Filed 12/27/17 In re J.J.A. 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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| In re J.J.A., a Person Coming Under the Juvenile Court Law. | 2d Juv. No. B281741<br>(Super. Ct. No. J070973)<br>(Ventura County) |
| VENTURA COUNTY HUMAN SERVICES AGENCY,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>V.A. et al.,<br><br>Defendants and Appellants. | |

J.J.A. tested positive for methamphetamine at birth in 2016, was detained at the hospital, and went directly into foster care. His parents, appellants Vanessa A. (Mother) and Jorge A. (Father) have a long history of drug abuse. Reunification services were bypassed owing to Father's violent felony conviction and Mother's resistance to court-ordered drug treatment.

The juvenile court found that the Indian Child Welfare Act (ICWA) does not apply, declined to move J.J.A. to the home of his paternal grandmother and, one year after detention, terminated parental rights. The record supports these rulings.

First, Mother's speculative declaration that she "may have" Indian ancestry did not trigger ICWA notice requirements.

Second, the court properly refused to move J.J.A. to the home of his paternal grandmother Teresa A. (PGM), whose belated application for custody of J.J.A. was denied. She did not provide adequate medical treatment for a child in her care, and her relationship with J.J.A. is insignificant. J.J.A. is bonded with the prospective adoptive parents, who have provided for all his needs since he was two days old.

Third, substantial evidence supports the termination of parental rights. Appellants never progressed beyond supervised visitation and do not have a parental relationship with J.J.A. that overcomes the legislative policy favoring adoption. Eight months after J.J.A. was detained, appellants were arrested while under the influence of methamphetamine and candidly admitted frequent drug use to the arresting officers. J.J.A. would not benefit from continuing his relationship with appellants. We affirm.

## FACTS AND PROCEDURAL HISTORY

In April 2016, Ventura County Human Services Agency (HSA) detained J.J.A. when he tested positive for methamphetamine at birth. Mother previously gave birth in 2012 to a child who was prenatally exposed to methamphetamine. J.J.A. was not placed with Father, who has robbery and drug convictions.

HSA filed a petition alleging that appellants cannot take care of J.J.A. due to their substance abuse and criminal histories; further, Mother abused her three-year-old daughter by exposing her to drugs in utero. The juvenile court found a prima facie case for detaining J.J.A. in foster care.

The jurisdiction report states that Mother denied drug use during pregnancy. When confronted with J.J.A.'s positive drug screen, she admitted to using methamphetamine four days before giving birth. She explained that she did not seek prenatal care because "I had a lot going on." Mother began drinking alcohol at the age of 16 and has used methamphetamine since age 18. Appellants lived with PGM. In May 2016 they had to vacate the residence and have no permanent home.

Father acknowledged past drug abuse but claimed sobriety since 2009; however, he tested positive for methamphetamine one month after J.J.A. was born. In the social worker's view, Father's failure to admit current drug use cast doubt on his ability to safely care for his child. Father conceded that he has convictions for drug offenses and first degree robbery.

Mother has four children by a former partner. In 2012, a dependency petition was sustained against Mother after her newborn tested positive for methamphetamine. The parents completed the case plan and the case was dismissed in 2013. Mother does not have custody of the children, who range in age from three to eight.

The jurisdiction report notes that J.J.A. faces a risk of developmental delays related to drug exposure. The social worker wrote that reunification services could be bypassed for both parents because Father was convicted of a violent felony and Mother resumed drug use after receiving services in the prior

dependency case. Nevertheless, HSA recommended services because Mother recently enrolled in a drug treatment program and had one negative test; appellants visit J.J.A. regularly and display nurturing skills; they would benefit from services; and J.J.A. was comfortable with them.

In updates, HSA reported that Mother was discharged from her drug treatment program and did not enroll in a new program. Appellants missed random drug tests, were homeless, and did not provide proof of attendance in services. Expressing doubts about appellants' commitment to sobriety and ability to safely care for their baby, HSA asked the court to bypass services and set a permanent plan hearing.

On September 19, 2016, after appellants waived their right to trial, the court sustained the petition, bypassed reunification services, and set a permanent plan hearing. HSA recommended the termination of parental rights and implementation of a plan of adoption. Appellants were allowed one supervised visit per week with J.J.A.

Appellants were arrested on December 5, 2016 for being under the influence of a controlled substance, and possessing drugs and paraphernalia. Father told arresting officers that he has used drugs "'for years and uses weekly.'" Mother volunteered that she used methamphetamine one day earlier, uses drugs five times per week and has done so for five years. Appellants tested positive for methamphetamine when arrested.

