Filed 11/21/18 In re T.N. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re T.N., JR., a Person Coming Under the Juvenile Court Law.	B288887 (Los Angeles County Super. Ct. No. DK20285)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.N., SR., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Emma Castro, Juvenile Court Referee. Dismissed in part and conditionally reversed in part.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

Over the course of 13 months, the juvenile court assumed dependency jurisdiction over T.N., Jr. (T.N.), terminated reunification services provided to his father, T.N., Sr. (Father), and eventually terminated Father's parental rights over T.N. The Department of Children and Family Services (the Department) concedes it inadequately investigated whether T.N. was an Indian child within the meaning of state and federal law. We accept the concession and are thus left with only one issue to resolve: whether the manner in which the juvenile court sent notice to Father of his appellate rights, which did not strictly comply with a statute and rule requiring notice to be sent to his "last known address," means he can now challenge the court's decision to terminate his reunification services—a challenge that would otherwise be barred by his failure to earlier seek appellate court review of that decision.

I. BACKGROUND

In November 2016, the Department removed then one-year-old T.N. from his parents' home after his mother, L.S. (Mother), stabbed Father with a kitchen knife.[1] The Department filed a dependency petition pursuant to Welfare & Institutions Code section 300, subdivisions (a) and (b)(1),[2] alleging Mother's violence placed T.N. at risk of serious physical harm, Mother and Father both had histories of substance abuse that impaired their

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[1] Mother was sentenced to a five-year prison term for her assault on Father.

[2] Undesignated statutory references that follow are to the Welfare and Institutions Code.

ability to care for T.N., and Mother and Father's home was in a filthy condition that endangered T.N.'s physical well-being.

Neither parent attended T.N.'s initial detention hearing—Mother, because she was in police custody, and Father, because he was in the hospital being treated for his injuries. The juvenile court ordered the Department to provide monitored visitation between T.N. and each parent, family reunification services, and referrals for counseling and drug testing.

Mother notified the court that T.N. might be an Indian child under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.)[3] because she had "Blackfoot" and "Sioux" heritage through her mother and grandfather. The court ordered the Department to investigate T.N.'s Indian status.

The Department learned that T.N.'s maternal grandmother L.N., who was deceased, was a registered member of the Standing Rock Sioux tribe and Mother's half-brother M.D. was found in an earlier dependency proceeding to be "ICWA eligible" because of L.N.'s tribal status. Mother recommended the Department contact her father (maternal grandfather), who lived

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[3] Congress enacted ICWA in response to concern over the removal of Indian children from their families and tribes and placement of those children in non-Indian homes. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8 (*Isaiah W.*); 25 U.S.C. § 1902.) "The minimum standards established by ICWA include the requirement of notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.' (25 U.S.C. § 1912(a).)" (*Isaiah W.*, *supra*, at p. 8.)

with T.N.'s maternal great-grandmother, to obtain additional information. The Department did not do so.

The Department sent ICWA notices to the Bureau of Indian Affairs (BIA), the Secretary of the Interior, and the Sioux and Blackfeet tribes. The notices did not disclose maternal grandmother's tribal membership status. Nor did the notices include any information regarding Mother's grandparents. Eleven tribes responded that T.N. was not enrolled or was not eligible for enrollment in those tribes.

At the jurisdiction hearing, the juvenile court adjudicated T.N. a dependent child after sustaining the allegations (as amended by the court) of Mother's violence and both parents' substance abuse. The court dismissed the allegation regarding the condition of the parents' home.

At a progress hearing held approximately six weeks later, the juvenile court advised Father that in order to regain custody of T.N., he would need to comply with orders regarding drug-testing and participation in parenting classes. Based on the tribes' responses to the notices sent by the Department, the court found ICWA did not apply.

At a hearing the following month, the court ordered Father to participate in domestic violence group counseling, to submit to weekly random drug tests, and to provide proof he could obtain childcare for T.N. Over the next month, Father tested positive for marijuana on four consecutive occasions. He was also assaulted by three men who stole his wallet and bus pass.

At the disposition hearing, which was held shortly after Father was assaulted, the juvenile court ordered T.N. released to Father's custody but it stayed the order for several days in order for Father to confirm he had childcare and a bed for T.N. The

court advised Father that future drug tests should show decreasing marijuana levels. The court ordered that Mother receive no reunification services.

A few days after the hearing, Father was evicted and moved into a motel. Father told the Department he was having trouble appearing for his drug tests and finding a new place to live because his identification had been stolen with his wallet. Father said he had been consistently participating in a domestic violence program but had not paid for the balance of sessions he needed to complete.[4] The juvenile court stayed the order releasing T.N. to Father for another six days. During that time, Father informed the Department he lost his job. The court then stayed the order placing T.N. in Father's home for another three weeks.

