Filed 10/11/18 In re Grace C. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 GRACE C., a Person Coming Under the Juvenile Court Law.	B289071 (Los Angeles County Super. Ct. No. DK10113)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. PHILLIP B., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Steven E. Ipson, Commissioner. Affirmed in part and reversed in part and remanded with directions.

Maryann M. Goode, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Phillip B., father of three-year-old Grace C., appeals from the juvenile court's order denying alleged paternal aunt Yvette H.'s Welfare and Institutions Code section 388[1] petition to have Grace placed with her.[2] Father further appeals from the juvenile court's section 366.26 order terminating his parental rights to Grace, claiming the Department of Children and Family Services (Department) failed to comply with its inquiry duties under the Indian Child Welfare Act (ICWA).

We affirm the juvenile court's order denying Yvette's section 388 petition because father lacks standing to raise the issue on appeal. Even if father had standing, we would affirm the order because the juvenile court did not abuse its discretion in concluding Yvette, as a nonrelated extended family member, could not invoke the relative placement preference of section 361.3.

The Department concedes it did not comply with its ICWA inquiry duties. Therefore, we conditionally reverse the order terminating father's parental rights and remand the case with

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1 All statutory citations are to the Welfare and Institutions Code.

2 We dismissed Yvette's appeal from the denial of her section 388 petition for failing to file an opening brief.

directions to the juvenile court to ensure full compliance with ICWA.

BACKGROUND

The Sustained Section 300 Petition

On January 22, 2015, the Department filed a section 300 petition alleging that new-born Grace and her two siblings came within the jurisdiction of the juvenile court because mother Misty C. was a current abuser of opiates, which rendered her incapable of providing the children regular care and supervision.[3] Further, mother abused opiates during her pregnancy with Grace and she and Grace tested positive for opiates when Grace was born.

ICWA Evidence

Mother filed an ICWA-020 form, checking the box that indicated she may have Indian ancestry. She stated her deceased grandmother was the source of her claim to Indian ancestry and identified the Sioux tribe.

At the detention hearing, the juvenile court and mother engaged in the following discussion:

"The Court: The Court finds there may be reason to believe that your maternal great-grandmother—

"Mother: It's my grandmother.

"The Court: It's your—

"Mother: My grandmother; the kids' great grandma. My grandmother.

"The Court: So the childrens' great-grandmother. Is there any additional information?

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3 This appeal does not concern Grace's siblings and mother is not a party to the appeal.

"Mother: No.

"The Court: Is there anyone else a member?

"Mother: No.

"The Court: Or eligible for membership?

"The Court is going to make a finding at this time that there is no reason to believe this child is an—these children are Indian children under ICWA. However, the Department is to continue ICWA. The Department has other ongoing obligations to continue to investigate."

The juvenile court found a prima facie case that the children were described by section 300, subdivision (b); a substantial danger existed to their physical or emotional health; and there was no way to protect them without removal from the home. Accordingly, the juvenile court detained Grace from mother's custody and placed her in foster care.

Father was incarcerated. On April 14, 2015, father filed an ICWA-020 form stating that he had no Indian ancestry.

Placement Evidence

Freddy H. and Jerry H., Grace's paternal grandparents, requested that Grace be placed with them. Paternal grandfather and paternal grandmother had criminal histories, and sought ASFA (Adoption and Safe Families Act) criminal waivers so that Grace could be placed with them. In an August 9, 2016, Last Minute Information for the Court, the Department informed the juvenile court that Yvette wanted to have Grace placed with her if the paternal grandparents were not approved for placement.

On September 21, 2016, Yvette filed a section 388 petition requesting that Grace be placed with her for adoption. The Department opposed Yvette's section 388 petition, arguing

(among other things) that although Yvette claimed to be father's half-sister, Yvette's birth certificate showed that she and father "do not share the same father, contrary to what [Yvette] reported."

