Filed 6/22/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re KYLE E., a Person Coming Under the Juvenile Court Law.	C061669
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. MICHAEL E., Defendant and Appellant.	(Super. Ct. No. JD222236)

APPEAL from a judgment of the Superior Court of Sacramento County, Scott P. Harman, Juvenile Court Referee. Reversed in part and affirmed in part.

Janet H. Saalfield, under appointment by the Court of Appeal, for Defendant and Appellant.

Robert A. Ryan, Jr., County Counsel, and Lilly C. Frawley, Deputy County Counsel, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I, II, III, and V of the Discussion.

Appellant, Michael E., presumed father of minor Kyle E., appeals from an order of the juvenile court terminating reunification services. (Welf. & Inst. Code, §§ 366.21, subd. (f), 395.)[1] Appellant contends: (1) the juvenile court abused its discretion and violated appellant's due process rights when it denied him reunification services pursuant to *Robert L.*[2] and failed to abide by the requirements of section 361.5, subdivision (b)(14); (2) there is insufficient evidence to support the juvenile court's finding that the minor's "injury or detrimental condition . . . would ordinarily not be sustained, except as the result of the unreasonable or neglectful acts or omissions of the parents, [S.E.] and Michael [E.] . . . "; (3) the juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.); (4) the juvenile court's visitation order unlawfully delegated the responsibility of whether or not visitation would occur at all to the Sacramento County Department of Health and Human Services (the Department); and (5) there is insufficient evidence to support the juvenile court's finding regarding appellant's whereabouts and/or identity.

---

[1] Undesignated statutory references are to the Welfare and Institutions Code.

[2] *Robert L. v. Superior Court* (1996) 45 Cal.App.4th 619 (*Robert L.*).

The Department concedes the lack of substantial evidence to support the court's finding as to appellant regarding the cause of the minor's injury or detrimental condition, and further concedes the court erred in finding that appellant's whereabouts and/or identity were unknown.

We will accept the Department's concessions and strike the findings at issue with regard to appellant. We will reverse and remand for further proceedings the court's order of visitation. In all other respects, we will affirm the juvenile court's order.

FACTUAL AND PROCEDURAL BACKGROUND

On November 18, 2008, the minor, then 16 years old, was placed into protective custody after appellant put him on a plane from San Diego to Sacramento. Airport deputies took the minor to his mother's home. His mother, S.E., dropped him off at a Sacramento youth center claiming he was abusive to her other children and, due to his emotional and behavioral problems, she was unable to care for him.

On November 20, 2008, the Department filed a juvenile dependency petition on behalf of the minor alleging a substantial risk that the minor would suffer serious physical harm or illness due to the failure or inability of the mother to supervise or protect the child adequately. (§ 300, subd. (b).) The petition alleged that the minor's behaviors included running away, suicidal ideations, and threatening to kill his sister and that mother failed or refused to provide adequate care,

supervision and protection. (§ 300, subd. (b)(1) [hereafter the (b)(1) allegation].) The petition further alleged that mother was allowing appellant to have unsupervised visitation with the minor despite knowing the court had ordered supervised visitation due to "his physical abuse of the child." (§ 300, subd. (b)(2) [hereafter the (b)(2) allegation].)

At the jurisdictional hearing on February 3, 2009, appellant's counsel requested a waiver of appellant's appearance at both the hearing then taking place and the contested jurisdictional hearing to follow two days later. The court granted the request.

At the contested jurisdictional hearing on February 5, 2009, the court accepted an amendment to the petition, which deleted the (b)(1) and (b)(2) allegations noted above and replaced them with a section 300, subdivision (c) allegation (hereafter section 300(c) allegation), which alleged that the minor's mother was unable to provide for the care, supervision and protection of the minor in that the mother "does not have the necessary skills to parent [the minor] due to the fact that [the minor] is suffering from serious emotional damage evidenced by severe anxiety, depression, withdrawal, and/or untoward aggressive behavior toward self or others." The petition further alleged that the minor had been diagnosed with "Major Depressive disorder," and that his behaviors included running away, suicidal ideations, threatening to kill his sister, and

living with appellant "with whom there is a court order for supervised visitation only."