Over the course of those three weeks, Father tested negative for drugs on two occasions and missed one test. He did not secure stable housing or employment. In April 2017, the juvenile court found Father was "in substantial compliance" with his case plan and Father's "homelessness" was the "only barrier" to releasing T.N. to his custody. The court ordered T.N. released to Father within five court days of Father "securing appropriate housing."

At a progress hearing held three months later, the Department submitted evidence Father had not yet secured stable housing and had failed two drug tests and missed 11 others. Father said he did not have time to drug test because there was a 5:00 p.m. curfew at the shelter where he was staying.

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[4] The Department confirmed Father had attended five of 52 sessions.

The Department also reported Father stopped attending his domestic violence counseling sessions and counseling staff informed the Department Father was "passive and seem[ed] to consider having to attend [the] program as an unnecessary inconvenience in his life." Father told the Department he had an unpaid balance of $230 to continue the program. The juvenile court ordered the Department "to use all available funds, including stop funds, to ensure Father's domestic violence counseling is up to date and paid for."

In advance of the six-month review hearing, the Department submitted evidence that, since the last hearing, Father had missed four additional drug tests and tested positive at a fifth. The Department also informed the court there was no indication Father ever contacted or reentered the domestic violence counseling program.

Father did not personally appear at the six-month review hearing in September 2017 even though the hearing had been continued from an earlier date in order to ensure Father received proper notice. Attorneys representing the Department and T.N. asked the court to terminate Father's reunification services because of his decreasing compliance with the case plan. T.N.'s maternal great-grandmother, who also had custody of T.N.'s half-sister, was interested in adopting T.N. Counsel for Father asked that reunification services continue.

The juvenile court found that apart from visiting T.N., Father had "made minimal progress towards alleviating the causes necessitating [T.N.'s] placement." The court noted Father's drug tests showed increasing levels of marijuana use and Father provided no documentation that he was attending

parenting classes.[5] The court additionally observed Father's attendance at court hearings had declined over the past several months. Citing Father's "minimal compliance with the case plan of over six months," T.N.'s young age, and the date the petition was filed, the court found there was no "substantial probability that [T.N.] will be returned to his father by the 12-month permanency hearing" and it terminated Father's reunification services.

The juvenile court scheduled a section 366.26 permanency plan hearing and directed the clerk to send Father written notice of his right to seek appellate court review. The clerk sent that notice to Father in the care of his attorney, at her address.

Father did not attend the permanency plan hearing, which was held in January 2018. The juvenile court found there was no exception to placing T.N. for adoption and accordingly terminated Father's and Mother's parental rights. The court designated T.N.'s current caregivers—who had been caring for him for 13 months—as the prospective adoptive parents. T.N.'s great-grandmother approved of the court's decision, stating she realized T.N. "need[ed] more care than what [she could] provide" and she would prefer T.N. remain with his current caregivers, with whom he had bonded.

II. DISCUSSION

All parties agree the Department did not satisfy its obligations under ICWA and related California law, and we will

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[5] The court did not refer to Father's cessation of domestic violence group counseling when it described Father's lack of progress with his court-ordered case plan.

conditionally reverse the parental rights termination order and remand the case to ensure proper compliance in that regard. But we reject Father's arguments for a broader reversal, one that would encompass the prior order terminating his reunification services.

Father acknowledges he did not comply with the established statutory procedure—filing a petition for an extraordinary writ—to seek review of the juvenile court's reunification services ruling. We conclude Father has not shown good cause for that noncompliance such that review of his claim of error on the merits would be warranted.[6] Even though the juvenile court did not technically conform to the rule requiring it to send Father an advisement of his appellate rights at his "last known address," the court committed no error by sending the advisement to the address most likely to result in Father receiving actual notice when he lacked stable housing and no longer lived at the "last known address" on file.

A. Father's Challenge to the Termination of Reunification Services Is Not Reviewable on Appeal

A party may not appeal from a court order setting a section 366.26 hearing—including determinations underlying that order,

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[6] Father contends the juvenile court improperly terminated his reunification services because there was insufficient evidence the Department made a good faith effort to help Father complete his domestic violence group counseling program when he could no longer afford it. As noted *ante*, the reasons cited by the court in terminating Father's reunification were his drug test results and failure to attend parenting classes. The court made no reference to Father's participation in domestic violence group counseling.

which often, as here, include an order terminating reunification services—unless he or she timely files a petition for extraordinary writ review that addresses the challenged issues and is supported by an adequate record. (§ 366.26, subd. (*l*)(1).)

