Filed 3/21/17 In re Izabella B. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 IZABELLA B., a Person Coming Under the Juvenile Court Law.	B277349 (Los Angeles County Super. Ct. No. CK74892)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.T., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Amy Pellman, Judge. Affirmed.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Sally Son, Senior Associate County Counsel, for Plaintiff and Respondent.

S.T. (mother) appeals from orders made at a selection and implementation hearing held in accordance with Welfare and Institutions Code[1] section 366.26. She contends the juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). She also argues the juvenile court erred in refusing to consider her modification petition before terminating her parental rights. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Six-year-old Joseph G., five-year-old Layla G., and three-month-old M.B. (nicknamed Izabella) were detained on October 24, 2014, after the Los Angeles Department of Children and Family Services (the Department) received two separate child abuse hotline referrals about them within a 33-day period.

The first referral, on September 12, 2014, alleged negligent and emotional abuse by mother. Mother told the investigating social worker that she was homeless and bipolar, and that she had not been taking her medications because she was pregnant.

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[1] Further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

Her two older children, Joseph and Layla, had been taken away from her and placed with their father, Martin G. Mother reported that her youngest, Izabella, would be staying with a paternal aunt. Izabella's father, Joseph B., was in prison at the time.

Mother agreed to reconnect with her mental health care providers and resume her medication regimen. She also moved back in with Martin G. and her two older children. A safety plan was put into place and the Department closed the referral as unfounded.

On October 13, 2014, the Department received a second referral about the children. Upon investigation, Martin G. reported that he and mother had an argument that escalated. Joseph and Layla indicated mother slapped Martin G., scratched him, and "tried to take his eye out." After Martin G. sent the children to a neighbor's house, mother threw a rock at the window. Layla said Martin G. and mother are always screaming at each other and that mother is always angry at Martin G. Izabella was being cared for by her maternal grandmother, who reported that mother and Martin G. "are always fighting like cats and dogs and then they get back together like nothing happened."

On October 21, 2014, the juvenile court granted a removal order and issued a warrant to detain the children. All three children were detained on October 24, 2014.

At the October 29, 2014 detention hearing, mother filed a paternal notification of Indian status form indicating she may be a member of the Muscogee Creek Nation. In accordance with the juvenile court's order, the Department provided notice to the Bureau of Indian Affairs and the Muscogee Creek Nation. The

Muscogee Nation responded that Izabella was an Indian child but indicated it would not intervene in the proceedings.

In a jurisdiction/disposition report dated December 11, 2014, the Department reported that it had contacted the owner of the anger management program where mother claimed to be enrolled. The owner reported that mother had been enrolled in a court-ordered anger management class following a criminal conviction for battery in March 2013. However, mother had difficulty complying with the program, and she was terminated from it in June 2014. She re-enrolled in the program, but her attendance continued to be an issue.

With the Department's assistance, mother enrolled in an inpatient treatment program on December 2, 2014. She was discharged just six days later because of "maladaptive and aggressive behaviors." The treatment center provided a letter stating that mother had been discharged following an altercation with another client, in which mother spit in the other client's face and threatened to hit her. When the treatment center staff addressed the matter with mother, she was disrespectful, used profanity, and made racial comments.

The juvenile court held a jurisdictional/dispositional hearing on January 14, 2015. Mother pled no contest to the allegations in the section 300 petition, which was sustained. The children were placed in foster care and mother was ordered to participate in reunification services, including a drug treatment program, random drug testing, a 12-step program, a 52-week domestic violence program, parenting classes, and individual counseling.

At the six-month status review hearing on July 15, 2015, the Department reported that mother was in partial compliance

with the court-ordered case plan. Mother was enrolled in an outpatient substance abuse program, continued to participate in random drug testing, and was visiting somewhat consistently with Izabella. The court found that mother was in compliance with her case plan and continued reunification services for another six months. Izabella was to remain in foster care.

In a January 6, 2016 status report, the Department reported that mother's visits with Izabella were inconsistent. She was present for only 14 of 21 visits during the last period of supervision. Mother's attendance in individual therapy and enrolled programs also dropped. She was dismissed from her domestic violence class. Although she was allowed to rejoin, her progress was significantly delayed and the program reported that she was not committed and looked for any reason to be excused. Community members stated mother and her new boyfriend were seen selling the free bus tokens provided by the program, and then using this money to buy alcohol and drink near the facility. However, mother had also completed parenting classes, continued to test negatively for all substances, and was expected to graduate from an outpatient substance abuse program in March 2016.

