Filed 5/20/14 In re R.M. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re R.M., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B251013 (Super. Ct. No. J1396057) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD PROTECTIVE SERVICES, Plaintiff and Respondent, v. R.M., Defendant and Appellant.	

R.M. (father) appeals the juvenile court's order terminating his parental rights to his minor daughter R.M.[1] and choosing adoption as her permanent plan (Welf. & Inst. Code,[2] § 366.26). Father contends the order must be reversed because (1) the evidence is insufficient to support the court's finding that R.M. is likely to be adopted;

[1] All further references to R.M. are to the minor rather than the father, who has the same initials.

[2] All further undesignated statutory references are to the Welfare and Institutions Code.

and (2) the court failed to ensure compliance with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901). We affirm.

FACTS AND PROCEDURAL HISTORY

R.M. was born in March 2008. On August 30, 2012, Santa Barbara County Child Protective Services (CPS) filed a dependency 300 petition on behalf of R.M. for alleged failure to protect and no provision for support. (§ 300, subds. (b), (g).) The petition alleged that R.M. and one of her half-siblings had been left in the care of the maternal grandmother, who was observed to be under the influence of a stimulant drug. R.M.'s mother,[3] whose whereabouts were unknown, abused drugs and had a history of leaving R.M. and her half-siblings with other people. The petition further alleged that father, whose whereabouts were also unknown, had a criminal history that included corporal injury on a spouse.[4]

Father appeared at the jurisdiction and disposition hearing and was declared R.M.'s biological father. Father was subsequently declared to be R.M.'s presumed father. In its report for the jurisdiction and disposition hearing, CPS reported that R.M. was doing well in her foster care placement. R.M. did not talk about her family, although she said her grandmother was taking her to Disneyland. Her only comment about mother was a reference to her name and the fact that she colored her hair. After another child who had difficulties after visits with her family was placed in the foster home, R.M. began to say she missed her grandmother. The foster mother believed that R.M. was simply mimicking the other child.

Father and mother were offered family reunification services. Father's case plan required him to regularly visit R.M., maintain a suitable residence, obtain a legal source of income, and participate in therapy, parenting classes, and a drug assessment.

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[3] R.M.'s mother, L.G., is not a party to this appeal.

[4] In the section 300 petition, R.M.'s alleged father was initially identified as mother's husband J.G. Their son, Joe G., is R.M.'s younger half-sibling. R.M. also has two older half-siblings from mother's relationship with another man.

Mother and R.M.'s grandparents were also granted visitation. Neither parent visited R.M., however. Mother had one supervised phone call with the child, but CPS was subsequently unable to communicate with her because her whereabouts were unknown. CPS also attempted to set up three visits between father and R.M., but father did not attend any of them.

At the six-month review hearing, CPS reported that father and the paternal grandfather had both been incarcerated on charges of murder, torture, and other offenses. Father was in jail three additional times in the preceding six months, following an arrest for battery and charged violations of his post-release supervision. Father had made no effort to maintain contact with CPS, nor had mother, whose whereabouts were still unknown.

CPS reported that R.M. was "flourishing under the care and love of her foster family." R.M.'s court-appointed special advocate (CASA) characterized her as "a 5-year-old healthy, loving, independent, very intelligent and curious child." When CASA interviewed R.M. in February 2013, R.M. said, "I miss [mother]. I liked living with her better." R.M. also missed her "baby brother Joe" and wanted to see him. When CASA asked what R.M. wanted her to tell the judge, R.M. replied, "I miss my Grandpa and want to live with him." R.M. replied "yes" when asked if she wanted to stay with her foster parents (the prospective adoptive parents) if she could not live with her grandfather.

The prospective adoptive mother told CASA that her only concern related to the fact that R.M. "was only a little sad over the holidays when many of her other foster sisters had family visits and she did not." CASA reported that the prospective adopted mother "feels that [R.M.] is happy in the home and gets along well with the other children, adjusted well and is enjoying preschool." The prospective adoptive mother also expressed that "her intention is to adopt [R.M.] if reunification fails." CASA concluded that R.M. "is in a good place, and has every chance to lead a productive and happy life. At this time, with little contact from her mother and other family members, it is my recommendation that [R.M.] remains in her current placement, and that Family Reunification services are terminated." CPS made the same recommendation.

Mother and father were both present at the six-month review hearing. At the conclusion of the hearing, the court terminated reunification services and set the matter for a section 366.26 hearing. Father, who was still in custody awaiting trial, was not offered visitation. The court also ordered that there be no visits between mother and R.M. until a counselor determined whether the visits would be harmful to R.M.

At the section 366.26 hearing, CPS recommended that mother and father's parental rights to R.M. be terminated and that adoption be selected as the child's permanent plan. The adoption assessment concluded that R.M. was adoptable. R.M. stated that she loved the prospective adoptive parents and wanted to be adopted. CPS concluded that R.M. was likely to be adopted even if the prospective adoptive parents declined to do so.