HSA's January 2017 permanent plan report states that the foster parents are child development experts. J.J.A. is thriving in their care. He recognizes them as his caregivers, is comfortable in their home, coos and smiles when they hold him, and visually searches for them if they walk away. They have cared for J.J.A.

since he was two days old, meeting all his needs for food, clothing, hygiene, stimulation, and treatment for a misshapen skull (plagiocephaly). They requested de facto parent status and designation as prospective adoptive parents.

The report notes that PGM applied for custody on August 19, 2016. By October 24, 2016, PGM had neither visited J.J.A. nor submitted required documents, including valid identification. As of January 9, 2017, PGM had visited J.J.A. three times. They have no significant relationship. Appellants have weekly supervised visits. They feed J.J.A., change his diaper, and tell J.J.A. in hushed voices that they love and miss him. J.J.A. coos back during these interactions, but shows no distress when visits end. The social worker opined that the visits are appropriate and consistent, but appellants do not have a parental relationship with J.J.A.

In February 2017, Father filed a petition for a modification. He requested reunification services because he recently enrolled in a drug program and a parenting class, sees to J.J.A.'s needs during visits, and they are bonded. Father requested a change in J.J.A.'s placement. He explained that PGM lacked a stable home for J.J.A. early in the dependency case, but can now provide him with a safe and permanent home where he can maintain family ties.

Mother petitioned for a modification in March 2017. She sought reunification services because she recently joined a substance abuse program, attends 12-step meetings, and regularly visits J.J.A. J.J.A. is comfortable with Mother. Despite forgetting skills she learned during the 2012 dependency proceeding, giving in to her addiction, and failing to seek prompt

treatment, Mother is now confident that she can be a proper parent to J.J.A. Mother also requested placement with relatives.

The juvenile court summarily denied appellants' requests for reunification services, but granted a hearing to address their request to place J.J.A. with PGM.

HSA reported that PGM's application for relative placement was late because she spent several months after J.J.A.'s birth searching for housing. She is the guardian of two grandchildren. Since detention, she has had a few brief supervised visits, but does not interact with J.J.A. The social worker observed that PGM "appears to be present as more of an observer and a resource for the father to ask about feeding, etc." PGM and J.J.A. have no significant relationship.

Of greater concern, HSA reported that PGM's ward, an 11-year-old grandson, has unaddressed special needs. She did not regularly administer the boy's prescribed psychotropic medication, was unable to answer questions about his diagnosis, and failed to resolve his persistent bedwetting, giving him liquids before bedtime against the advice of a pediatrician. PGM's lack of insight into her ward's medical issues and her unfamiliarity with his Individualized Educational Plan raised doubts about her ability to care for J.J.A. J.J.A. has special needs owing to his exposure to methamphetamine, which the prospective adoptive parents are trained to identify and treat. J.J.A. refers to them as "mama" and "dada."

Though appellants continue to visit J.J.A., neither of them brought necessities, such as diapers, wipes, bottles or formula. The foster parents provided for J.J.A.'s needs at every visit. HSA did not liberalize appellants' visits because they did not engage in rehabilitative services. Though J.J.A. is accustomed to

appellants' routine, weekly visits, he depends for his daily care since birth on the foster parents and is sociable, interactive, comfortable and happy in their home.

At the permanent plan hearing, Father objected to the termination of parental rights. He testified that during his consistent visits, he plays with J.J.A., talks to him, displays affection, and feeds and soothes J.J.A. They are bonded. Father has enrolled in services to address drug abuse and become a better parent. Mother testified that she has been sober for two months. She never misses visits with J.J.A. She feeds, changes and soothes J.J.A.; he is comforted and reacts positively to her. Mother acknowledged that addiction is a life-long disease. Her sobriety comes first, then her children.

The social worker testified to her concerns about PGM's ability to care for a special needs baby like J.J.A. when she is already struggling with the needs of her 11-year-old grandson. In any event, PGM did not satisfy the vetting procedures required to take custody of J.J.A.

On April 5, 2017, the juvenile court identified this case as one in which (a) J.J.A. never lived with his parents; (b) the parents never progressed beyond supervised visits; (c) visits are limited; and (d) they have never filled a parental role. The court stated that visits were consistent, regular and pleasant; however, there was no showing that J.J.A. would suffer detriment if parental rights ended. J.J.A. should not have to wait to see if appellants can maintain sobriety and deserves a stable, permanent home. Because PGM's psychosocial assessment was disapproved, J.J.A. could not be placed with her. The court terminated parental rights and identified adoption as the

permanent plan. The foster caregivers were granted de facto parent status.