In the meantime, Izabella was thriving in her foster placement. She was well-bonded to her foster parents and became upset when they dropped her off for her weekly visits with mother. An ICWA expert witness provided a letter opining that Izabella would suffer serious emotional or physical damage if she were to remain in mother's care. He noted that Izabella's caretaker is an enrolled member of the Cherokee Nation and that the placement was a preferred placement under ICWA. The caretaker believed it was important to expose Izabella to Native

American culture, customs, and traditions, and was actively taking steps to ensure that happened. The expert opined that the placement was "very positive" for Izabella.

On January 6, 2016, the court held a family maintenance review hearing for Joseph and Layla. At the close of the hearing, the juvenile court terminated jurisdiction over the two children and granted the parents joint legal custody with sole physical custody to Martin G. The matter was set for a contested hearing as to Izabella.

On February 3, 2016, the Department filed an interim review report concluding that mother had not adequately addressed the issues that led to Izabella's detention and recommending that reunification services be terminated. More than a year after the disposition hearing, mother still had not completed a substance abuse treatment program. She continued to test negative on random drug tests, but was a "[n]o show" to five tests between September 2014 and January 2016. Mother also had not completed her domestic violence program. The program facilitator reported that mother frequently arrived late or left early from group meetings, did not participate in group activities, and did not disclose much regarding her personal experiences as a domestic violence victim.

Mother did complete her parenting classes. Her therapist reported that she had increased her ability to identify and appropriately express her feelings, and change self-destructive behaviors. The therapist noted, however, that mother continued to struggle with low self-worth, boundaries, and judgment.

The foster care social worker reported that mother had made "minimal progress" in her monitored visits. Mother was sometimes sullen or distracted during the visits. Although she

was a familiar face to Izabella, the child continued to demonstrate a lack of attachment to her. Mother showered Izabella with hugs and kisses during the visits, but Izabella did not reciprocate the gestures or seek them out, and sometimes pulled away. Izabella spent the majority of the visits seeking out activities, playing independently, or trying to play with the social worker, rather than engaging with mother.

In a last minute information dated February 3, 2016, the Department reported that mother had been discharged from her outpatient treatment program. Mother admitted she had lied about attending her 12-step program meetings for the last two months and had someone else sign her program cards. As a result of mother's non-compliance with her case plan, the Department recommended that reunification services be terminated and asked the court to set a hearing to identify a permanent plan for Izabella.

On February 3, 2016, the juvenile court held a 12-month review hearing for Izabella. It found that mother's progress was "minimal to satisfactory" and that there was not a substantial probability that Izabella would be returned to her custody in the next six months. It also found by clear and convincing evidence that active efforts had been made to provide remedial and reunification services designed to prevent the breakup of the Indian family, that those efforts had been unsuccessful, and that Izabella's placement adhered to the statutory placement preferences under ICWA. The court terminated reunification services and scheduled a section 366.26 hearing to choose a permanent plan for Izabella.

On February 26, 2016, the Department filed a modification petition for an order allowing mother to visit Izabella only once a

month, and then only if she was in an inpatient substance abuse program and if the visits were monitored by a Department-approved monitor. The Department reported that mother was under the influence of drugs when she visited Izabella. She later admitted to the social worker that she had been using marijuana and methamphetamine. The juvenile court granted the modification petition in part on April 12, 2016, allowing mother to have weekly visits monitored by a Department-approved monitor.

On May 31, 2016, Joseph B. filed a parental notification of Indian status form stating he may have Cherokee ancestry through his maternal grandmother.

Also on May 31, 2016, the Department filed a last minute information stating that mother continued to arrive for visits with Izabella while under the influence of an intoxicant. Mother failed to engage with Izabella during her visits and instead took phone calls and ended visits early. On April 13, 2016, mother voluntarily left her residential treatment program. The program reported that, during a group therapy session, some other women in the home had confronted mother about being mean to them and calling them derogatory names such as "ho." Mother reportedly became defensive and left, saying the program was "not for her."

On August 2, 2016, the court held a section 366.26 selection and implementation hearing for Izabella. Right before the hearing, mother filed a modification petition requesting further reunification services. She stated she had been in a treatment facility for three months and was working on her behavior and addiction problems. She added that she wanted to be a mother and that Izabella could live with her blood relatives or with her

at the inpatient treatment facility, Prototypes Residential Women's Center (Prototypes).

