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

In re ISAAC C. et al., Persons Coming
Under the Juvenile Court Law.

TULARE COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

SIERRA C.,

Defendant and Appellant;

ISAAC C. et al.,

Respondents.

F064659

(Super. Ct. Nos. JJV065919A,
JJV065919B, JJV065919C)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

Jennifer A. Gibson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Donna Furth, under appointment by the Court of Appeal, for Minors.

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* Before Levy, Acting P.J., Gomes, J., and Franson, J.

This appeal involves three young children, whom the juvenile court removed from their mother's custody and ordered placed with their father in Mexico pursuant to Welfare and Institutions Code section 361.2.¹ Two years earlier, the father left mother and the children to live in Mexico when he believed mother was unfaithful.

Mother appeals from the juvenile court's placement order. She also challenges the failure to give notice of these proceedings pursuant to the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.) after she claimed Indian heritage. On review, we will reverse. We conclude the juvenile court abused its discretion by issuing its placement order and erred by failing to order ICWA notice.

BACKGROUND

Five-year-old Isaac, three-year-old Isabel, and two-year-old Jesus were detained in January 2012 from their mother's physical custody as a result of her drug abuse and domestic violence, among other issues, which placed the children at a serious risk of physical harm. She had cared for the children while she was under the influence of a controlled substance. The children also had been around and cared for by other drug abusers. Mother and the children had not lived in stable housing for over six months. In addition, the children had witnessed domestic violence between mother and her former boyfriend.

Respondent Tulare County Health and Human Services Agency (agency) alleged these facts as a basis for dependency jurisdiction (§ 300, subd. (b) [neglect]) in its petition. It also alleged that the children had been left without provision for support by their father who resided in Mexico (§ 300, subd. (g) [no provision for support]).

The father came to Tulare County in 2000, apparently from Mexico. He and mother met, while she was a teenager. They later married and the children were born in

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

California. Then, in April 2010, when Isaac was 3 years old, Isabel was 21 months old, and Jesus was 9 months old, the father moved back to Mexico. The father left the family because mother was allegedly unfaithful to him. He was not deported. April 2010 was the last time the father saw his children. Since then, the children had no relationship with him. At most, the father had some telephone contact with the children.

As of 2012, the father lived with his parents in Mexico, where he was employed as a farm worker. He had four sisters all of whom were married and lived nearby him. According to his financial declaration, his parents and one brother were his dependents.

Although the father remained in Mexico throughout the dependency proceedings, agency social workers had periodic telephone contact with him. During one of their conversations, a social worker mentioned mother's statement that the children witnessed domestic violence between her and the father. He responded they often yelled and he only hit her once. He added he had never received any type of counseling for anger. The father also reported he was unable to care for the children in the United States but thought he would be able to provide for them in Mexico. He expressed a desire to take care of the children as well as a commitment to providing for all their needs.

The social worker was concerned about domestic violence in the home between the father and mother to which the children may have been exposed. It was the social worker's recommendation that the father participate in some type of domestic violence counseling before considering placement with the father. A Mexican consulate representative later advised the agency that the consulate was assisting the father in finding counseling to address his domestic violence issues.

Meanwhile, in February 2012, the agency placed the children with their maternal aunt. On March 1, 2012, the court exercised its dependency jurisdiction over the children, having found all the neglect allegations true as to mother as well as the no-provision-for-support allegation regarding the father.

The agency in turn prepared a number of reports in which it recommended the court remove the children from mother's custody, not place the children with the father, and order reunification services for both parents. Regarding the placement issue, the agency recommended that the court find by clear and convincing evidence placement with the father would be detrimental to the safety, protection, or physical or emotional well-being of the children. In one report, the agency reasoned:

“He has not had in-person contact with the children in almost two years. There is concern about domestic violence in the home between the father and the mother that the children may have been exposed to. There is not enough information for the father and his current circumstances to recommend placement. Also, the children are currently placed with a maternal aunt who they have a relationship with. It would be disruptive at this time to remove them from her home and from their school.”

In a subsequent report, the agency added:

“Although the father has phone contact with his children, he has not seen them in over a year. The children, when they talk about dad, speak about the mother's ex-boyfriend. It is believed that it would be detrimental to remove the children from the aunt, who they have known their entire life [sic], to be placed in Mexico with family they do not know. It is recommended that the mother be given the opportunity to reunify with her children.”

The juvenile court conducted its dispositional hearing for the children on March 21, 2012. Attorneys for all of the parties, including the father's counsel, submitted on the agency's reports and had no additional evidence to introduce.

Mother's attorney urged that the children had no relationship with and did not remember the father. To these arguments, the court observed “it does appear that he has a relationship with at least the older children” and that the children did not remember the father was “not the evidence before the Court.”

