoma was incomplete. She claims first that the court "never received the signed return receipts showing that the correct agent for service of ICWA notice had been served." Not so. A return receipt from the Cherokee Nation of Oklahoma was received by the agency on March 18, 2011, and filed with the court on May 28, 2011. If mother is claiming lack of notice due to the fact that the notice was addressed to "Chadwick Smith, Prin. chief" but signed by James Pathkiller, the two response letters from the Cherokee Nation of Oklahoma requesting further information is further evidence that the appropriate parties were noticed.

We also reject mother's argument that the agency did not adequately inquire and obtain information from "any of the relatives." Mother specifically argues that the agency should have contacted Thomas R., the paternal grandmother, and other paternal relatives listed.

If circumstances indicate a child may be an Indian child, the social worker is required to interview the child's parents, extended family members, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility. (§ 224.3, subd. (c); *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539; Rules of Court, rule 5.481(a)(4)(A).) The interview must gather information described in section 224.2, subdivision (a)(5), namely names, addresses, places of birth and death, tribal enrollment numbers, and any other identifying information "if known," for the child's biological parents, grandparents and great-grandparents.

It is obvious from the record that the social worker did consult with someone, most likely father's paternal grandmother as she was the one who suggested possible Cherokee heritage through her mother's side, which lead to the extensive information included in the ICWA parentage chart.

Finally, we reject mother's claim that the agency did not respond appropriately when the Cherokee Nation of Oklahoma requested further information, if available, regarding M.'s great-grandfather on her father's father's side. Mother argues that "there is no provision in the ICWA allowing further information to be transmitted to the tribes via e-mail or voice mail." While that may be technically true, both letters from the Cherokee Nation of Oklahoma specifically state that additional information may be "mailed, faxed ... or e-mailed" In addition, the second letter states that, should the social worker need to contact the Cherokee Nation of Oklahoma, she may do so via telephone.

For all of the above-stated reasons, mother has failed to establish any ICWA notice deficiency that requires reversal.

DISPOSTION

The order is affirmed.

Franson, J.

WE CONCUR:

Cornell, Acting P.J.

Poochigian, J.