## DISCUSSION

*1. ICWA Does Not Apply*

Mother contends that the juvenile court should have applied ICWA and HSA did not give proper notice to tribes. (25 U.S.C. § 1901 et seq.; Welf. & Inst. Code, § 224.2.)[1] Using a substantial evidence standard of review (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251), we conclude that ICWA does not apply.

Mother declared that she "may have Indian ancestry," without specifying a tribe. An HSA paralegal called repeatedly to learn more about Mother's ancestry. Mother did not respond to the messages, so no tribal affiliation could be identified. During a prior dependency case involving Mother's four older children, the juvenile court found that ICWA does not apply to Mother's offspring. Here, the court found that J.J.A. "shares the same parentage as [the] prior children, and in those cases it was found that ICWA [does] not apply."

Procedural safeguards attach when the court or social worker "knows or has reason to know that an Indian child is involved." (§ 224.2, subd. (a).) The court has a "continuing duty" to inquire about the child's heritage. (*Ibid.; In re Isaiah W.* (2016) 1 Cal.5th 1, 6.) Knowledge of the child's status may arise if a party informs the court that the child is an Indian child. (*In re O.K.* (2003) 106 Cal.App.4th 152, 156.) Tribal notices need *not* be sent "if there is insufficient reason to believe a child is an Indian child." (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538.) The law requires "more than a bare suggestion that a

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[1] Unlabeled statutory references are to the Welfare and Institutions Code.

child might be an Indian child." (*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520.)

ICWA does not apply to a generalized claim that a child "'may have Indian in him'" because this is "too vague and speculative to give the juvenile court any reason to believe the minors might be Indian children." (*In re O.K.*, *supra*, 106 Cal.App.4th at pp. 155, 157.) "[A] claim that a parent, and thus the child, 'may' have Native American heritage is insufficient to trigger ICWA notice requirements" to the Bureau of Indian Affairs. (*In re Jeremiah G.*, *supra*, 172 Cal.App.4th at p. 1516.)

Mother's claim that she "may have Indian ancestry," without more, did not trigger an obligation to give notice. She did not respond to HSA's attempts to investigate her claim. Neither HSA nor the court knew or had reason to know that J.J.A. has Indian heritage, a conclusion bolstered by a finding in Mother's prior dependency case that ICWA does not apply to her children.

*2. The Court Properly Determined J.J.A. Cannot Be Placed With PGM*

Appellants contend that the juvenile court should have given PGM preference, and placed J.J.A. with her. (§ 361.3.) The issue was not preserved for appeal because counsel acceded without objection to the court's refusal to place J.J.A. with the PGM after she was denied Resource Family Approval (RFA).[2]

Appellants lack standing to challenge the denial at the section 366.26 hearing of their request to place J.J.A. with the PGM. "Once a parent's reunification services have been terminated, the parent has no standing to appeal relative

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[2] The RFA process is a new, unified approach for licensing foster homes, approving relatives as caregivers, and approving guardians and adoptive families. (§ 16519.5, subd. (a).)

placement preference issues." (*In re Jayden M.* (2014) 228 Cal.App.4th 1452, 1460.) Raising the point does not advance appellants' argument against terminating parental rights. (*In re K.C.* (2011) 52 Cal.4th 231, 238; *In re Isaiah S.* (2016) 5 Cal.App.5th 428, 436.) At the time of the section 366.26 hearing, J.J.A. had no emotional ties to PGM that warranted preservation. Appellants are not aggrieved because the relative caregiver exception to adoption did not apply to PGM. (§ 366.26, subd. (c)(1)(A); *In re A.K.* (2017) 12 Cal.App.5th 492, 499-500.)

The social worker may place a child removed from parental custody in "[t]he approved home of a relative." (§ 361.2, subd (e)(2).) After disposition, the issue of relative placement is revisited "whenever a new placement of the child *must be made*." (§ 361.3, subd. (d), italics added.) No new placement was planned for J.J.A. The foster parents have envisioned permanency since disposition, and J.J.A.'s placement with them was not challenged until the eleventh hour.

The legislative scheme contemplates that relatives be "investigated." (§ 361.3, subd. (c)(1).) The inquiry encompasses the special medical, emotional or educational needs of the child; the nature and duration of the child/relative relationship; and the relative's ability to provide a safe environment for the child. (*Id.*, subd. (a)(1)-(8).) When a request for placement with a relative is made by petition after reunification services end, the court's duty is to determine the best interests of the child; relatives are considered favorably, but are not presumed fit to take custody. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320-321.)

