Filed 12/5/17 In re G.A. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re G.A., et al., Persons Coming Under the Juvenile Court Law.	B282730 (Los Angeles County Super. Ct. No. DK03626)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Z.H., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Steff R. Padilla, Commissioner. Affirmed.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and Appellant Z.H.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jeanette Cauble, Principal Deputy County Counsel, for Plaintiff and Respondent.

In this juvenile dependency appeal, Z.H. (Mother) challenges a juvenile court order, made pursuant to section 366.26 of the Welfare and Institutions Code,[1] terminating her parental rights to her sons, G.A. III (G.A.) and J.A. Although Mother's opening brief is framed as an attack on the juvenile court's adoptability finding, the focus of her appeal is what she characterizes as the juvenile court's erroneous application of the Indian Child Welfare Act (ICWA). She faults the juvenile court for failing to confirm, by means of genetic testing or otherwise, that G.A. and J.A. are the biological sons of G.A., Jr. (the father), a member of the Cherokee Nation, so as to render the ICWA applicable to this case. Mother then contends that, "in addition to the insufficiency of the evidence of [G.A.]'s and [J.A.]'s specific adoptability as Indian children, there was insufficient evidence they were generally adoptable." We disagree.

FACTUAL AND PROCEDURAL BACKGROUND

On February 11, 2014, the Department of Children and Family Services (DCFS) filed a juvenile dependency petition with respect to G.A. (born December 2012).[2] The petition alleged, under section 300, subdivision (a), that G.A. was at risk of harm due to a history of violent altercations between Mother and the father, including the father's use of a skateboard to shove Mother against a gate, inflicting a bleeding laceration to Mother's eye, requiring stitches, and that such violent conduct on the father's part against Mother, and Mother's failure to protect G.A., endangers G.A.'s physical health and safety and places him at risk of physical harm,

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[1] Unless otherwise indicated, further statutory references are to the Welfare and Institutions Code.

[2] At the time of G.A.'s birth in 2012, Mother had just turned 14 years old; the father was 17 years old.

and danger. The petition also alleged, under section 300, subdivision (b), that the father has a history of substance abuse which endangers G.A.'s physical health and safety and places him at risk of physical harm. G.A. was removed from Mother's custody and placed in foster care.

At the detention hearing held the same day, the juvenile court found the father to be G.A.'s presumed and biological father. Although the father's whereabouts were then unknown, a DCFS social worker had identified him as having "ICWA Tribal Membership." The juvenile court found that DCFS had made active efforts to eliminate detention of the child,[3] and ordered DCFS to investigate Mother's claim that G.A. had Native American ancestry and to give notice to any applicable tribe and governmental entity.

Mother, then pregnant with J.A., at first identified someone named Xavier, who she claimed was deceased, as her unborn child's biological father. She indicated, however, that the father believes that *he* is the father, and although he later denied paternity, he did accompany her to all of her prenatal visits. According to Mother, the father denied paternity as to J.A. because he was afraid that he would go to jail. The father never denied that he was G.A.'s biological father.

The juvenile court held the jurisdiction hearing on June 26, 2014. A DCFS representative informed the juvenile court that the Cherokee Nation had identified G.A. as an "ICWA eligible" child,

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[3] The juvenile court continued to make positive active efforts findings throughout the case. Section 361.7, subdivision (a) provides that "a party seeking an involuntary foster care placement of, or termination of parental rights over, an Indian child shall provide evidence to the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

after which the juvenile court transferred the case to a courtroom that heard ICWA cases. The juvenile court ordered DCFS to obtain an ICWA expert letter, to arrange for live expert testimony from an ICWA expert, and to provide notice to the Cherokee Nation of the adjudication hearing calendared for August 19. The juvenile court ordered that G.A. remain in foster care.

In early July 2014, Mother gave birth to J.A. On July 18, DCFS filed a dependency petition under section 300, subdivisions (a), (b)(1) and (j) as to the newborn child. At the detention hearing held the same day, the juvenile court ruled, pursuant to section 224.3, subdivision (b), that the ICWA may be applicable to J.A. and that the father was J.A.'s alleged father. The juvenile court found "it is likely that this child will fall under the Indian Child Welfare Act." The juvenile court conditionally released J.A. to Mother pending a full detention hearing on July 22.