When the juvenile court schedules a section 366.26 hearing, it must "advise all parties . . . that if the party wishes to preserve any right to review on appeal of the order setting the hearing . . . the party is required to seek an extraordinary writ . . . ." (Cal. Rules of Court, rule 5.590(b); see also § 366.26, subd. (*l*)(3)(A).) "The advisement must be given orally to those present when the court orders the hearing under . . . section 366.26" and it "must be sent by first-class mail by the clerk of the court to the last known address of any party who is not present when the court orders the hearing under . . . section 366.26." (Cal. Rules of Court, rule 5.590(b)(1)-(2); see also § 366.26, subd. (*l*)(3)(A)(i)-(ii).) In this case, Father did not file a timely petition for extraordinary writ review of the termination of his reunification services, which formed the basis of the order setting the section 366.26 hearing.

A parent's failure to comply with the writ requirements of section 366.26, subdivision (*l*) will not foreclose appellate review if the parent shows the juvenile court failed to "adequately inform the parent of their right to file a writ petition." (*In re A.A.* (2016) 243 Cal.App.4th 1220, 1240 (*A.A.*); see also *In re Harmony B.* (2005) 125 Cal.App.4th 831, 838 ["When notice is not given, the parents' claims of error occurring at the setting hearing may be addressed on review from the disposition following the section 366.26 hearing"]; *In re Cathina W.* (1998) 68 Cal.App.4th 716, 722 [failure to file writ petition required by section 366.26, subdivision (*l*) does not prevent appellate review where "the

juvenile court, through no fault of the [parent], failed to discharge its duty to give [the parent] timely, correct notice"] (*Cathina W.*).) Father has not demonstrated the juvenile court inadequately informed him of his appellate rights under the circumstances here.

Father did not attend the hearing at which his reunification services were terminated. He nevertheless contends that because the juvenile court sent him written notice of his right to appeal from the rulings made during that hearing to his attorney's address, rather than his last known address, the notice was deficient and he is entitled to challenge the termination of reunification services in this appeal. Relevant case law shows, however, that technical noncompliance—or even compliance for that matter—with the advisement requirement does not determine whether the juvenile court has committed error.

In *In re T.W.* (2011) 197 Cal.App.4th 723 (*T.W.*), for instance, a mother argued she was excused from complying with the section 366.26, subdivision (*l*) writ requirement because the written advisement sent to her did not include a zip code. (*Id.* at p. 729.) The Court of Appeal held the mother did not show good cause under "the circumstances of [her] case" because there was no evidence she did not actually receive notice. (*Id.* at p. 730.) Despite lacking a zip code, the notice was not returned to the sender and the mother did not provide a declaration stating she did not receive the notice or was unaware of the writ requirement. (*Ibid.*)

In *In re Hannah D.* (2017) 9 Cal.App.5th 662 (*Hannah D.*), a father was personally served in court with documents informing him of the need to seek writ review in order to preserve his

appellate rights, but the court did not orally advise the father of that same requirement despite the fact he was present in court. (*Id.* at pp. 679-680.) The Court of Appeal held that the juvenile court's failure to comply with the oral advisement requirement in California Rules of Court, rule 5.590(b)(1) did not excuse the father from filing a writ petition because the advisement requirement was "directory" rather than "mandatory" and the father received actual notice. (*Id.* at pp. 680-682.)

In *A.A.*, *supra*, 243 Cal.App.4th 1220, the Court of Appeal excused a mother's failure to file a writ petition under section 366.26, subdivision (*l*) even though the juvenile court sent written notice to what "was literally the 'last known address' on file for [her]" because the "court knew for almost seven months" that the mother did not actually reside at that address. (*Id.* at pp. 1242-1243.) Thus, even strict compliance with the "last known address" requirement may be error where the court has reason to know the parent no longer lives at his or her last known address.

T.W., *Hannah D.*, and *A.A.* demonstrate that what matters for purposes of assessing compliance with the written advisement requirement is whether the juvenile court sent notice "to an address where [the party] would likely receive it" (*A.A.*, *supra*, 243 Cal.App.4th at p. 1240) and whether the party actually received notice (*T.W.*, *supra*, 197 Cal.App.4th at p. 730; see also *Hannah D.*, *supra*, 9 Cal.App.5th at p. 681 ["the ultimate purpose of the rule (i.e., actual notice) was accomplished"]; *Cathina W.*, *supra*, 68 Cal.App.4th at p. 723 ["[n]othing in the record dispute[d] [party's] claim" she never received notice]).