The Six-Month Review Hearing

At the February 27, 2017, six-month review hearing, the juvenile court found that neither mother nor father had complied with their case plans. The juvenile court terminated the parents' reunification services and set the case for a section 366.26 hearing to select and implement Grace's permanent plan. The court also agreed to address Yvette's section 388 petition despite the termination of father's reunification services.

The Section 388 and 366.26 Hearing

The section 388 and 366.26 hearing began on August 28, 2017, and concluded on November 14, 2017. Father's counsel argued the relative placement preference of section 361.3 supported Grace's placement with Yvette. Counsel for father also noted the Department had granted resource family approval for Yvette.[4]

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4 On July 16, 2017, the Department issued a Resource Family Approval certificate to Yvette in accordance with section 16519.5, which provides in part: "The State Department of Social Services, in consultation with county child welfare agencies, foster parent associations, and other interested community parties, shall implement a unified, family friendly, and child-centered resource family approval process to replace the existing multiple processes for licensing foster family homes, certifying foster homes by licensed foster family agencies, approving relatives and nonrelative extended family members as foster care

The Department's counsel responded that "even today we still can't verify that [Yvette is] actually a relative" of Grace because there was no documentation showing Yvette and father shared the same biological father. Counsel acknowledged that Yvette's visits with Grace "go very well" and "they have a great relationship . . . ." But "at best [Yvette] can be considered a non-related extended family member . . . ." Therefore, she was not entitled to the relative placement preference.

On October 6, 2017, Yvette, who was not represented by counsel, testified she believed that father was her brother because, when Yvette was between 15 and 16 years old, she overheard her mother and her aunt talking about someone who might be her father. Yvette asked her aunt about the conversation, and her aunt told her that, according to Yvette's mother, Philip B., Sr. was Yvette's father. Yvette's mother and father went their separate ways and Yvette's mother later met Earl H., who signed Yvette's birth certificate and was around when Yvette was a child growing up. Philip B., Sr. is deceased.

Yvette's account was supported by a letter, dated October 6, 2017, from her aunt Deborah M., the sister of Yvette's mother Donna R. The letter stated that when Yvette was about 16 years old, Donna told Deborah that Donna had "made a big mistake" by "saying that Yvette's father is Earl." Donna said "the truth is that she met and fell in love with Phillip [B., Sr.] first. Then later in their relationship, things weren't going as she'd hoped, so she moved to another town. [¶] Shortly after moving was when she met Earl [H.]. That's when she discovered she was pregnant. She said she couldn't reach Philip, and Earl was willing to step

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providers, and approving guardians and adoptive families." (§16519.5, subd. (a).)

up and sign the birth certificate and play the role of father so she left it at that!" Yvette overheard the conversation.

On October 18, 2017, the juvenile court denied Yvette's section 388 petition. The court explained that, according to Yvette's birth certificate, her father is Earl H. Although Yvette asserted her father was Grace's paternal grandfather, Philip B., Sr., no other evidence supported Yvette's assertion. The court concluded Yvette was a nonrelated extended family member, and the relative placement preference in section 361.3, subdivision (c)(2) therefore did not apply.

With respect to the section 366.26 hearing, the juvenile court admitted the Department's documentary evidence. No other party presented evidence. The court then heard the parties' arguments. The Department argued that Grace had been in an adoptive home since she was four days old, the caregivers' home study had been approved, Grace was clearly adoptable, and there were no viable affirmative defenses to terminating parental rights.

Mother's counsel objected to the juvenile court terminating mother's parental rights. Counsel acknowledged, however, that she did not have a legal basis to set the matter for a contest and there was no exception to termination.

Counsel for father stated, "Your Honor, same as to my client. I have not identified a legal basis to contest either adoptability or an exception to adoption." Father's counsel objected to the juvenile court's denial of Yvette's section 388 petition, and added: "I really don't have . . . any basis recognized under [section 366.26] to contest the adop—or contest termination of parental rights" but counsel nonetheless objected.