Appellant was absent from the contested jurisdictional hearing but represented by counsel. When asked whether appellant was in agreement with the amended petition, appellant's counsel replied as follows: "I just spoke to the father. He is not in agreement with the resolution or with the new language in the petition, specifically, the language stating that [the minor's] behaviors including [*sic*] residing with the father in Southern California with whom there is a court order for supervised visitation only. [¶] He is [*sic*] asked on his behalf that I obtain a continuance either for him to be present to testify or for me to obtain a declaration which he wishes to have read into the record. [¶] He is also--he believes that information that is in the jurisdictional[/]dispositional report, most of it is false and that its continued promulgation is contributing to [the minor's] problems, and so I am requesting a continuance on his behalf. [¶] *I would also note that he is not able to take* [*the minor*] *into his care and custody at this time and is not requesting that he have any services*." (Italics added.) The court noted appellant's objections, but denied his request for a continuance for lack of good cause.

Mother's counsel provided the court with a waiver of reunification services and confirmed that mother was declining reunification services. The court found mother's waiver to be

knowing, intelligent and voluntary and denied services to her pursuant to section 361.5, subdivision (b)(14). Thereafter, appellant's counsel requested as follows: "Your Honor, I would be requesting that the Court make a finding under *Robert L.*, that my client is a noncustodial parent who is not seeking reunification services at this time." The court responded, "I will order no services to the father under the case of *Robert L.* He is a nonoffending father who's not requesting placement of [the minor] or services."

The juvenile court dismissed the (b)(1) and the (b)(2) allegations for insufficient evidence and sustained the section 300(c) allegations in the petition, as modified, adjudged the minor a dependent child of the court (*ibid.*), committed him to the care and custody of the Department for suitable confidential placement, and ordered regular visitation for the mother with the minor. Included in the court's findings was the following: "An injury or detrimental condition sustained by [the minor] is of a nature as would ordinarily not be sustained, except as the result of the unreasonable or neglectful acts or omissions of the parents, [S.E.] and Michael [E.], who has [*sic*] the care or custody of [the minor]." The court's order also included a finding that the "whereabouts and/or identity of the father, Michael [E.], are unknown and a reasonably diligent search has failed to locate the father." With regard to compliance with the ICWA, the court found as follows: "[Appellant] has not examined the [form] ICWA-030 for errors. [¶] Notice

requirements pursuant to ICWA have been complied with as to the identified tribes and 60 days have passed. [¶] [The minor] is not an Indian Child as to those tribes. [¶] No further notice need be given to those tribes." The matter was set for annual review pursuant to section 366.3, subdivision (d)(4).

Appellant filed a timely notice of appeal.

DISCUSSION

I. Denial of Reunification Services

Appellant contends section 361.5, not *Robert L.*, *supra*, 45 Cal.App.4th 619, controls a court's denial of reunification services and, as such, the juvenile court violated his due process rights and exceeded its authority by failing to obtain his executed waiver of services or to make a finding that such waiver was knowingly and intelligently made as required by section 361.5, subdivision (b)(14).

Section 361.5 provides in relevant part as follows: "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (14) That the parent or guardian of the child has advised the court that he or she is not interested in receiving family maintenance or family reunification services or having the child returned to or placed in his or her custody and does not wish to receive family maintenance or reunification services. [¶] The parent or guardian shall be represented by counsel and shall execute a waiver of services form to be

adopted by the Judicial Council. The court shall advise the parent or guardian of any right to services and of the possible consequences of a waiver of services, including the termination of parental rights and placement of the child for adoption. The court shall not accept the waiver of services unless it states on the record its finding that the parent or guardian has knowingly and intelligently waived the right to services." (§ 361.5, subd. (b)(14).)

"These procedural requirements ensure that parents understand the potentially grave consequences of their failure to participate in services. [Citations.] Before section 361.5, subdivision (b)(14) was enacted, parents could implicitly waive services by declining to seek custody. (See *In re Terry H.* (1994) 27 Cal.App.4th 1847.)" (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1233-1234, fn. 7.) Section 361.5 now "governs the grant or denial of reunification services to a noncustodial parent who has not assumed custody of his or her child under section 361.2, subdivision (b)." (*In re Adrianna P.* (2008) 166 Cal.App.4th 44, 54; see also *In re D.F.* (2009) 172 Cal.App.4th 538, 546, fn. 1.)

The record here contains no evidence of a written waiver executed by appellant. He did not attend the hearing. The court did not obtain appellant's personal waiver nor did it explain to him the consequences of such a waiver. As such, it was error to accept a waiver based only on counsel's representations. However, notwithstanding that the waiver was not obtained according to the statutory requirements, the error

is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] [error of constitutional dimension is reviewed under stricter standard].)