In Father's case, the juvenile court acted appropriately by sending notice to Father in the care of his attorney because, as

the court knew, Father lacked stable housing at that time and the record does not show he provided the court with a current or permanent mailing address.[7] (See *A.A.*, *supra*, 243 Cal.App.4th at pp. 1243-1244 [where court was aware mother was homeless, it could have mailed notice to a relative's house, where the minors were placed, since the court knew mother had contact with the relative and there was, therefore, "at least a reasonable chance" mother would receive the notice or be told it was sent to her].) Father does not assert his attorney did not receive the notice, nor does he represent his attorney failed to give him the notice she received or inform him of its contents. Under the circumstances, the juvenile court committed no error and Father's challenge to the order terminating reunification services is non-justiciable.

B. Remand for ICWA Compliance Is Appropriate

To comply with ICWA, the juvenile court and the Department "have an affirmative and continuing duty to inquire whether" a child who is the subject of a section 300 dependency petition "is or may be an Indian child . . . ." (§ 224.3, subd. (a); see also Cal. Rules of Court, rule 5.481(a).) If the Department "knows or has reason to know that an Indian child is involved" in a section 300 proceeding, it must "make further inquiry regarding

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[7] The record contains a Notification of Mailing Address filed by Father in February 2017. Father moved out of that residence the following month, and the record indicates he was still seeking permanent housing at the time of the September 2017 hearing when the juvenile court terminated his reunification services and scheduled the hearing to terminate parental rights.

the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather . . . information" including the identities of tribes in which the child could be a member or eligible for membership, as well as biographical and contact information for the child and his or her biological parents, grandparents, and great-grandparents.[8] (§§ 224.2, subd. (a)(5), 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4)(A).)

The Department must also seek information from "any other person that reasonably can be expected to have information regarding the child's membership status or eligibility." (Cal. Rules of Court, rule 5.481(a)(4)(C).) Once an appropriate inquiry is made, the Department is required to contact the BIA and all tribes in which the child may be a member or eligible for membership, and it must provide those entities with various information, notices, and documents as set forth by statute, including the identifying information the Department has obtained about the child and his or her biological relatives. (§ 224.2, subds. (a) & (b).)

Here, Father contends the Department did not comply with the inquiry and notice requirements regarding Indian children because the Department did not contact Mother's father or grandmother, as Mother recommended, to obtain additional information. Father notes the record shows the Department had personal contact with Mother's grandmother (maternal great-

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[8] Such identifying information includes former names and aliases, birthdates, places of birth and death, current and former addresses, tribal enrollment numbers, and "any other identifying information, if known." (§ 224.2, subd. (a)(5)(A), (C).)

grandmother) when it began considering her as a possible placement option for T.N. Father also asserts the Department failed to provide meaningful notice to the contacted tribes because it did not include all known, pertinent information about Mother's relatives.

The Department acknowledges it had "contact with relatives who may have had further information about [T.N.]'s Indian heritage and lineage" and concedes it should have interviewed those relatives and should have issued updated ICWA notices.

"ICWA notice requirements are strictly construed" and "must contain enough information to be meaningful," including, if known, identifying information for the child's grandparents and great-grandparents. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703 (*Francisco W.*).) "Just as notice to Indian tribes is central to effectuating ICWA's purpose, an adequate investigation of a family member's belief a child may have Indian ancestry is essential to ensuring a tribe entitled to ICWA notice will receive it." (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 787.) If the Department receives additional information about the child's biological relatives after ICWA notices have been sent out, the Department must send updated notices, even if the juvenile court has already found ICWA does not apply. (§ 224.3, subd. (f); *In re I.B.* (2015) 239 Cal.App.4th 367, 377; see also *Isaiah W.*, *supra*, 1 Cal.5th at p. 11 [court's continuing obligation to inquire whether minor is an Indian child "applies to 'all dependency proceedings,'" including a proceeding to terminate parental rights, even if the court previously determined ICWA was inapplicable].) Because the Department did not meet its "continuing duty" (§ 224.3, subd. (a)) to determine T.N.'s Indian

status, including by providing updated notices with "sufficient information that would allow the tribes or the BIA to determine [T.N.'s] membership or eligibility for membership" (*Francisco W.*, *supra*, at p. 703), we will conditionally reverse the parental rights termination order and remand the case for the limited purpose of directing further ICWA compliance.

DISPOSITION

Father's challenge to the order terminating reunification services is dismissed. The juvenile court's January 23, 2018, order terminating Father's parental rights is conditionally reversed. The matter is remanded to the juvenile court for the limited purpose of demonstrating full compliance with the inquiry and notice provisions of ICWA and related California law, and for further proceedings not inconsistent with this opinion. If the juvenile court determines, after proper inquiry and notice, that T.N. is not an Indian child, the order terminating Father's parental rights shall be reinstated. If the court finds T.N. is an Indian child, the court shall vacate the parental rights termination order and proceed in compliance with ICWA and related California law.

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BAKER, Acting P. J.

We concur:

MOOR, J. SEIGLE, J.[*]

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[*] Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.