CPS reported that R.M. was still participating in therapy. The prospective adoptive mother had expressed concerns regarding the fact that R.M. and one of her foster brothers had "been hiding together and pulling down their pants." During one of these incidents, R.M. kissed the boy's penis. The situation was being addressed and R.M. was working with her therapist "on boundaries and what is acceptable behavior." R.M. said she had learned the behavior from a movie she watched with the paternal grandfather. R.M. had also expressed "some anxiety regarding the lack of contact with her biological family and not knowing what had happened to them." Those concerns were being addressed by R.M.'s therapist, who "recommended a single closure visit for [R.M.] and the mother in a therapeutic setting, in order to assuage any lingering anxiety about [R.M.'s] family."

At the section 366.26 hearing, father asked the court if he could "sign guardianship" of R.M. over to the paternal grandmother or another member of father's family. The court responded, "[y]ou don't have the power at this point to sign the guardianship over to your mother or anyone else. She's a dependent child of the court; that could all have happened before [CPS] became involved, but not at this point." Father replied, "I understand." The court proceeded to terminate mother and father's parental rights to R.M. and found by clear and convincing evidence that she was likely to be

adopted. The court declined to order a closure visit for mother, who did not attend the hearing. Father remains in custody awaiting trial for murder and other charges.

DISCUSSION

I.

R.M.'s Adoptability

Father contends the evidence is insufficient to sustain the juvenile court's finding that R.M. is likely to be adopted because the adoption assessment report was incomplete and inaccurate. He asserts that the report failed to include specific information regarding R.M.'s relationship with her biological family members, as required under section 366.21, subdivision (i)(1)(B).

This claim was not raised below, so it is forfeited. (*In re G.M.* (2010) 181 Cal.App.4th 552, 564.)[5] In any event, father's assertion is belied by the record. The relevant statutes provide in pertinent part that the adoption assessment must include "[a] review of the amount of and nature of any contact between the child and his or her parents . . . and other members of his or her extended family since the time of placement." (§ 366.21, subd. (i)(1)(B).) R.M.'s adoption assessment states that she had no contact with any family members during the proceedings, save for a single phone call with mother. Father complains that the assessment does not refer to R.M.'s stated desire to maintain a relationship with certain family members, but that information was not required. Father's attempt to highlight problems regarding R.M.'s current placement is also unavailing because the determination of adoptability focuses first upon the characteristics of the child. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) The

[5] In his reply brief, father cites *In re Erik P.* (2002) 104 Cal.App.4th 395 (*Erik P.*), and *In re Brian P.* (2002) 99 Cal.App.4th 616, as support for his assertion that "when a parent objects to the termination of parental rights, no specific objection need be made to the social services agency's alleged failure to establish the likelihood of adoption for the parent to raise the issue on appeal." The cited cases make clear, however, that although claims of insufficient evidence to support an adoptability finding can be raised for the first time on appeal, claims that an adoption assessment did not comply with the statutory requirements cannot and are forfeited if not raised below. (*Erik P.*, at p. 399; *Brian P.*, at p. 622.)

existence or suitability of the prospective adoptive family, if any, is not relevant to this issue. (*Ibid.*; *In re Scott M.* (1993) 13 Cal.App.4th 839, 844.)

Father also asserts that the inclusion of information regarding R.M.'s desire to maintain a relationship with her younger half-sibling Joe G. may have led the court to find that the sibling relationship exception to adoption applied. (§ 366.26, subd. (c)(1)(B)(v).) Father failed to raise this issue below, so it is forfeited. (*Erik P.*, *supra*, 104 Cal.App.4th at p. 403.) In any event, father offers no argument in support of his position. "The sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption." (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 813.) The exception requires a showing that (1) a significant sibling relationship exists; (2) terminating parental rights would substantially interfere with that relationship; and (3) it would be detrimental to the child if the relationship ended. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 952.) On this record, father cannot make such a showing because Joe G. is in the custody of his father J.G., who contacted CPS about the possibility of establishing visitation between the children.

Father also claims the court erred when it stated at the conclusion of the section 366.26 hearing that it had no authority to order guardianship as an alternative to adoption. Father misconstrues the record. The court merely stated—and correctly so—that it was too late for father to sign guardianship of the child over to his mother or anyone else. To the extent father asserts that the court should have chosen guardianship over adoption, the claim was not raised below and is thus forfeited. (*Erik P.*, *supra*, 104 Cal.App.4th at p. 399.) In any event, there was no legal basis for the court to choose guardianship over adoption. Contrary to father's suggestion, there is no "best interests" exception to the selection and implementation of adoption as a child's permanent plan. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164-1165.) "At the time of a selection and implementation hearing, '. . . there is no window of evidentiary opportunity for a parent to show that in some general way the "interests" of the child will be fostered by an order based on some consideration not set forth in section 366.26.' [Citation.]" (*Id.* at p. 1164.)

"If the court determines, based on the assessment . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." (§ 366.26, subd. (c)(1).) Here the court found by clear and convincing evidence that R.M. was likely to be adopted. None of the statutory exceptions to adoption applied, so the court was required to terminate parental rights and select adoption as R.M.'s permanent plan.

II.

ICWA

Father asserts that the order terminating his parental rights must be reversed and the matter remanded for the juvenile court to ensure compliance with the investigation and notice requirements of the ICWA. We disagree.