On July 22, 2014, the juvenile court placed J.A. with his maternal grandmother (MGM) and provided for Mother to live in the home subject to monitored contact with J.A. In the meantime, G.A. remained in foster care.

By letter dated August 14, 2014, the Cherokee Nation informed the juvenile court that Cherokee Nation Indian Child Welfare had examined tribal records and had determined that G.A. and J.A. were Indian children as defined in the ICWA.

On August 19, 2014, the juvenile court held a jurisdiction hearing. It found beyond a reasonable doubt that "continued custody of the children by the parents is likely to result in serious emotional or physical damage to the children." The juvenile court ordered that family reunification services be provided to the parents.

Three days later, the Cherokee Nation filed a motion to intervene in J.A.'s case. The tribe recommended that the juvenile court find that continued parental custody of J.A. would result in serious damage to the child within the meaning of 25 U.S.C. § 1912(f) and that family reunification services be offered to the parents. The Cherokee Nation also provided a letter stating that both G.A. and J.A. were Indian children within the meaning of the ICWA. On September 9, 2014, the juvenile court granted the motion and ordered DCFS to provide the Cherokee Nation with all court documents and notices of future hearings. That same day, the juvenile court "received" a "statement regarding parentage" signed by the father, indicating that he is not J.A.'s father.

On September 24, 2014, DCFS filed a section 387 petition alleging that Mother had physically assaulted MGM and thrown a radio at the boys' maternal uncle. On September 29, the juvenile court ordered J.A. detained from MGM's home and placed with the father's half-sister, April N.

On October 3, 2014, DCFS filed a section 388 petition seeking placement of G.A. in the home of April N. On October 23, the juvenile court granted a hearing on the request.

On October 28, the juvenile court sustained the section 387 petition removing J.A. from MGM's home and ordered that he remain with April N.; the juvenile court also granted DCFS's section 388 petition and ordered G.A. placed in April N.'s home.

At the six-month review hearing on February 19, 2015, the father made his first appearance, in custody. The juvenile court continued the hearing to February 26, at which hearing the father was again present, in custody, and set the matter for a contested hearing on April 28. The father did not appear at that hearing. During a recent interview by a social worker, he had apparently

said that he wanted nothing to do with DCFS, even if it meant not seeing "my kids." The juvenile court appointed LabCorp Genetics to perform genetic testing and ordered the father, G.A., and J.A. to submit to DNA testing to determine whether the father is the biological parent of either or both G.A. and J.A. The juvenile court ordered reunification services for both parents. The juvenile court found that Mother had made significant progress in resolving the problems leading to the children's removal, but continued the children's placement with April N.

On June 9, 2015, DCFS emailed Cherokee National Tribal Worker Amanda Neugin inquiring whether paternity needed to be established in order for the children to become enrolled members of the tribe. Neugin replied in the affirmative. Meanwhile, the father was refusing to cooperate, although his full sibling, Amaya A., was apparently willing to submit to DNA testing and DCFS recommended that she be included in the juvenile court's order.

On June 30, 2015, the juvenile court ordered G.A. and J.A. released to Mother and also provided for family preservation services and on-demand drug testing.

On September 29, 2015, Mother tested positive for amphetamine and methamphetamine, and had also assaulted MGM in front of the boys. DCFS obtained a removal order from the juvenile court. The boys were returned to April N.

DCFS filed a section 342 petition on December 8, 2015, alleging Mother's substance abuse history and her September 29 positive drug test. At the combined detention and section 364 hearing on December 9, the juvenile court ordered the boys placed with April N., and provided for unmonitored visits for Mother conditioned on Mother's negative drug tests.

On January 6, 2016, the juvenile court again appointed LabCorp Genetics to conduct genetic testing, with the father's

DNA to be taken at his place of incarceration. On February 5, the father refused to participate in DNA testing.