Attorneys for the father and the children argued in favor of placement with the father. The children's counsel understood that the youngest child had no relationship

with his father. However, based on her reading of the law, she did not see any showing of detriment. She also requested that the court “dismiss jurisdiction,” because mother’s visitation would be severely impacted if the court retained jurisdiction and granted her the opportunity to reunify. The agency appeared to object and reiterated it would be detrimental to uproot the children.

The court announced it was “not convinced” there had been a showing of detriment to the children’s well-being. It added, “[i]t appears [the father] is entirely appropriate.”

The court consequently adjudged the children dependents of the court, removed them from mother’s custody, and ordered the children placed with the father and without reunification services for mother. The court also expressed its intent to terminate its jurisdiction once the children were successfully and safely placed. Its dispositional order further granted the father sole legal and physical custody of the children with visitation rights for mother.

Mother’s attorney requested a stay of the court’s placement order until an appeal could be filed and a request for stay could be made in this court. In considering the stay request, the court expressed concern whether California courts would lose jurisdiction once the placement occurred and whether California courts could order the children returned. The children’s attorney assumed that California courts would not lose jurisdiction because the children were United States citizens, although she admitted she had no authority on point. Assuming there would be no loss of jurisdiction, the court denied the stay request.

Mother subsequently appealed and requested a writ of supersedeas to stay implementation of the placement order, which this court granted. This court also appointed appellate counsel for the children and invited the father and his trial counsel to

request the appointment of appellate counsel on his behalf. Neither the father nor his trial counsel ever replied to our invitation.

DISCUSSION

I. The Juvenile Court Abused its Discretion by its Placement Order.

A parent's interest in the care, custody, and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest. The welfare of a child is a compelling state interest, however, that a state has not only a right, but a duty, to protect. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) The state's compelling interest in protection requires the court to focus on the child's placement and well-being, rather than on a parent's custody challenge. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.)

When a court orders removal of a dependent child from a custodial parent's care, the court first must determine whether there is a parent who wants to assume custody who was not residing with the child at the time the events that brought the child within the provisions of section 300 occurred (§ 361.2, subd. (a)). If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child. (*Ibid.*) Because the state has a right and a duty to protect a dependent child's well-being, section 361.2 requires the court to consider whether the child will suffer detriment if placed with a noncustodial parent. (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1423.)

The juvenile court has broad discretion to determine what would best serve and protect a child's interest and to fashion a dispositional order in accordance with this discretion. The court's determination in this regard will not be reversed absent a clear abuse of discretion. (*In re Jose M.* (1988) 206 Cal.App.3d 1098, 1103-1104.) In this

case, the juvenile court abused its discretion by ordering the children placed with the father.

We appreciate that the juvenile court was not convinced by the agency's evidence. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1828-1829 [detriment finding demands clear and convincing evidence as a matter of due process].)² We note for instance the absence of any evidence that the social worker ever interviewed Isaac who was more than four years old to obtain his view of his circumstances. (§ 328.) Also, the agency claimed there was not enough information about the father and his current circumstances to recommend placement. However, it was the agency's burden, not the father's, to obtain the necessary information to establish detriment. (*In re Z.K.* (2011) 201 Cal.App.4th 51, 70.) Additionally, the agency did a poor job of connecting the dots between the evidence it obtained regarding the family and the detriment it alleged would occur if the children were placed with the father in Mexico. For example, although the agency opined about the children's relationship with the aunt and concluded it would be disruptive to remove the children from their aunt's home, there was no evidence offered as to the basis of that opinion. (See Evid. Code, § 802 [witness may be examined concerning the matter upon which his opinion is based].) Further, the question begs asking: did any of the children even know the father as of 2012? The agency never addressed this either.

However, we seriously question why the juvenile court did not exercise its discretion and duty to protect the children's welfare (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 307), by bringing such omissions to the agency's attention and requesting a more complete report. Instead, the court failed to properly exercise its discretion. It treated the

² Mother's argument that the juvenile court found that the children's placement with the father would not be detrimental and there was insufficient evidence to support such a finding is misplaced. The juvenile court's ruling was that it was not convinced that the children's placement with the father would be detrimental to the children's well-being. It is misleading to characterize a failure-of-proof issue as whether substantial evidence supports the judgment. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

issue like a failure-of-proof in some other type of litigation, where the court is not required to focus on a party's welfare.

We are also troubled by the court's apparent lack of concern for the international implications of its placement order. (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1262-1263.) First, there is the cultural issue associated with moving a child from this country to another. Would the cultural conditions and practices be the same or different so as to affect the children's well-being? Second, there is the distance problem. An order relocating a child far away may be tantamount to terminating the other parent's visitation rights. Third, there is the jurisdictional issue: will the juvenile court's visitation order for mother be enforceable in Mexico. (*Ibid.*)

The serious concerns we express regarding the juvenile court apply with equal force to the children's trial counsel. A primary responsibility of counsel appointed to represent a child shall be to advocate for the protection, safety, and physical and emotional well-being of the child. (§ 317, subd. (c).) Consequently, we recommend that on remand the juvenile court consider appointing different counsel for the children.