The juvenile court found by clear and convincing evidence that Grace was adoptable, the prospective adoptive parents' home study had been approved, it would be detrimental to return Grace to her parents, ICWA did not apply, and there was no exception to adoption. Accordingly, the court terminated mother's and father's parental rights and ordered adoption as Grace's permanent plan.

DISCUSSION

I. Standards of review.

In reviewing a challenge to a parent's standing to raise issues in a juvenile dependency appeal, "[w]e liberally construe the issue of standing and resolve doubts in favor of the right to appeal." (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 948.)

"The grant or denial of a section 388 petition is reviewed for abuse of discretion." (*In re R.T.* (2015) 232 Cal.App.4th 1284, 1300.)

Where the facts concerning ICWA notice are undisputed, we review the issue de novo. (See *Guardianship of D.W.* (2013) 221 Cal.App.4th 242, 250.)

II. Father lacks standing to appeal the juvenile court's order denying Yvette's section 388 petition requesting placement of Grace.

Father contends he has standing to appeal the juvenile court's denial of Yvette's section 388 petition to have Grace placed with her. We disagree.

Only a person aggrieved by a decision has standing to appeal. (*In re K.C.* (2011) 52 Cal.4th 231, 236.) An aggrieved person "is one whose rights or interests are injuriously affected

by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision." (*Ibid.*) These rules apply to appeals from dependency proceedings. (*Ibid.*)

In *In re K.C.*, *supra*, 52 Cal.4th 231, our Supreme Court considered "whether a father whose parental rights have been terminated (Welf. & Inst. Code, § 366.26, subd. (c)), and who does not challenge that decision, has standing to appeal an order entered at the same hearing denying a petition by the dependent child's grandparents to have the child placed with them (§§ 361.3, 366.26, subd. (k), 388)." (*Id.* at p. 234, fn. omitted.) In that case, K.C. was removed from his mother's custody, declared a dependent child, and placed with a foster parent who wished to adopt him. (*Ibid.*) The juvenile court bypassed reunification services for both parents because of their failure to reunify with K.C.'s siblings and their history of drug and alcohol abuse and set the matter for a section 366.26 hearing to select and implement a permanent plan for K.C. (*Id.* at p. 235.) The grandparents filed a section 388 petition asking to have K.C. placed in their home. (*Ibid.*)

At the hearing on the grandparents' section 388 petition, which took place immediately preceding the section 366.26 hearing, the father stated he believed K.C. should be placed with his grandparents. "Neither father nor his counsel, however, offered any argument against terminating father's parental rights." (*In re K.C.*, *supra*, 52 Cal.4th at p. 235.) At the conclusion of the hearing, the juvenile court denied the grandparents' section 388 petition, selected adoption as the permanent plan, and terminated the parents' parental rights. (*Ibid.*) The father filed a notice of appeal from both the order

denying the grandparents' section 388 petition and the judgment terminating his parental rights. (*Ibid.*)

In the ensuing appeal, the father did not argue that the juvenile court erred or abused its discretion in terminating his parental rights. (*In re K.C.*, *supra*, 52 Cal.4th at p. 235.) Instead, he limited his argument to the question of K.C.'s placement and asserted that, if the Court of Appeal reversed the placement order, it should also reverse the judgment terminating parental rights. (*Ibid.*) The Court of Appeal dismissed the father's appeal, reasoning that he was not aggrieved by the placement order because he could not show it affected his parental rights. (*Ibid.*)

On review, the Supreme Court considered *In re H.G.* (2006) 146 Cal.App.4th 1 and *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, the cases on which the father primarily relied. (*In re K.C., supra,* 52 Cal.4th at p. 237.)