On January 6 and 13, 2016, Mother again tested positive for amphetamine and methamphetamine. When interviewed on January 4, the father, who was serving a nine-year sentence for robbery, said, "My kids are better off with my sister."

At the section 342 adjudication hearing on January 20, 2016, the juvenile court found that DCFS's active efforts to prevent the breakup of an Indian family had been unsuccessful and that the children's placement with April N. adhered to the ICWA statutory placement preferences. Over DCFS's objection, the juvenile court ordered six more months of services for Mother, but terminated the father's services. The juvenile court scheduled a progress review hearing to address any paternity test results and Mother's participation in her programs.

On April 11, 2016, DCFS informed the juvenile court that, after consulting with the Cherokee Nation, J.A. and G.A. had been removed from April N.'s home and placed in a local ICWA compliant foster home with Lisa S. because April N.'s home did not meet ASFA[4] approved standards.

In its report dated July 21, 2016, DCFS informed the juvenile court that enrollment in the tribe had not been resolved because both the father and his sister, Amaya A., had refused to cooperate with the court-ordered paternity testing. By this time, the father was in state prison.

At a contested 24-month review hearing on September 6, 2016, Mother withdrew her request for a contest and her services were terminated. The juvenile court ordered DCFS to initiate an

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[4] ASFA refers to the Adoption and Safe Families Act of 1997 (42 U.S.C. § 670 et seq.)

Interstate Compact on the Placement of Children (ICPC) with respect to placement with ICWA prospective adoptive parents in Oklahoma. On November 22, the juvenile court authorized the boys' visit to Oklahoma to meet their ICWA prospective adoptive parents.

On November 28, 2016, the Cherokee Nation recommended that parental rights be terminated with the goal of adoption by the Oklahoma prospective parents.

At the January 3, 2017, section 366.26 permanency hearing, the juvenile court authorized another visit with the ICWA prospective adoptive parents "upon written verification of the I.C.P.C. and ASFA." The juvenile court continued the matter, first to February 14 and then to April 14.

On March 29, 2017, Mother filed a section 388 petition seeking custody or, alternatively, reinstatement of reunification services. On April 14, the juvenile court continued the section 388 hearing to April 21, on which date the juvenile court found no change in circumstances and denied the petition. On April 21, Mother filed another section 388 petition, which the juvenile court summarily denied on April 26. In the interim, on April 7, DCFS placed the children in the Oklahoma home of ICWA prospective adoptive parents Timothy T. and Patricia T.[5] On April 14, April N. filed a section 388 petition asking the juvenile court to return the children to California and to make efforts to establish paternity or

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[5] The juvenile court had previously authorized travel to Oklahoma pending approval of the ICPC. As of April 7, however, the ICPC had not yet been approved, although the record, apparently in error, indicates that the ICPC was approved on March 22. In fact, the state of Oklahoma requires that parental rights be already terminated before an adoptive home study can be initiated and thus before an ICPC can be completed.

find the children ineligible as Indian children. On April 21, the juvenile court summarily denied the petition.[6]

At the May 1, 2017 section 366.26 hearing, Mother and Cherokee Nation representative Jay Silk testified. After considering the testimony, DCFS's reports, and hearing argument from counsel,[7] the juvenile court terminated parental rights, finding by clear and convincing evidence that G.A. and J.A. were adoptable and that no exception to termination was applicable. The juvenile court found that G.A. and J.A. were Indian children, noting that the juvenile court had previously placed them in a Cherokee compliant home in Oklahoma, and confirmed that the Cherokee Nation was in agreement with the juvenile court's decision.

Mother filed a notice of appeal that same day.

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[6] In summarily denying April N.'s section 388 petition, the juvenile court stated: "She's attacking the finding that these children are Indian children and that the Cherokee Nation has intervened. Well, those findings have been made a long time ago, and therefore, this [section] 388 [petition] is denied on its face. There's no legal basis to set this matter for hearing."