"ICWA provides '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).)" (*In re Damian C.* (2009) 178 Cal.App.4th 192, 196.) To satisfy the notice provisions of ICWA and provide a proper record of such notice, CPS must first "identify any possible tribal affiliations and send proper notice to those entities[.]" (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739, fn. 4.) "The notice must include the names of the child's ancestors and other identifying information, if known, and be sent registered mail, return receipt requested." (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 384.) Next, CPS must file with the court copies of the notices sent, the returned receipts, as well as any correspondence received from the tribes. (Cal. Rules of Court, rule 5.482(b); *Marinna J.*, at p. 739, fn. 4.) Prior to sending notice, the social worker "is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents . . . and extended family members to gather the information" that should be included in the notice if known. (§ 224.3, subd. (c); see also Cal. Rules of Court, rule 5.481(a)(4).)

At the detention hearing, mother completed a parental notification of Indian status stating that she was or might be a member of the Apache tribe. During a follow-up investigation, mother told CPS that she had Apache heritage, but did not know the names of any family members who would have further information. CPS contacted the maternal grandmother, who stated that the maternal grandfather's heritage was Navaho, not Apache. The maternal grandmother provided CPS information regarding R.M.'s maternal relatives through whom Indian heritage was claimed.

When CPS contacted father to inquire whether he had possible Indian heritage, he referred them to the paternal grandmother. The paternal grandmother told CPS that R.M. had Indian heritage through the paternal great-great grandmother and provided information on R.M.'s paternal relatives.

CPS mailed the notice of Indian child custody proceedings (form ICWA 30) to the parents, the Bureau of Indian Affairs (BIA), the Secretary of the Interior, the Sacramento Area BIA, the two federally recognized Navaho tribes, and the eight federally recognized Apache tribes. The notice included information regarding mother; father; the maternal and paternal grandmothers; the maternal grandfather, great-great grandfather, and great-great grandmother; and the paternal great-grandfather, great-great grandfather, and great-great grandmother. CPS filed return receipts from the eight Apache tribes, the two Navaho tribes, and the BIA, and proof of the Department of Interior's receipt of the notice.

As of the six-month review hearing on April 8, 2013, CPS had received responses from the two Navaho tribes and five of the Apache tribes stating that R.M. was not a member. The Sacramento area BIA responded that it did not determine tribal eligibility or maintain a list of persons with Indian blood.

On May 2, 2013, the court found the ICWA did not apply. While the appeal was pending, CPS filed an addendum report requesting that the court "reaffirm" its ICWA finding.[6] CPS filed the addendum because it had omitted the April 8, 2013,

[6] We grant CPS's motion to augment the record on appeal to include the addendum report and attachments and a copy of the juvenile court's February 3, 2014,

response it had received from the Apache tribe of Oklahoma stating that R.M. was not a member. On February 3, 2014, the court once again found that the ICWA did not apply.

Father asserts that the court's ICWA finding cannot stand because "the actual notice letters were not attached as to what information was provided to the [BIA] and the various tribes." This assertion is belied by the record, which demonstrates that the BIA and tribes were all served with a copy of the same notice. Although father notes that two of the tribes never responded, the record demonstrates their receipt of the notice. After 60 days passed without a response, it was proper for the court to find the ICWA did not apply. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703; Cal. Rules of Court, rule 5.482(d)(1).) The record also belies father's claim that notice was not sent to both the BIA and the Secretary of the Interior.

Father also argues that CPS and the court should have conducted further inquiry into mother and father's claims of Indian heritage. We agree with CPS that it conducted a reasonable inquiry and that R.M.'s maternal and paternal grandmothers provided all the information they had relating to R.M.'s claimed Indian heritage. This is not a case where little or no effort was made or where the necessary information was already in the hands of the agency. (*In re D.T.* (2003) 113 Cal.App.4th 1449, 1454-1455.) There is simply no basis for us to conclude CPS should have done more here. For the same reason, there is no merit in father's complaint that CPS did not respond to the Navaho Nation's request for any additional information that might become available.

Father also claims that the tribes and the BIA were not given notice of the November 5, 2012, jurisdiction hearing and the November 19, 2012, disposition hearing. The court expressly found, however, that proof of such notices was filed with the court. Although father correctly notes that no such proof exists with regard to the six-month

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minute order reflecting the court's finding that the ICWA does not apply. Father opposes the motion to augment, asserting that the documents do not "cure" the alleged failure to comply with the ICWA. As we will explain, CPS properly filed the addendum report to correct its error in failing to file the response it received from the Apache Tribe of Oklahoma. Because the correction of this error is relevant to our evaluation of the ICWA issue, CPS also properly moved to augment the record on appeal to include this information. (See *Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 865-867.)

review hearing on April 8, 2013, the matter was set for a contested hearing on May 2, 2013. When the matter was called on May 2, the court found the ICWA did not apply, thereby rendering any further notice unnecessary.

DISPOSITION

The judgment (order terminating parental rights) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Arthur A. Garcia, Judge

Superior Court County of Santa Barbara

Eva E. Chick, under appointment by the Court of Appeal, for Defendant and Appellant.

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