Filed 10/10/19 In re C.M. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re C.M., a Person Coming Under the Juvenile Court Law.	B296510 (Los Angeles County Super. Ct. No. DK15326A)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Jeslynn M., Defendant and Appellant.	

APPEAL from orders of the Los Angeles Superior Court, Jana M. Seng, Judge. Affirmed, but conditionally remanded.

Janette Freeman Cochran, under appointment by the California Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Navid Nakhjavani, Principal Deputy County Counsel, for Plaintiff and Respondent.

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In this juvenile dependency case, a mother appeals from the termination of her parental rights over her five-year-old daughter. She argues that the juvenile court (1) erred in finding the beneficial parent-child exception inapplicable, and (2) did not comply with the duty to notify set forth in the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). Only the ICWA claim has merit. Accordingly, we affirm but conditionally remand for further proceedings in compliance with ICWA.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Jeslynn M. (mother) gave birth to C.M. in September 2013.

For the first few years of C.M.'s life, mother and C.M. lived a transient life bouncing between Texas, California and Mississippi. By January 2016, mother and C.M. were homeless. Mother asked C.M.'s father if he would care for C.M. He initially agreed and mother traveled to California with C.M., but when mother tried to drop C.M. off at the father's apartment, father's girlfriend refused to allow mother or C.M. into the home. With no other options, mother and C.M. slept on father's porch for a few nights—until father's landlord called the police to have her arrested for trespassing. Because the responding officers were unable to locate a shelter that could accommodate both mother and C.M., mother agreed to surrender C.M. to the Los Angeles

County Department of Children and Family Services (the Department) to ensure C.M.'s safety.

II. Procedural Background

A. *Generally*

In January 2016, the Department filed a petition asking the juvenile court to exert jurisdiction over C.M. on the ground that mother was "unable to provide [C.M.] with the basic necessities of life, including food, clothing, shelter and medical care," thereby "endanger[ing]" C.M.'s "physical health and safety and plac[ing C.M.] at risk of serious physical harm, damage and danger" and rendering dependency jurisdiction appropriate under Welfare and Institutions Code section 300, subdivisions (b)(1) and (g).[1]

In June 2016, the juvenile court sustained these allegations, removed C.M. from mother and ordered the Department to provide mother with reunification services. The Department provided mother with 12 months of reunification services before the juvenile court terminated them in July 2017. After several continuances, the court held the permanency planning hearing in March 2019.

In the 38 months between C.M.'s detention from mother and the permanency planning hearing, mother had a total of eight or nine monitored, one-hour visits with C.M. From January 2016 to August 2017, mother would call C.M. only once or twice a month, and those "rare[]" calls stopped altogether when mother

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1 The Department made similar allegations against father. Father has not appealed the subsequent termination of his parental rights.

All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

and C.M.'s foster mother stopped getting along. Although mother tried to be involved with C.M. during her few in-person visits, their interactions were "minimal," and both she and attending social workers noted that C.M. "did not exhibit an attachment to mother." Mother voluntarily terminated at least one visit early. In contrast to the bond with her mother, C.M. had a "strong bond" with her caregivers and their children.

At the permanency planning hearing, the court rejected mother's argument that the parent-child bond exception barred C.M.'s adoption. The court reasoned that mother had "minimally participated in [C.M.'s] life since the child's removal from her custody," that mother had not "made enough efforts to try to establish a bond with the child," and that it was in C.M.'s "best interest . . . to remain" with her current caregivers. The court then terminated mother's parental rights over C.M.

B. *ICWA, Specifically*

Although mother initially disclaimed having Native American ancestry, she informed the trial court that she may have Native American heritage through C.M.'s maternal grandmother. The Department spoke with the maternal grandfather, who reported that the family may have Cherokee heritage.

In November 2017, the Department sent ICWA notices to all three Cherokee tribes (the Cherokee Nation, the Eastern Band of Cherokee Indians and the United Keetoowah Band of Cherokee Indians), the Bureau of Indian Affairs and the Secretary of the Interior. All three tribes responded that, based on the information provided in the notice, C.M. was not an Indian child.

DISCUSSION

I. Termination of Parental Rights

The beneficial-parent child exception applies—and precludes a juvenile court from terminating parental rights—if (1) "the parent[] ha[s] maintained regular visitation and contact with the child," and (2) "the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) Because "'[i]nteraction between natural parent[s] and [a] child will always confer some incidental benefit to the child,'" the second element of the exception requires a parent to "show [that] [(1)] he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent" and (2) "the child would suffer detriment if . . . her relationship with the parent were terminated." (*In re C.F.* (2011) 193 Cal.App.4th 549, 555.) In assessing whether termination of parental rights would be detrimental to a child, courts look to "(1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.) We review the question of whether the parent has maintained regular visitation (the first element) for substantial evidence, and review the juvenile court's determination whether the child would benefit from continuing the relationship (the second element) for an abuse of discretion. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 646-647; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

Substantial evidence supports the juvenile court's finding that mother had not maintained regular visitation and contact with C.M. Mother's eight or nine hours of visits over the course of three years, interspersed with occasional phone calls, does not constitute regular visitation and contact. (*In re I.R.* (2014) 226 Cal.App.4th 201, 212 ["significant lapses in visits" preclude a finding of regular visitation].)