In *In re H.G.*, the parents appealed an order removing their daughter from her grandparents' custody and a judgment terminating their parental rights. The Court of Appeal reversed the order removing the child from her grandparents because the juvenile court had not properly considered the request to place the child with her grandparents, violating the relative placement preference of section 361.3. Because the court did not properly consider the request for placement with relatives, the order terminating parental rights was at least premature and possibly erroneous, as a child's placement with relatives may make the termination of parental rights unnecessary.[5] Because the

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5 The court need not terminate parental rights when "'[t]he child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the

propriety of terminating parental rights depended partly on the placement decision, the order removing the child from her grandparents' custody sufficiently affected the parents' interests to give them standing to appeal that order. (*In re K.C.*, *supra*, 52 Cal.4th at pp. 237-238, citing *In re H.G.*, *supra*, 146 Cal.App.4th at p. 10.)

In *In re Esperanza C., supra,* 165 Cal.App.4th 1042, a mother whose parental rights had been terminated sought to appeal an order, entered immediately before termination, denying a relative's section 388 petition for placement of the child. Adopting the reasoning of *In re H.G., supra,* 146 Cal.App.4th 1, the court concluded the mother had standing because resolution of the placement issue could potentially alter the decision to terminate parental rights. The court therefore reversed both the order denying placement and the judgment terminating parental rights. (*In re K.C., supra,* 52 Cal.4th at p. 238, citing *In re Esperanza C.*, *supra*, 165 Cal.App.4th at pp. 1054, 1062.)

From these decisions, the Supreme Court "derive[d] the following rule: A parent's appeal from a judgment terminating parental rights confers standing to appeal an order concerning the dependent child's placement only if the placement order's reversal advances the parent's argument against terminating parental rights." (*In re K.C., supra,* 52 Cal.4th at p. 238.)

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child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child . . . ." (*In re K.C.*, *supra*, 52 Cal.4th at p. 237, fn. 3, quoting § 366.26, subd. (c)(1)(A).)

In *In re K.C.*, this rule did not support the father's claim of standing to appeal because he did not contest the termination of his parental rights in the juvenile court. Specifically, "father did not argue below, and does not argue now, that any [statutory exception to termination of parental rights] applies" and he "does not contend the order terminating his parental rights was improper in any respect." (*Id.* at p. 237.) "By thus acquiescing in the termination of his rights, [the father] relinquished the only interest in K.C. that could render him aggrieved by the juvenile court's order declining to place the child with [his] grandparents." (*Id.* at p. 238, fn. omitted.)

Applying the rule announced in *In re K.C., supra,* 52 Cal.4th at page 238, we conclude that father does not have standing to appeal the juvenile court's order denying Yvette's petition to have Grace placed with her. Although father's counsel objected to termination of parental rights at the section 366.26 hearing, he admitted he could assert no statutory ground for contesting termination of parental rights. As a result, father relinquished the only interest in Grace that could have rendered him aggrieved by the juvenile court's order declining to place the child with Yvette, and reversal of the order denying Yvette's petition for placement would not advance any argument by father that his parental rights should not have been terminated. Because father lacks standing to appeal the order denying Yvette's section 388 petition, we affirm the order.[6]

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6 The Department argues "the placement issue father appeals has been rendered moot" by the juvenile court's order terminating parental rights. (Initial capital letters made lower case, bold omitted.) In light of our resolution of the standing issue, we need not address the Department's mootness argument.

III. The juvenile court did not abuse its discretion in concluding the relative placement preference did not apply to Yvette's request for placement because she is a nonrelated extended family member.

Even assuming father had standing to challenge the juvenile court's order denying Yvette's request to have Grace placed with her, there was no abuse of discretion warranting reversal.

"At a hearing on a motion for change of placement, the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317, citing § 388.)

The juvenile court denied Yvette's 388 petition because it found Yvette was not Grace's aunt. The court found Yvette instead was a nonrelated extended family member, and therefore was not entitled to the relative placement preference of section 361.3, subdivision (c)(2).

The court did not abuse its discretion. The person listed as Yvette's father on her birth certificate is Earl H., but father's father is Philip B., Sr. Although Yvette testified the information on her birth certificate is incorrect and she and father are both the children of Philip B., Sr., and Yvette's aunt Deborah submitted a letter supporting Yvette's testimony, the juvenile court was not required to believe their account.