Alternatively, we agree with the children and their appellate counsel that the evidence compelled a detriment finding as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571.) The evidence in this case was uncontradicted and unimpeached and of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding. (*Ibid.*; *In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

How the juvenile court could place the children with a father who essentially abandoned them two years earlier, had no on-going relationship with them thereafter, and

lived approximately 2,000 miles away³ is difficult to reconcile with section 361.2. The father left the children in April 2010 when Isaac was 3 years old, Isabel was 21 months old, and Jesus was 9 months old. And he did so, not to somehow benefit them, for example to seek greater employment opportunities and wage-earning capabilities. Rather, he left them and returned to Mexico because he believed mother was unfaithful to him.

By the time of these proceedings, the children had no subsequent in-person contact or ongoing relationship with the father. When the children talked about dad, they were speaking about mother's ex-boyfriend. While the court observed that it appeared the father had a relationship with at least the older children, there was no evidence in the record to support such inference-drawing by the court. At best, there was evidence of a telephone call between the father, mother, and the children two weeks into the dependency proceedings. The father also left them without provision for support. (*In re V.F.* (2007) 157 Cal.App.4th 962, 970 [court may consider any jurisdictional findings that may relate to the noncustodial parent under section 300, as well as any other evidence showing there would be a protective risk to the child if placed with that parent].)

To the extent the juvenile court relied on its determination that the father was "entirely appropriate" in rejecting the agency's claim of detriment, the juvenile court missed the point. A detriment finding does not require a noncustodial parent's contribution to the detriment. (*In re Luke M., supra*, 107 Cal.App.4th at p. 1425.) Also, the juvenile court appeared to overlook not only the evidence of the father's abandonment of the children, but the fact that he had hit mother at least once and apparently in front of one or more of the children.

³ We take judicial notice of the distance between the father's village in Mexico and Tulare County, California, upon the implied request of the children's counsel. (Evid. Code, §§ 452, subd. (h) & 453.)

For all the reasons stated above, we will reverse the juvenile court's placement and consequential denial of services and custody orders and remand the matter for a new dispositional hearing. Under these circumstances, we refrain from addressing mother's further argument that the juvenile court could not dismiss its dependency jurisdiction upon the children's placement with the father.

II. The Juvenile Court Failed to Order Notice Under the ICWA.

In its initial hearing report, the agency advised that ICWA "does or may apply." Mother had stated her grandmother was Cherokee Indian. Mother added she was not enrolled and did not know if she was eligible to enroll. In an attachment to its report, the agency recommended the court make a series of findings and orders including: there was "insufficient reason to believe the child is or may be an Indian child covered by [ICWA]." According to its January 17, 2012, minute order, the juvenile court did not adopt this recommended finding.

The juvenile court conducted a detention hearing on February 1, 2012. According to its minute order and the reporter's transcript for that hearing, the juvenile court made no finding or order regarding ICWA and the children. Nevertheless, the agency stated in its jurisdictional/dispositional report that "[o]n February 1, 2012, the court found the Indian Child Welfare Act to not apply." In fact, based on the record before us, the juvenile court never made any finding or order regarding ICWA.

If a juvenile court or agency knows or has reason to know that a child involved in a dependency proceeding is an Indian child, an agency seeking foster care placement or termination of parental rights must provide notice of the proceedings to the appropriate tribe(s) and the Bureau of Indian Affairs (BIA). (§§ 224.2 & 224.3, subd. (d); 25 U.S.C. § 1912(a).) The failure to provide the required notice is prejudicial error that requires remand. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424.)

While the juvenile court may have been misled by the agency's report, we agree with mother that the juvenile court's failure to comply with the notice requirements of ICWA requires us to also remand the matter on this ground to the juvenile court. It is true that the agency has to date neither pursued foster care placement for the children or termination of parental rights. However, either outcome is not so remote a possibility in this case, that the notice requirements of ICWA can be overlooked.

DISPOSITION

The March 21, 2012, dispositional orders placing the children with the father and granting him sole legal and physical custody are reversed. The matter is remanded with directions for the juvenile court to: (1) conduct a new dispositional hearing regarding the issues of placement and reunification services; and (2) assure that the agency gives notice of the underlying proceedings in compliance with the Indian Child Welfare Act (ICWA) to the Bureau of Indian Affairs and any identified tribes. The agency shall document its efforts to provide such notice by filing such documentation and any and all responses received with the juvenile trial court. If any tribe timely responds by confirming that the children are or may be eligible for membership under ICWA, the court shall proceed pursuant to the terms of the ICWA.