The juvenile court also did not abuse its discretion in concluding that C.M. would not benefit from continuing her relationship with mother. Mother did not occupy a parental role in C.M.'s life, as she only saw C.M. fewer than three times a year (on average) and only did so during monitored visits. C.M. would also not suffer a detriment were C.M.'s relationship with mother terminated. By the time of the permanency planning hearing, C.M. had spent over half of her young life with her foster parents. What is more, C.M. had formed a "strong" bond with her foster family, and her bond with mother was so "minimal" that C.M. would cry and have to be consoled before visiting with mother.

Mother's chief argument in response is that her infrequent visits (and the resulting lack of a bond with her daughter) cannot be counted against her because she was living out of state and her limited finances precluded traveling to California for more visits. "[T]he benefit of continued contact between mother and children," mother argues, "must be considered in the context of the very limited visitation mother was permitted to have." (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1537-1538.) The authority mother cites involves "limit[s]" on "visitation" imposed *by the juvenile court*, not by a parent's financial challenges. But even if we assume for sake of argument that a parent's financial circumstances *can be* relevant to the parent-child exception, they

are not relevant *in this case* because, as the juvenile court found, "mother [never] made enough efforts to try to establish a bond with" C.M. in ways not hampered by financial considerations, such as "calling [or] video conferencing." And this paucity of effort was evident even before mother stopped between-visit contact altogether in August 2017.

II. ICWA

ICWA was enacted to curtail "the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement." (*Miss. Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32.) Under ICWA and the California statutes our Legislature enacted to implement it (§§ 224-224.6), a juvenile court—and, as its delegate, the Department—have (1) a continuing duty to investigate whether a child is an "Indian child" and, if at any time in the proceedings the court "knows or has reason to know" that she is, (2) a duty to notify the child's parent and either the Indian child's tribe or, if the tribe is unknown, the Secretary of the Interior and the Bureau of Indian Affairs. (25 U.S.C. §§ 1912, subd. (a), 1903(11); §§ 224.2, subd. (b)(4) & 224.3, subds. (a), (c) & (d); Cal. Rules of Court, rule 5.481(a).) A child is an "Indian child" if he or she is either (1) "a member of an Indian tribe," or (2) "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); § 224.1. subd. (a).) Notice to the tribe enables the tribe to decide whether the child is in fact an Indian child, and the tribe's determination is conclusive. (§ 224.3, subd. (e)(1); *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165.)

The notice sent to the tribes and/or federal agencies must meet certain minimal requirements. Among other things, it must

(1) set forth "[t]he name, birth date, and birthplace of the Indian child, *if known*" as well as "[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, . . . as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information . . . and any other identifying information, *if known*," and (2) include "[a] copy of the child's birth certificate, *if available*." (§ 224.3, subds. (a)(5)(A), (a)(5)(C) & (a)(5)(E), italics added.) What is more, the Department's continuing duty to investigate also requires that the notice include information that the Department can readily obtain. (E.g., *In re E.H.* (2018) 26 Cal.App.5th 1058, 1074 [noting department's "duty to attempt to obtain . . . information" to include in ICWA notice]; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 703-704 [notice is defective for failure to include information the department "easily could have" obtained].)

As the Department concedes, the ICWA notices here did not meet these minimal requirements. The ICWA notices sent to the tribes did not include, among other things, (1) C.M.'s middle name and place of birth, (2) mother's middle name, her place and date of birth, (3) the maternal grandparents' places and dates of birth, or (4) a copy of C.M.'s birth certificate. Because this information bore directly on C.M.'s potential Native American ancestry and was either in the Department's possession or readily available to it, the Department's notices were defective for its absence.

Where, as here, the Department has not complied with its duties under ICWA, the remedy is not to reverse the order terminating parental rights because "there is not yet a sufficient showing that the child is, in fact, an Indian child within the

meaning of ICWA." (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467; accord, *In re D.C.* (2015) 243 Cal.App.4th 41, 64.) Instead, the remedy is to "remand with instructions to ensure compliance with ICWA." (*Hunter W.*, at p. 1467.)

DISPOSITION

The juvenile court's orders terminating mother's parental rights over C.M. are conditionally remanded, and the court is directed to properly comply with the inquiry and notice provisions of ICWA. If, after proper notice, the court finds that C.M. is an Indian child, the court shall proceed in conformity with ICWA. Otherwise, the court's orders are affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