Appellant did not appear for any of the hearings in this matter. He was, however, represented by counsel throughout the proceedings. Counsel represented to the court that she had communications with appellant regarding the proceedings and that appellant communicated to her his opposition to the proposed modifications to the petition, his objection to statements contained in the jurisdictional/dispositional report, and the fact that he desired neither custody nor reunification services. Appellant does not deny this. Based on those communications, appellant's counsel requested that appellant's appearance be waived and that the court find "under *Robert L.*" that appellant was a noncustodial parent and was not seeking reunification services. The court found that appellant was a "nonoffending father who's not requesting placement of [the minor] or services," without objection.

Moreover, even if appellant had been present and properly admonished, there is no evidence he would have requested services. (See *Arlena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 573 [court's error in failing to advise parent pursuant to § 361.5, subd. (a)(3) that failure to participate in reunification plan can result in termination of parental rights harmless where parent aware of six-month limitation for reunification and no evidence in record that she

would have participated in plan if directly advised].) The dependency proceedings were initiated when appellant put the minor on a plane in San Diego and sent him to his mother in Sacramento, where the mother promptly dropped him off at a youth center because there was "no one to care for him." From inception to conclusion, there is little in the record to suggest appellant had any desire to obtain reunification services. According to the November 2008 detention report, appellant stated he would not attend the detention hearing but "would like to be involved in the process." According to the December 2008 jurisdictional/dispositional report, appellant stated he "would benefit from counseling services and a psychiatric medication evaluation" and "could use a psychiatric medication assessment," yet there is no indication appellant requested services aimed at reunification. To the contrary, the report notes appellant was amenable to a permanent plan of adoption for the minor "under the right circumstances. As long as people who adopt him are doing so with their eyes wide open and are in it for the right reasons." We note, as the juvenile court did, that appellant has the right to "come in and ask for services at some point and ask for placement of [the minor]." Were appellant to decide he would like services or custody, he is not precluded from petitioning the juvenile court to change or modify the court's order. (§ 388.)

The court's error in not requiring that a waiver be executed and failing to make the requisite section 361.5,

subdivision (b)(14) finding on the record was harmless beyond a reasonable doubt.

II. Lack of Substantial Evidence to Support Certain Findings

Appellant contends the juvenile court's finding that the minor's "injury or detrimental condition . . . would ordinarily not be sustained, except as the result of the unreasonable or neglectful acts or omissions" of appellant was not supported by substantial evidence and must be reversed. The Department concedes that the court's finding was the result of judicial oversight and was therefore not supported by the evidence; however, the Department argues the error was harmless because jurisdiction need only be established by one true allegation. We agree that the finding is not supported by the evidence and must be stricken. In doing so, however, we preserve the court's finding of dependency jurisdiction which is otherwise supported by substantial evidence.

A child comes within the jurisdiction of the juvenile court if "[t]he child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care. . . ." (§ 300, subd. (c).)

The burden of proof in the jurisdictional phase of a dependency proceeding is preponderance of the evidence.

(§ 355.) On appeal, the substantial evidence test is the appropriate standard of review. (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 170.) "'If there is any substantial evidence to support the [jurisdictional] findings of the juvenile court, a reviewing court must uphold the trial court's findings. All reasonable inferences must be in support of the findings and the record must be viewed in the light most favorable to the juvenile court's order.'" (*Id.* at p. 168.) A "reviewing court may affirm a juvenile court judgment if the evidence supports the decision on any one of several grounds." (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875.)

While the original dependency petition alleges facts related to both parents, the petition, as modified, alleges facts related only to the mother, S.E. Specifically, the modified petition alleges that S.E. was "unable to provide for the care, supervision, and protection of [the minor] . . . in that she does not have the necessary skills to parent [the minor] due to the fact that [the minor] is suffering from serious emotional damage evidenced by severe anxiety, depression, withdrawal, and/or untoward aggressive behavior toward self or others." Where, as here, the juvenile court sustained those allegations and S.E. has not appealed the jurisdictional findings or the order, "[t]he court could declare jurisdiction over [the minor] based on the actions of the mother alone." (*In re James C.* (2002) 104 Cal.App.4th 470, 482; see also § 302, subd. (a); *In re Nicholas B.* (2001) 88 Cal.App.4th

1126, 1135 ["a finding against one parent is a finding against both in terms of the child being adjudged a dependent"].) In the absence of a specific allegation related to appellant, and given the lack of evidence to support any implied allegation, the court's finding must be stricken as to appellant. We do so without disturbing the court's exercise of dependency jurisdiction over the minor based upon its sustaining of the allegations as to the mother.

