Filed 3/18/14 In re K.S. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re K.S., et al., Persons Coming Under the Juvenile Court Law.	2d Juv. No. B251872 (Super. Ct. No. JV49528) (San Luis Obispo County)
SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. T.L., Defendant and Appellant.	

T.L. (mother) appeals the juvenile court's orders denying her modification petition and terminating her parental rights to her minor children K.S. and D.S. with adoption selected as the permanent plan (Welf. & Inst. Code,[1] §§ 366.26, 388). Mother contends the court failed to properly evaluate the maternal grandfather's request that the minors be placed with him in accordance with section 361.3. She also claims the court failed to comply with the investigation and notice requirements of the Indian Child

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

Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We conditionally reverse and remand for the limited purpose of compliance with the ICWA.

FACTS AND PROCEDURAL HISTORY

Mother gave birth to twin boys K.S. and D.S. (the minors) in August 2009. Shortly after the minors' birth, they were found to have neurological problems and tested positive for THC, the active ingredient in marijuana.[2] In March 2013, a section 300 petition was filed as to the minors after mother was arrested on drug-related charges. The minors were removed from mother's custody placed with the maternal grandmother and maternal step-grandfather, who are the legal guardians of mother's two eldest children.[3]

The maternal grandmother and maternal step-grandfather indicated from the outset that although they were willing to take care of the minors on a temporary basis, a long-term placement was not possible. At an April 2013 team decision making (TDM) meeting in which mother participated by telephone, a maternal cousin in Utah (the prospective adoptive mother) was identified as a possible placement for the minors, with an out-of-state adoption as the concurrent plan. Mother did not identify the maternal grandfather as a potential placement. Ten days after the TDM meeting, the San Luis Obispo County Department of Social Services (DSS) notified mother of its intent to seek a bypass of reunification services due to her continued use of drugs following court-ordered treatment (§ 361.5, subd. (b)(13)).

At the May 2013 jurisdiction and disposition hearing, DSS recommended that services be bypassed and the matter be set for a permanency planning hearing. At the conclusion of the hearing, the court bypassed services pursuant to section 361.5, subdivision (b)(13), and set the matter for a section 366.26 hearing on September 25, 2013. In its order, the court expressly found that DSS "has made diligent efforts to

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[2] The minors' father, E.S., did not participate in the proceedings and is not a party to the appeal.

[3] The two eldest children were removed from mother's custody in August 2008 as a result of mother's neglect and drug abuse.

identify, locate, and contact the child's [*sic*] relatives." Mother was granted monthly supervised visitation.

On August 1, 2013, mother filed a section 388 petition (form JV-180) requesting that reunification services be granted as a result of her recent progress in treatment. Mother also requested that the minors be placed with the maternal grandfather. She asserted that such a placement would be in the minors' best interests because it would ensure a strong bond with their half-siblings and mother was in treatment nearby. In support of the petition, the maternal grandfather submitted a declaration stating that he wanted the minors to be placed with him during the reunification period, and permanently in the event that reunification efforts failed.

The section 388 petition and the section 366.26 matter were set for a combined hearing on October 8, 2013. DSS recommended that mother's section 388 petition be denied and her parental rights terminated with adoption as the minors' permanent plan. DSS applauded mother's recent attempts at recovery, yet concluded it would not be in the minors' best interest to delay their need for permanency and stability in the hopes that mother would ultimately succeed in overcoming the issues that led to the minors' removal.

DSS also concluded that the minors were likely to be adopted. The prospective adoptive mother has four children, two of whom were already self-sufficient adults. She worked as a kindergarten teacher, was aware of the minors' special needs, and had the ability and training to meet those needs. DSS also reported that the prospective adoptive mother's home in Utah had already received approval for placement from Utah's child welfare services. DSS also concluded that despite the minors' developmental issues, they were considered very adoptable by either the prospective adoptive mother or other families with the necessary experience and training to deal with special needs children.