In support, she attached a July 26, 2016 letter from a Prototypes therapist, stating that mother had been at the inpatient facility since April 28, 2016 and had been participating in weekly individual therapy as well as residential programs on substance abuse, domestic violence, relapse prevention, and parenting education. The therapist said mother was motivated and engaged in treatment, demonstrated fair insight into mental health and substance abuse issues, and had been increasing her ability to identify and appropriately express her feelings and change self-destructive behavior. Mother also attached a second letter, dated July 27, 2016, from a Prototypes case manager who stated that mother has taken on one of the leadership roles at the facility, and has been very open and willing to change. The case manager added, however, that mother continues to become very confrontational with her counselor when she does not get the response that she is looking for, to the point of going from one staff member to another in an effort to get her counselor changed. Although therapy sessions were going well and mother had come a long way, the case manger believed more work on self was still needed.

At the August 2, 2016 hearing, the court denied the Department's request to continue the hearing so it could send ICWA notices to the Cherokee tribes and investigate Joseph B.'s claim of Indian heritage. The court noted that it was already applying ICWA's standards in the case and Izabella was already in an ICWA-compliant home.

The court found by clear and convincing evidence that Izabella was likely to be adopted, as there were individuals who

were ready, willing, and able to adopt the child. The court further found that mother had not made substantial progress toward reunification. Mother then asked if the court was denying her section 388 modification petition. The court was unaware of the petition, which had been filed that day. Because it did not have the petition before it to consider, it found no exception to adoption and went on to terminate parental rights.

Nine days later, on August 11, 2016, the juvenile court denied mother's section 388 modification petition, deeming it moot as parental rights had already been terminated. Mother timely appealed on August 31, 2016.

After the section 366.26 hearing, the Department provided ICWA notice to the Cherokee tribes. At a September 20, 2016 progress hearing, the juvenile court found ICWA notice to the Cherokee tribes proper and determined that ICWA did not apply based on Joseph B.'s claimed ancestry.[2]

DISCUSSION

A. ICWA Notice

The ICWA "protect[s] the best interests of Indian children and [] promote[s] the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will

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[2] On December 28, 2016, the Department filed a motion to take judicial notice of the notices provided to the Cherokee tribes and the juvenile court's September 20, 2016 minute order. We granted the motion on December 30, 2016.

reflect the unique values of Indian culture . . . ." (25 U.S.C. § 1902.) "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . . ." (25 U.S.C.A. § 1903(4).)

"When a court 'knows or has reason to know that an Indian child is involved' in a juvenile dependency proceeding, a duty arises under ICWA to give the Indian child's tribe notice of the pending proceedings and its right to intervene. [Citations.] Alternatively, if there is insufficient reason to believe a child is an Indian child, notice need not be given. [Citations.]" (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538.)

In her opening brief, mother argues the juvenile court erred by not requiring ICWA notice to be sent to the Cherokee tribes, based on Joseph B.'s claimed heritage. However, the record demonstrates the Department provided notice to the Cherokee tribes on August 12, 2016. At a progress hearing held on September 20, 2016, the juvenile court found ICWA notice proper and that ICWA did not apply based on Joseph B.'s claimed heritage. Therefore, the issue is now moot. (See *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1388 [failure to provide ICWA notice to Cherokee tribe mooted when the Department provided post-disposition notice to the tribe, although matter was remanded to order notice to two other tribes].)

B. The Modification Petition

1. Mother Failed to Make a Prima Facie Case for Modification

Section 388 allows a parent to petition the juvenile court to change or modify a previous order based on a change of circumstance or new evidence. (§ 388, subd. (a).) The parent seeking modification must "make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

There are two components to the prima facie showing: "The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the [child]. [Citation.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250 (*Anthony*).) "'[A] petition must be liberally construed in favor of its sufficiency.'" (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 418-419.) However, a prima facie case is not made "'if the allegations would fail to sustain a favorable result even if they were found to be true at a hearing.'" (*In re K.L.* (2016) 248 Cal.App.4th 52, 61-62, quoting *In re G.B.* (2014) 227 Cal.App.4th 1147, 1157.)