[7] Counsel for Mother did not argue that the ICWA did not apply; she only argued that Mother has a parental relationship with the children which is worth preserving.

DISCUSSION

A. The Juvenile Court Correctly Applied the ICWA.

Mother contends, for the first time on appeal, that in the absence of genetic testing or other proof establishing that G.A. and J.A. are in fact the father's biological children, the juvenile court could not declare the children to be of Indian descent under the ICWA. We disagree. The father never denied that he was G.A.'s biological father. And although he denied that he was J.A.'s biological father, he accompanied Mother to all of her prenatal visits and repeatedly referred to both boys as "his kids." Further, in light of the father's ongoing refusal to submit to paternity testing, the juvenile court would have been justified in finding that he was the biological father of both G.A. and J.A. based solely on his lack of cooperation. (Fam. Code, § 7551.)[8]

In any event, although the Cherokee Nation did, at one time, indicate that it needed to establish paternity by genetic testing before G.A. and J.A. could be enrolled in the tribe, it ultimately concluded that, even absent the genetic testing, the boys are Indian children and so notified the juvenile court. And because the Cherokee Nation determined that G.A. and J.A. are Indian children

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[8] That section provides, in pertinent part: "In a civil action or proceeding in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person who is involved . . . order the mother, child, and alleged father to submit to genetic tests. If a party refuses to submit to the tests, the court may resolve the question of paternity against that party or enforce its order if the rights of others and the interests of justice so require. A party's refusal to submit to the tests is admissible in evidence in any proceeding to determine paternity."

for purposes of the ICWA, the juvenile court had no authority to modify the tribe's decision.

Section 224.3, subdivision (e)(1) states: "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." As explained in *In re K.P.* (2015) 242 Cal.App.4th 1063, "Congress has given Indian tribes concurrent jurisdiction over state court child custody proceedings that involve Indian children living off of a reservation. [Citation.] 'When applicable, ICWA imposes three types of requirements [on the state court]: notice, procedural rules, and enforcement.' [Citation.] Those requirements are limited in scope. [Citation.] Congress did not grant jurisdiction or authority to state courts determining child custody to review the validity of internal governing documents of Indian tribes, or the tribe's enrollment procedures. [Citation.]" (*Id.* at p. 1074.)

In light of the Cherokee Nation's determination, the juvenile court found the boys to be Indian children, granted the tribe's motion to intervene in the case, and, with the tribe's concurrence, placed the boys in an ICWA compliant home. Of course, and notwithstanding the tribe's determination and the Indian child adoption preferences set forth in section 361.31, subdivisions (c) and (d),[9] the ultimate placement decision rested with the juvenile

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[9] Section 361.31, subdivision (c) provides: "In any adoptive placement of an Indian child, preference shall be given to a placement with one of the following, in descending priority order: [¶] (1) A member of the child's extended family, as defined in [s]ection 1903 of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.). [¶] (2) Other members of the child's tribe. [¶] [(3) Another Indian family." Subdivision (d) provides: "Notwithstanding the placement preferences listed in subdivision[] . . . (c), if a different order of placement preference is established by the child's tribe, the court or agency effecting the

court. Subdivision (h) of section 361.31 authorizes the juvenile court to "determine that good cause exists *not* to follow placement preferences applicable under subdivision . . . (c)." (Italics added.) Pursuant to subdivision (j), "[t]he burden of establishing the existence of good cause not to follow [the applicable] placement preferences . . . shall be on the party requesting that the preferences not be followed." (See, generally, *In re Alexandria P.* (2016) 1 Cal.App.5th 331.)

B. Substantial Evidence Supports the Juvenile Court's Adoptability Finding.

Mother contends that the record is devoid of substantial evidence of either general or specific adoptability. We disagree.