III. The ICWA Notice

Appellant contends the jurisdictional findings and orders must be reversed due to the juvenile court's failure to provide adequate notice pursuant to the ICWA. The Department argues any error that might have occurred was harmless. (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1414.)

The ICWA provides, in part: "In 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, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) The Indian status of a child need not be certain or conclusive to trigger the ICWA's notice requirements. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.) California Rules of Court, former rule 5.664

contained identical requirements. (See Cal. Rules of Court, rule 5.481, eff. Jan. 1, 2008.)

The Department and the juvenile court have an affirmative and continuing duty to inquire whether a child who is subject to these proceedings is, or may be, an Indian child. (Cal. Rules of Court, rules 5.481(a)(4), 5.482(d)(2).) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the Bureau of Indian Affairs (BIA) if the tribal affiliation is not known. (25 U.S.C. § 1912(a); Cal. Rules of Court, rule 5.481(a)(4).) Notices must include all available information about the child's parents, grandparents and great-grandparents, especially those with alleged Indian heritage, including maiden, married and former names and aliases, birthdates, places of birth and death, current and former addresses, and information about tribal affiliation including tribal enrollment numbers. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703; *In re Louis S.* (2004) 117 Cal.App.4th 622, 630.)

"Deficient notice under the ICWA is usually prejudicial [citation] but not invariably so." (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1411.) "[E]rrors in ICWA notice are subject to harmless error review" (*Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784), and reversal and remand is not necessarily required if "the tribe has . . . expressly indicated no interest in the proceedings" (*In re Desiree F.*, *supra*,

83 Cal.App.4th at p. 472). However, in such circumstances it must be established that proper notice was given, or at the very least that the person indicating no interest has the authority to do so on the tribe's behalf. (See *In re Asia L.* (2003) 107 Cal.App.4th 498, 509; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1213-1215.)

Appellant contends the Department "failed to provide the tribes with *all* the information which it had in its possession regarding [appellant's] Indian heritage, failed to couple that information with information regarding the mother's heritage which was readily available from its own records via proper inquiry, and failed to interview any of [appellant's] relatives."[3] In particular, appellant claims the Department had in its possession the former form JV-135 (Notice of Involuntary Child Custody Proceeding for Indian Child) from the 2005 Orange County proceeding but failed to include portions of the information contained in that form in the new form ICWA-030 (Notice of Child Custody Proceeding for Indian Child) mailed on November 25, 2008, in this proceeding. As we shall explain, inquiry regarding mother's heritage was unnecessary, and any error in failing to provide all of the information from the 2005 notice was harmless.

---

[3] Although appellant did not raise objections to the ICWA notice before the juvenile court, he may nevertheless raise them on appeal. A challenge to compliance with the ICWA notice requirements is not forfeited due to failure to object in the juvenile court proceedings. (*In re J.T.* (2007) 154 Cal.App.4th 986, 991.)

The record makes plain that the mother denied any Indian heritage in the 2005 proceeding, and affirmed her denial in the 2008 proceeding. Because there was otherwise no reason to believe the minor had Indian heritage on his mother's side, no further inquiry was required in that regard.

As for possible Indian heritage on appellant's side, the ICWA notices sent out in this proceeding contain some, but not all, of the information contained in the 2005 notices. In particular, the notices omit information regarding appellant's father, grandfather and grandmother. The notices were received by the United Keetoowah Band of Cherokee Indians, the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, the BIA, the United States Department of the Interior, and appellant. Of those, the Cherokee Nation of Oklahoma and the Eastern Band of Cherokee Indians responded and determined the minor is not an Indian child.

However, as appellant concedes, the notice prepared in the 2005 Orange County proceeding contained all of the required information. The 2005 notice was provided to the BIA, the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians, none of which have indicated that the minor has Indian heritage. Given that adequate notice was provided to the tribes in 2005, it is not likely that a different outcome would have resulted had the current notice contained the complete information. The error is harmless. [END OF NONPUB. PTS. I.-III.]

IV. Visitation*

Appellant contends that the court, in its dispositional order, improperly delegated to the Department the responsibility to determine whether visitation with the minor would occur at all. We agree.