The juvenile court's summary denial of a petition without a hearing is reviewed for abuse of discretion. (*In re Anthony W., supra*, 87 Cal.App.4th at p. 250.) However, mother argues the trial court committed legal error and denied her due process in failing to *consider* her petition before terminating her parental rights. We conclude any error was harmless beyond a reasonable doubt (see *Chapman v. California* (1967) 386 U.S. 18, 24

(*Chapman*)), because mother failed to set forth a prima facie case for modification.[3]

"In considering whether the petitioner has made the requisite showing, the juvenile court may consider the entire factual and procedural history of the case. [Citation.] The court may consider factors such as the seriousness of the reason leading to the child's removal, the reason the problem was not resolved, the passage of time since the child's removal, the relative strength of the bonds with the child, the nature of the change of circumstance, and the reason the change was not made sooner. [Citation.] In assessing the best interests of the child, 'a primary consideration . . . is the goal of assuring stability and continuity.' [Citation.]." (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616.) It is not enough for mother to show *changing*

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[3] The trial court's refusal to consider a properly filed section 388 petition prior to terminating parental rights implicated mother's federal constitutional right to due process. (See *Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1387 [applying *Chapman* standard to the improper denial of a contested hearing on the issue of permanent placement]; but see *In re Alayah J.* (Mar. 8, 2017, B275728) __ Cal.App.4th__ [2017 WL 914619] [trial court's decision to defer hearing on section 388 petition until after the section 366.26 hearing, and then only on the condition that parental rights are not terminated, is reviewed as a violation of state law].)

We recognize some cases hold a trial court's failure to exercise judicial discretion is reversible error unless it would have been abuse of discretion for the trial court to have ruled in favor of the appellant. (See, e.g., *Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 932.) Neither party analyzed the trial court's error under this standard. In the context of this case, a review of the issue under this standard is not materially different from a review guided by *Chapman*.

circumstances. (*Id*., p. 615.) She must demonstrate *changed* circumstances "'of such significant nature that it requires a setting aside or modification of the challenged prior order.' [Citation.]." (*Ibid*.)

In this case, mother's case plan called for her to complete a drug treatment program, random drug testing, a 12-step program, a 52-week domestic violence program, parenting classes, and individual counseling. Some 20 months after the disposition hearing, mother still had not completed the drug treatment program, the 12-step program, or the domestic violence program. In fact, she had been terminated from two treatment programs, left a third program because it was "not for her," and had been dropped from domestic violence classes—each time because of behavioral and attendance problems.

Mother's modification petition indicated she had been enrolled in yet another inpatient treatment program for the past three months, and was taking domestic violence and substance abuse classes. However, she had not yet completed the program, and there was no indication that she was close to completing it. There was also nothing to suggest she was more likely to complete this program than the prior three programs she attempted. In fact, the supporting letter from Prototypes indicated that while she had made progress, she continued to be confrontational with staff when she did not get her way. In other words, mother demonstrated only "changing" circumstances, not changed circumstances. Even if all of her allegations were supported and true, it still would not warrant a reinstatement of reunification services. (See *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1449-1451 [affirming summary denial of modification petition alleging that mother was now participating

in a drug recovery program, testing clean, and receiving Regional Center services, because these were "weak and inadequate changes of circumstances" in light of mother's history of failure to follow the court-ordered reunification plan and her limited contact with the child].)

Equally important, the petition fails to show that the proposed modification would be in Izabella's best interests. The petition does not state mother had been visiting Izabella, or that she had developed any kind of bond with the child since the section 366.26 hearing. Mother asserts (without any reasoning) her child will be "better off" with her or her blood relatives, "where she belongs." However, the juvenile court clearly found otherwise based on reports that Izabella was thriving in the care of her foster parents. The court's conclusion was also based on reports that mother had failed to develop any kind of meaningful bond with Izabella during her monitored visits, and in fact had shown up to some of them while under the influence of drugs. The modification petition wholly fails to address this factor. As it was mother's burden to establish a prima facie case, her failure to allege facts in this regard was fatal. (See *Anthony W., supra*, 87 Cal.App.4th at pp. 246, 251 [party petitioning for modification bears responsibility to make a prima facie showing in the first instance]; see also *In re K.L.*, *supra*, 248 Cal.App.4th at pp. 52, 64 [affirming summary denial of section 388 motion filed one month before the section 366.26 hearing in part because mother "did not allege facts that would rebut the presumption that continued foster care was in [the children's] best interests at this advanced stage of the dependency proceedings"]; *In re Aaron R.* (2005) 130 Cal.App.4th 697, 706 [affirming summary denial of modification petition that "contain[ed] nothing to rebut the mass of evidence in

the record indicating [the child] was thriving under [the foster parent's] care"].)