DSS further concluded that placing the minors with the maternal grandfather would not be in their best interests. DSS reported that the maternal grandfather had "[first] contacted [DSS] in late June/early July and stated he would be a

resource for the boys until their mother got better or if not, as a permanent plan. [DSS] assessed the maternal grandfather's situation and did not believe it would be the best placement for the minors." In assessing the maternal grandfather's request, DSS "reviewed the information shared about the family dynamics in the previous case in 2010 as well as believing the boys would have a better opportunity to remain in contact with their half-sisters if placed with [the prospective adoptive mother]." Mother alleged in the prior case that she had been sexually abused by the maternal grandfather, although she subsequently said she was not sure whether any abuse occurred. Mother also reported that the maternal grandfather had mood swings and was violent with the maternal grandmother when mother was a child.

DSS concluded that the minors' placement with the prospective adoptive mother would more likely promote continued contact with their half-siblings because the maternal grandmother, with whom the half-siblings live, has a highly contentious relationship with the maternal grandfather. The social worker believed that the maternal grandmother would not allow any kind of unsupervised visitation between the minors' half-siblings and the maternal grandfather; because the half-siblings are no longer dependents, the court had no jurisdiction to facilitate their contact with the minors. On the other hand, the maternal grandmother often visited the prospective adoptive mother and other relatives in Utah. Moreover, the prospective adoptive mother immediately came forward as a possible placement and the rest of the family considered her to be the best concurrent plan for the minors.

In light of the available information, the social worker doubted the maternal grandfather's ability to pass a home study. The maternal grandfather had also failed to establish a relationship with the minors and had little contact with them. The day prior to the hearing, he merely greeted the minors when he dropped off mother for a scheduled visit and did not ask if he could stay. The prospective adoptive mother, by contrast, had visited with the minors during various family gatherings and recently spent a week with them at the maternal grandmother's home. The minors also spent a week in Utah with the prospective adoptive mother and her family. The prospective adoptive mother also spoke

to the minors on the telephone a few times a week and had plans to visit them again in the near future.

The maternal grandfather testified that he first met the minors shortly after they were born. He subsequently saw the minors on their second birthday in August 2011, and then during a scheduled visit in September 2013. He also briefly saw them the day prior to the hearing. Despite his limited contact and belated request for placement, he believed he would be more able to facilitate contact between the minors and their half-siblings because he lived in California and planned to retire within the next year. The maternal grandfather also believed he had not been given an adequate opportunity to be evaluated as a placement for the minors.

Mother also testified at the hearing. She claimed that her prior reports of the maternal grandfather's sexual abuse and domestic violence were not true. She also offered that she planned to continue with six months of outpatient treatment after she was released from her six-month residential treatment program. Mother acknowledged, however, that she had used methamphetamine only three weeks prior to the hearing.

At the conclusion of the hearing, the court denied mother's section 388 petition and found the minors were likely to be adopted. In making its ruling, the court emphasized the lack of contact between the maternal grandfather and the minors and concluded, "It just is not a relationship . . . that is important to protect and I don't think it's in the best interest of the kids on that basis." The court also concluded that the contentious relationship between the maternal grandfather and maternal grandmother would hinder the minors' relationship with their half-siblings. The court further emphasized the prospective adoptive mother's early involvement and found it was in the minors' best interests to be placed with her. Accordingly, the court terminated mother's parental rights and selected adoption as the minors' permanent plan.

DISCUSSION

The Section 388 Petition

Mother contends the juvenile court erred in denying her section 388 modification petition because it failed to properly evaluate the maternal grandfather's

request for placement pursuant to the relative placement preference of section 361.3. DSS responds that mother lacks standing to challenge the maternal grandfather's placement request and forfeited her claim by failing to raise it below. DSS further asserts that mother failed to show either changed circumstances or that the requested placement would be in the minors' best interests.