In fashioning a visitation order, the court may delegate the responsibility of managing the details of visitation--including time, place, and manner--but not the decision whether visitation will occur. (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1374 (*Moriah T.*).) In *Moriah T.*, this court upheld an order entered at an 18-month review hearing for the father to visit "'regularly'" with the children "'consistent with the[ir] well-being . . . and at the discretion of [the social services agency] as to the time, place, and manner.'" (*Id.* at p. 1371.) Because the juvenile court's order mandated regular visitation, the social services agency was not given absolute discretion to decide whether visits would occur. (*Ibid.*) We concluded it was not an improper delegation of authority to allow the social services agency to determine the frequency and length of visits when the order provided for regular visitation. (*Id.* at pp. 1376-1377; but see *In re M.R.* (2005) 132 Cal.App.4th 269, 274-275; *In re Jennifer G.* (1990) 221 Cal.App.3d 752, 757.)

The visitation order in the present matter is problematic for two reasons. First, unlike the order in *Moriah T.*, the

---

* See footnote, *ante*, page 1.

order articulated by the court at the hearing provides appellant with supervised visitation and nothing more. Second, the written order, unlike the order in *Moriah T.*, provides for visitation "as frequent as is consistent with the well-being of [the minor]," with all other conditions, including determinations regarding time, place and manner, and frequency and length of visits, left to the discretion of the Department.

At the conclusion of the contested jurisdictional hearing, the court adopted the Department's recommendations regarding visitation as to the mother.[4] The court then stated that, "[w]ith regard to the father's visits, those will be supervised only at this point."

The court's minute order following the hearing states as follows with respect to visitation: "The father shall have supervised visitation with [the minor] as frequent as is consistent with the well-being of [the minor]. [The Department]

---

[4] The court referenced page 24 of the December 16, 2008 jurisdiction/disposition report, which states as follows: "The parent, [S.E.], shall have regular visitation with [the minor], consistent with [the minor's] well[-]being. [The Department] shall determine the time, place and manner of visitation, including the frequency of visits, length of visits, and whether the visits are supervised and who supervises them. The Department's discretion shall extend to determining if and when to begin unsupervised overnight and weekend visits. The parents [*sic*] shall not be under the influence of alcohol or controlled substances during visits and if found to be so, that visit shall be terminated. The Department may consider [the minor's] desires in its administration of the visits, but [the minor] shall not be given the option to consent to, or refuse, future visits."

shall determine the time, place and manner of visitation, including the frequency of visits, length of visits, and by whom they are supervised. [The Department] may consider [the minor's] desires in its administration of the visits, but [the minor] shall not be given the option to consent to, or refuse, future visits. Parent/guardian shall not be under the influence of alcohol or controlled substances during visits. If found to be, that visit shall be terminated."

The oral pronouncement regarding appellant's visitation is inconsistent with the visitation provision set forth in the written order. "It may be said . . . as a general rule that when, as in this case, the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to the greater credence [citation]. Therefore whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case." (*In re Evans* (1945) 70 Cal.App.2d 213, 216.) Such error may be corrected at any time. (*People v. Smith* (1983) 33 Cal.3d 596, 599-600.)

Here, the oral pronouncement of the visitation order, which is vague, cannot be reconciled with the court's written order, which calls for visitation but fails to set a minimum number of visits or provide that appellant could visit the minor "regularly." (*Moriah T.*, *supra*, 23 Cal.App.4th at p. 1371.)

Given the lack of necessary detail in the oral pronouncement and the improper delegation of authority to the Department regarding whether visitation would occur at all in the written order, we must remand for further proceedings at which the juvenile court shall clarify the terms and conditions applicable to appellant's visitation, including, but not limited to, a minimum number of visits or that visitation is to occur regularly. [END OF PUB. PT. IV.]

V. Court's Erroneous Finding re: Appellant's Whereabouts

Appellant contends, and the Department concedes, there was no evidence to support the juvenile court's finding that appellant's whereabouts and/or identity were unknown. Given that the court's minute order contains appellant's address, it appears that the finding regarding appellant's whereabouts and/or identity was a clerical error. We therefore accept the Department's concession and strike the court's finding. [END OF NONPUB. PT. V.]

DISPOSITION

The court's finding that the minor's "injury or detrimental condition . . . would ordinarily not be sustained, except as the result of the unreasonable or neglectful acts or omissions of" appellant is stricken, as is the court's finding that "[t]he whereabouts and/or identity of the father, Michael [E.], are unknown and a reasonably diligent search has failed to locate the father."

We reverse the court's order of visitation as to appellant and remand for further proceedings consistent with part IV of this opinion.

In all other respects, the juvenile court's jurisdictional findings and dispositional order are affirmed. **(*CERTIFIED FOR PARTIAL PUBLICATION.*)**

BUTZ, J.

We concur:

SIMS, Acting P. J.

CANTIL-SAKAUYE, J.