Mother's inability to meet her prima facie burden is highlighted by comparison to the very case that she relies on: *In re Jeremy W.* (1992) 3 Cal.App.4th 1407 (*Jeremy W.*). There, the mother had successfully complied with her court-ordered reunification plan, with the sole exception of maintaining stable housing, when the juvenile court terminated reunification services. (*Id.*, pp. 1414-1415.) At the time of the hearing, she was temporarily living with friends. (*Ibid.*) In terminating reunification services, the referee cited one factor only, i.e., she had not established an ability to provide a stable environment. (*Id.*, p. 1415.) Subsequently, the mother submitted a section 388 modification petition, with declarations stating she had maintained her own apartment for the last four months and continued to visit with her son, who remained strongly bonded to her. (*Id.*, pp. 1415-1416.)

Jeremy W. concluded the juvenile court abused its discretion in summarily denying the section 388 modification petition prior to holding the section 366.26 permanency hearing. (*Id.*, p. 1416.) It noted that the modification petition established a prima facie showing of a favorable change, "if not [the] complete elimination," of the one negative factor cited against mother. (*Id.*, p. 1416.) In this context, the Court of Appeal held, a fair hearing on the modification petition was a "procedural predicate to proceeding to the section 366.26 hearing and disposition." (*Ibid.*, fn. omitted.) Because the mother in *Jeremy W.* alleged facts showing that she may have remedied the one deficiency cited against her, she had presented "facts which will sustain a favorable decision if the evidence submitted in support of the

allegations by the petition is credited." (*In re Josiah S., supra*, 102 Cal.App.4th at p. 418.)

By contrast, in this case, mother failed to comply with her reunification plan in multiple aspects, despite being given well over a year to do so. Her modification petition simply showed that she was trying yet again to comply, but offered no facts or evidence to suggest that she had complied, or even that could or would comply within a reasonable timeframe. (See *Anthony W.*, *supra*, 87 Cal.App.4th at pp. 251-252 ["[O]n the eve of the selection and implementation hearing, the children's interest in stability was the court's foremost concern, outweighing any interest mother may have in reunification . . . . Mother made no showing how it would be the children's best interest to continue reunification services, to remove them from their comfortable and secure placement to live with mother who has a long history of drug addiction and a recurring pattern of domestic violence in front of the children. The children should not be made to wait indefinitely for mother to become an adequate parent"].)

2. The Juvenile Court Did Not Commit "Structural" Error

Mother argues the juvenile court committed per se reversible error when it failed to even consider whether she had made a prima facie showing before it terminated her parental rights. We disagree.

Automatic reversals are required only where the error is "structural." The concept of "structural error" appears most often in criminal cases, where they involve "'"*basic* protections, [without which] a criminal trial cannot reliably serve its function as a *vehicle* for determination of guilt or innocence, and no

criminal punishment may be regarded as *fundamentally fair*.'" [Citation]." (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 555 [emphasis in original].) Examples include total deprivation of the right to counsel, a biased judge, or denial of the right to self-representation at trial. (*Id.*, p. 555.)

"Trial errors," by contrast, are errors that occur during the presentation of a case. (*Ibid.*) They do not require automatic reversal "because a court may quantitatively assess such error in the context of other evidence presented in order to determine whether the error was harmless beyond a reasonable doubt. [Citation.]" (*Ibid.*) Criminal and dependency cases differ in that criminal cases are typically resolved in a single trial, whereas dependency matters are typically resolved in stages. (*Id.*, p. 556.) However, the concept of "structural" and "trial" errors are equally applicable in both types of cases. (*Ibid.*)

We conclude the juvenile court's error was not "structural" in this case, because the record demonstrates mother failed to set forth a prima facie case for modification. Therefore, mother was not entitled to a full hearing to present further evidence in support of her request for modification. Accordingly, prejudice may be evaluated without resort to "'a speculative inquiry into what might have occurred in an alternate universe. [Citation].'" (*In re James F.* (2008) 42 Cal.4th 901, 915.) We have done so, and conclude that any error was harmless beyond a reasonable doubt.

DISPOSITION

The jurisdictional finding, the order terminating parental rights and the order denying the modification petition are affirmed.

KUMAR, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, 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.