J.J.A.'s best interests would not be served by placement with PGM. She did not visit J.J.A. for over half a year after detention, did not submit an application for relative placement

until four months after detention, and had only a few, supervised visits with him before the permanent plan hearing. PGM was primarily an observer and a resource for Father; she did not interact with J.J.A. in a manner that promoted bonding. One year after the dependency proceeding began, PGM and J.J.A. had no meaningful relationship. Under the circumstances, moving J.J.A. to the home of PGM and severing his strong bond with the foster parents would not be in his best interests regardless of the relative placement preference. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 321.)

From an investigation, HSA learned that PGM's 11-year-old ward requires psychotropic medication and has persistent bedwetting. PGM lacked insight into his needs: she failed to administer his medication; ignored medical advice to avoid giving him liquids before bedtime; and was uninformed about his diagnosis and educational plan. She was deemed ineligible to take custody of J.J.A.

The law limits child placements to a relative's *approved* home. The PGM's home was disapproved.[3] As Father acknowledges, the primary consideration at this stage is ensuring permanency and stability for the child. The record discloses no reason to disturb J.J.A.'s placement. He is bonded with the foster parents, who are trained to identify and treat his special needs; he has no bond with the PGM, who appears to be ill-equipped to provide him with a safe home environment.

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[3] PGM had to pursue administrative remedies to overturn the denial of her application. (§§ 16519.5, 16519.6.) Those remedies are not the subject of this appeal.

*3. Substantial Evidence Supports the Termination of Parental Rights*

Children have a fundamental right to a placement that is stable and permanent. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) A bypass of reunification services "ordinarily constitutes a sufficient basis for terminating parental rights." (*In re K.C.* (2011) 52 Cal.4th 231, 236-237.) At the permanent plan hearing, the court must terminate parental rights and order the child placed for adoption if it finds that the child is likely to be adopted. (§366.26, subd. (c)(1).) Adoption is the Legislature's "first choice" because it gives the child the best chance at a full emotional commitment from a responsible caretaker. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) Only "exceptional circumstances" permit a choice other than adoption. (*Ibid.*)

Appellants had to prove a significant emotional attachment such that J.J.A. would be "greatly harmed" by the termination of parental rights. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853; *In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) Appellants had to satisfy a two-pronged showing: (1) "regular visitation and contact" and (2) "the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

HSA concedes the first prong. Appellants visited J.J.A. every week since his detention. As to the second prong, the court found that J.J.A. would not benefit from continuing the relationship. This finding is supported by substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

Appellants cannot establish the requisite benefit to the child because they do not occupy a parental role. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109.) None of the variables that

logically affect a parent/child bond favor appellants: these include the age of the child, the portion of the child's life spent in parental custody, the interactions between parent and child, and the child's particular needs. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

J.J.A. was detained at birth in the hospital after testing positive for methamphetamine. Two days later, he entered foster care. He has never lived with appellants and does not look to them for any of his physical or emotional needs, let alone for his special needs owing to prenatal drug exposure. Appellants are friendly, supervised visitors. There is no hint in the record that J.J.A. would be harmed in any way if these visits end. A biological relationship alone does not outweigh the benefit of a permanent adoptive home. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

Appellants do not dispute that J.J.A. is thriving, bonded to his life-long caregivers, and will be adopted. Appellants belatedly entered sobriety programs on the eve of the permanent plan hearing, after HSA requested the termination of parental rights. The outcome of this case does not hinge upon their sobriety.

Mother proposes a guardianship or long-term foster care so that she can continue to visit J.J.A. This is not the legislative plan. "Once the court determines adoption is feasible, the less desirable and less permanent alternatives of guardianship and long-term foster care need not be pursued." (*Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 249; *In re Jose V.* (1996) 50 Cal.App.4th 1792, 1799.) Mother's opposition to adoption does not overcome the legislative preference for adoption.

Appellants did not carry their burden of showing that J.J.A. would be greatly harmed by the termination of parental

rights or that the benefit of continuing the relationship outweighs the benefits of a stable, permanent home. Appellants' drug abuse during the dependency proceeding—culminating in their arrests before the permanent plan hearing—prevented reunification. When faced with the choice of using methamphetamine or reunifying with their infant, appellants chose drugs. Where, as here, a child is likely to be adopted, the court must choose the most permanent and secure alternative that can be afforded. (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1419.)

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Tari L. Cody, Judge

Superior Court County of Ventura

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