Mother purports to have standing to challenge the court's denial of the maternal grandfather's placement request on the ground that "the placement order's reversal advances [mother's] argument against terminating parental rights." (*In re K.C.* (2011) 52 Cal.4th 231, 238.) She claims that if the court had granted the maternal grandfather's placement request, it may have gone on to find that the termination of mother's parental rights was precluded under section 366.26, subdivision (c)(1)(A).[4] Mother further asserts that her claim is not forfeited notwithstanding her failure to raise it below because "the juvenile court was at least alerted, if not specifically informed that the relative placement preference was applicable and with it, the requirement that a report be provided to the court."

Even if we were to agree with mother's assertions of standing and nonforfeiture, her claim fails on the merits. Section 388 allows a parent of a dependent child to petition the juvenile court to change, modify, or set aside any previous order of the juvenile court. To prevail on a section 388 petition, the parent must demonstrate that new evidence exists or circumstances have changed such that the proposed modification would be in the child's best interests. (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 641–642.) We review a juvenile court's summary denial of a section 388 petition for

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[4] Subdivision (c)(1)(A) of section 366.26 provides that parental rights shall not be terminated if "[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 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. For purposes of an Indian child, 'relative' shall include an 'extended family member,' as defined in the federal Indian Child Welfare Act (25 U.S.C. § 1903(2))."

abuse of discretion. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460.) "An abuse of discretion occurs when the juvenile court has exceeded the bounds of reason by making an arbitrary, capricious or patently absurd determination." (*Marcelo B.*, at p. 642.)

The court did not abuse its discretion in denying mother's modification petition. Even if the minors' need for a new placement amounted to a "changed circumstance" for purposes of section 388, the record supports the court's finding that the requested placement with the maternal grandfather was not in the minors' best interests. This conclusion is not altered by the fact that the maternal grandfather purported to invoke the relative placement preference of section 361.3. Under that statute, a "relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).) The relative placement preference "'does not create an evidentiary presumption in favor of a relative, but merely places the relative at the head of the line when the court is determining which placement is in the child's best interests.'" (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863 (*Alicia B.*).)

"In determining whether placement with a relative is appropriate, the county social worker and court shall consider, but shall not be limited to, consideration of [a list of eight factors]." (§ 361.3, subd. (a).) Those eight factors include: the best interest of the child, the wishes of the parents and relative, the nature and duration of the child/relative relationship, the relative's desire to care for the child, and the ability of the relative to protect the child from his or her parents. (*Id.* subd. (a)(1), (2), (6), (7).) "The linchpin of a section 361.3 analysis is whether placement with a relative is in the best interests of the minor." (*Alicia B., supra*, 116 Cal.App.4th at pp. 862–863.)

After reunification services are terminated, the parent's interests in the minor's care, custody, and companionship are no longer paramount. The juvenile court's focus shifts to "'. . . ". . . the needs of the child for permanency and stability. . . ."'" (*In re K.C., supra*, 52 Cal.4th at p. 236.) At this point of the proceedings, the relative placement preference only applies when "a new placement of the child must be made[.]" (§ 361.3, subd. (d).) Moreover, preferential consideration is only given "to relatives who have not been found to be unsuitable and who will fulfill the child's . . . permanent plan

requirements." (*Ibid.*) "In addition to the factors described in subdivision (a), the county social worker shall consider whether the relative has established and maintained a relationship with the child." (*Ibid.*)

When the issue of the minors' placement was raised at the TDM meeting, mother made no mention of the maternal grandfather. It was not until after mother's reunification services had been bypassed and the matter set for section 366.26 hearing that she and the maternal grandfather came forward with their request. Moreover, it was made clear from the outset of the proceedings that the minors' placement with the maternal grandmother and maternal step-grandfather was only temporary. It was also understood that DSS would be seeking to bypass reunification services and terminate mother's parental rights, and that the minors' permanent plan would include adoption by the prospective adoptive mother. Several months after this plan was underway—after the prospective adoptive mother's suitability had been established and the minors had begun bonding with her—mother urged the court to abandon that plan and place the children with an individual they barely knew, a man she had previously accused of sexually abusing her. Although mother theorized that this arrangement might have led to reunification, she does not challenge the court's finding that it was not in the minors' best interests to grant her reunification services.