Father asks us to remand the case "with instructions for [the Department] to sufficiently investigate the blood relationship between [Yvette] and [Grace] . . . ." He contends the Department

has "[t]he burden . . . to gather information and investigate the child's relatives." The relevant burden here, however, was Yvette's burden of proving a change of placement was in the child's best interest. (See *In re Stephanie M., supra*, 7 Cal.4th at p. 317.) At the October 6, 2017 hearing, father's counsel informed the court that he had explored DNA testing as a possible means of proving a biological relationship between father and Yvette, but Phillip B., Sr. was deceased and the testing results of half-siblings would probably be inconclusive; therefore, "the only evidence that we're going to have in front of us is [Yvette's] testimony . . . ." Although father now asks us to remand for further investigation, he suggests no other source of information that might prove Yvette is Grace's aunt. We deny the request.

IV. ICWA

Father contends the Department failed to comply with its ICWA inquiry duties and we should reverse the order terminating his parental rights with instructions to the Department to investigate further mother's claim of Indian ancestry and take any appropriate action. The Department concedes that mother indicated she may have Sioux ancestry, the juvenile court ordered the Department to inquire further about mother's possible Indian ancestry, and the record does not indicate it complied with that order. Accordingly, the Department does not oppose a conditional affirmance of the order terminating father's parental rights with a remand to the juvenile court with directions to the Department to investigate mother's Indian ancestry.

ICWA imposes on a juvenile court a continuing duty to inquire whether a child is an Indian child. (*In re Isaiah W.* (2016)

1 Cal.5th 1, 6.) Section 224.3, subdivision (a)[7] imposes the same duty on the juvenile court and the Department. When the Department knows or has reason to know that an Indian child is involved in dependency proceedings, section 224.3, subdivision (c)[8] requires the Department to make further inquiry about the child's ancestry, including interviewing extended family members.

ICWA's duty to inquire about a child's Indian ancestry is activated when "a person having an interest in the child . . . informs or otherwise provides information suggesting

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7 Section 224.3, subdivision (a) provides, "The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care."

8 Section 224.3, subdivision (c) provides, "If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer 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, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2, contacting the Bureau of Indian Affairs and the State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership in and contacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility."

that the child is an Indian child to the court[or] the county welfare agency . . . ." (Cal. Rules of Court, rule 5.481(a)(5)(A).)

Mother indicated on her ICWA-020 form that she believed she had Sioux ancestry, identifying her deceased grandmother as the source of her claim. At the detention hearing, the juvenile court addressed mother's claim and found there was no reason at that time to believe Grace was an Indian child. Nevertheless, it ordered the Department to investigate further mother's claim, noting the Department's continuing obligation to investigate. As the Department concedes, there is no evidence in the record that it complied with the juvenile court's order.

Because the Department did not comply with ICWA's inquiry provisions, we conditionally reverse the order terminating father's parental rights and remand this case with directions to the juvenile court to ensure full compliance with ICWA. (See *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1386 [juvenile court failed to comply with ICWA's requirements when it concluded that relatives' claims of Creek, Seminole, and Blackfeet ancestry were insufficiently supported or too remote to require notice to the identified tribes]; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 704-706 [discussing limited reversal procedure in ICWA cases].)

DISPOSITION

The order denying Yvette's request that Grace be placed with her is affirmed. The order terminating father's parental rights is conditionally reversed. The matter is remanded to the juvenile court for the limited purpose of ensuring compliance with ICWA and related California provisions (see, e.g., § 224.3, subd. (c); Cal. Rules of Court, rule 5.481). If, after appropriate inquiry, the juvenile court determines Grace is an Indian child, the court shall proceed as required by ICWA and related California provisions. If the juvenile court determines Grace is not an Indian child, then it shall reinstate the order terminating father's parental rights to Grace and conduct further proceedings as appropriate.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

JASKOL, J.*

We concur:

BAKER, Acting P. J.

MOOR, 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.