Whether a child is likely to be adopted is the "pivotal question" under section 366.26. (*In re Tamneisha S.* (1997) 58 Cal.App.4th 798, 804.) "In order for a juvenile court to terminate parental rights under section 366.26, the court must find by clear and convincing evidence that it is likely that the child will be adopted. [Citation.] [The appellate court] review[s] the juvenile court's order to determine whether the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that [the children] were likely to be adopted. [Citations.] 'Clear and convincing' evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. [Citation.]" (*In re Asia L.* (2003) 107 Cal.App.4th 498, 509-510.) In fact, the evidence " 'must be sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.]' [Citation.]" (*In re Amelia S.* (1991) 229 Cal.App.3d 1060, 1065.)

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placement shall follow the order of preference established by the tribe."

In assessing adoptability, courts have divided children into two categories: those who are "generally adoptable" and those who are "specifically adoptable." A child is "generally adoptable" if the child's traits, such as age, physical condition, mental state and other relevant factors do not make it difficult to find an adoptive parent. A child is "specifically adoptable" if the child is adoptable only because of a specific caregiver's willingness to adopt. (*In re R.C.* (2008) 169 Cal.App.4th 486, 492–494.) " 'When a child is deemed adoptable *only* because a particular caregiver is willing to adopt, the analysis shifts from evaluating the characteristics of the child to whether there is any legal impediment to the prospective adoptive parent's adoption and whether he or she is able to meet the needs of the child.' " (*Id.* at p. 494.)

In making its determination of adoptability, the juvenile court is required to "focus on the child, and whether the child's age, physical condition, and emotional state make it difficult to find a person willing to adopt. [Citations.]" (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) A finding that a child is likely to be adopted, however, does not require the child's placement in the home of a prospective adoptive parent, or even that one be " 'waiting in the wings.' " (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223, fn. 11.) Thus, while the existence of a prospective adoptive family is a factor to be considered in making the determination, it is not dispositive. (*In re David H.* (1995) 33 Cal.App.4th 368, 378.) As a general rule, "the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive

parent *or by some other family*." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.)

Here, the juvenile court made a finding of adoptability without specifying whether the children were generally or specifically adoptable. Nonetheless, substantial evidence supports that finding whether we consider it a finding of general *or* specific adoptability.

Mother contends the children are not generally adoptable because they have significant mental, emotional and developmental problems that were glossed over or ignored in a rush to locate an Indian home. Citing *In re I.W.* (2009) 180 Cal.App.4th 1517, 1525-1527, Mother acknowledges that the boys' prospective adoptive parents' desire to adopt the boys is sufficient to support a finding of adoptability. She contends, however, "[t]hat presumption is rebutted by the record in this case. The boys demonstrated significant behavioral and developmental problems which arose as the children matured during the dependency proceedings."

After describing some of the problems which had been observed earlier in the case, Mother acknowledges that those problems had greatly improved during the last few months, but contends that they have not entirely abated. Nonetheless, according to the Cherokee Nation representative, the boys were adapting well to their new placement. Moreover, DCFS's most recent report prior to the section 366.26 hearing indicated that G.A. and J.A. "already appear to be bonded with the [T.'s] and they represent an integral addition to the family dynamic/structure. The children will continue to receive the appropriate level of care in having their medical, educational, and emotional needs met by the [T.'s], who remain committed to adopting the children and providing a permanent, loving home."

In any event, even if the boys are not generally adoptable, the record contains clear and convincing evidence that they are specifically adoptable. Mother seems to contend that, because the juvenile court erred in finding that G.A. and J.A. are Indian children, they are not specifically adoptable as Indian children. She is mistaken. As we have discussed, they were properly identified as Indian children. Nothing in the record indicates that there are any legal impediments to adoption by the T.'s. Nor is there any reason to believe that the T.'s are unaware of what the future might hold for G.A. and J.A. If we were to adhere to Mother's view, *no* child with any behavioral problem, medical issue, or developmental delay could be freed for adoption until sufficient time had elapsed within which a determination could be made with absolute certainty as to the child's physical, mental, and emotional health. That is not the law. "Nowhere in the statutes or case law is certainty of a child's future medical condition required before a court can find adoptability. [Citations.]" (*In re Helen W.* (2007) 150 Cal.App.4th 71, 79.)

DISPOSITION

The order terminating parental rights is affirmed.
NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.