Mother nevertheless faults DSS for failing to, among other things, conduct a home study to determine whether the maternal grandfather was a suitable placement or prepare a formal assessment of his suitability with consideration of the factors enumerated in section 361.3. She also claims that the lack of such a report precluded the court from "follow[ing] its mandate to properly assess the maternal grandfather as a placement option under the criteria set forth in the statute." We are not persuaded. Although the statute contemplates consideration of various factors, once reunification services are terminated the minors' needs for permanency and stability became the paramount concern. The ultimate issue was the children's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 321 ["regardless of the relative placement preference, the fundamental duty of the court is to assure the best interests of the child"].) Following a

contested hearing at which both mother and the maternal grandfather testified, the court found it would not be in the minors' best interests to derail them from their already-established path toward permanency and stability.

Section 361.3 merely confers preferential placement *consideration*, and not a preference for placement. (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 798.) The court's reasons for declining to place the minors with the maternal grandfather are both manifest and supported by the record. Accordingly, any error in failing to comply with the requirements of section 361.3 was harmless. (*Ibid.*)

ICWA

Mother asserts that the matter must be reversed and remanded because DSS failed to comply with the investigation and notice requirements of the ICWA. DSS concedes the point.

"ICWA provides 'where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings, and of their right of intervention.' (25 U.S.C. § 1912(a).)" (*In re Damian C.* (2009) 178 Cal.App.4th 192, 196.) To satisfy the notice provisions of ICWA and provide a proper record of such notice, DSS must first "identify any possible tribal affiliations and send proper notice to those entities[.]" (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739, fn. 4.) "The notice must include the names of the child's ancestors and other identifying information, if known, and be sent registered mail, return receipt requested." (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 384.) Next, DSS must file with the court copies of the notices sent, the returned receipts, as well as any correspondence received from the tribes. (Cal. Rules of Court, rule 5.482(b);[5] *In re Marinna J.*, at p. 739, fn. 4.) Prior to sending notice, the social worker "is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the

[5] All further references to rules are to the California Rules of Court.

parents . . . and extended family members to gather the information" that should be included in the notice if known. (§ 224.3, subd. (c); see also rule 5.481(a)(4).)

At the detention hearing, mother claimed Cherokee heritage through the maternal grandmother. Notices were accordingly sent to the three federally registered Cherokee tribes. Those notices, however, did not include contact information for the maternal grandmother's relatives, even though DSS was in contact with both her and the maternal great-grandmother. Two of the tribes sent responses indicating that the minors were not registered or eligible for registration. The Cherokee Nation requested additional information, yet the record does not indicate whether DSS complied with the request. The court nevertheless found that DSS had complied with the notice requirements and that the ICWA did not apply.

DSS's concession of inadequate ICWA investigation and notice is well-taken. The social worker in this case admittedly failed to make any further inquiry regarding the minors' possible Indian ancestry, as required under subdivision (c) of section 224.3 and rule 5.481(a)(4). DSS also apparently failed to respond to the Cherokee Nation's request for further information. Because the notices were insufficient, the matter must be conditionally reversed and remanded for further proceedings in accordance with the ICWA. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 212, fn. 6; *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1429.)

DISPOSITION

The judgment is conditionally reversed. The case is remanded to the juvenile court with directions to order DSS to conduct the mandated inquiry regarding the minors' possible Cherokee ancestry and give the required ICWA notice and file all required documentation with the court. If a tribe then claims the minors as Indian

children, the court shall proceed in conformity with ICWA. If no tribe makes such a claim, the court shall reinstate its judgment.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Linda D. Hurst, Judge

Patrick J. Perry, Commissioner

Superior Court County of San Luis Obispo

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