Filed 4/16/12 In re Lilliana B. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 Lilliana B. a Person Coming Under the Juvenile Court Law.	2d Juv. No. B237170 (Super. Ct. No. JV45446) (San Luis Obispo County)
SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, , Plaintiff and Respondent, v. WENDY M. and KIRBY B. Defendants and Appellants.	

The biological parents of baby child Lilliana B., Wendy M. (mother) and Kirby B. (father), appeal from the juvenile court's order denying a petition for modification (Welf. & Inst. Code, § 388)[1] and terminating their parental rights (§ 366.26). We affirm the order denying the section 388 petition and conditionally reverse the order terminating parental rights with directions to comply with the notice and inquiry provisions of the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.).

[1] Unless otherwise noted all statutory references are to the Welfare and Institutions Code.

Facts and Procedural History

On June 18, 2010, San Luis Obispo County Department of Social Services (DSS) filed a dependency petition after Lilliana tested positive for methamphetamine at birth. (§ 300, subds. (b) & (j).) Mother admitted using methamphetamine two days before Lilliana's birth and suffering three drug relapses during the pregnancy. DSS reported that mother had an extensive history of substance abuse, resulting in the termination of parental rights of two older children (Lilliana's half-siblings).

Father was unable to care for Lilliana, suffered from substance abuse problems, and had a significant criminal history for drug sales and transportation. Father had attended drug rehabilitation programs in the past and did not like "NA being shoved down my throat." Father agreed to enroll in an outpatient program but tested positive for methamphetamine, failed to show for drug testing, and did not return phone calls or attend case-related meetings.

DSS placed Lilliana with her maternal great aunt and uncle. Although mother and father were granted supervised visits, visitation was sporadic.[2]

The trial court sustained the dependency petition on July 20, 2010, removed Lilliana from appellants' physical custody, and bypassed reunification services for mother. (§ 361.5, subds. (b)(10), (b)(11), (b)(13).)

Father was granted reunification services but violated probation on July 21, 2010, when he tested dirty for methamphetamine. After he was released from jail on October 2, 2010, father wanted to move forward with reunification. The trial court continued services and placed five-month old Lilliana with her paternal grandmother.

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[2] After Lilliana was detained, mother was arrested on an outstanding felony warrant for burglary and receiving stolen property. Mother was incarcerated from October 2010 to January 2011. Following her release from jail, mother failed to contact the social worker about visitation.

Father dropped out of contact with the case worker (November 2010 to February 2011), dropped out of the Drug Alcohol Services outpatient program, stopped drug testing, and was late to or missed scheduled visits from November 2010 through January 2011. Public Health Nurse Bodlak spoke to father at three supervised visits and reported that he was "aloof" and not interested in learning about Lilliana's developmental needs.

DSS recommended that the trial court terminate reunification services and proceed with a permanent placement plan. Father submitted on the proposed order. On March 23, 2011, the trial court terminated reunification services and set the matter for a section 366.26 hearing.

Combined Section 388/366.26 Hearing

On the eve of the hearing, father filed a section 388 petition to reinstate services and/or place Lilliana with father. At the combined section 388/366.26 hearing, evidence was received that Lilliana was bonded to her grandmother who met all the adoption home study requirements. Grandmother wanted to adopt, wanted Lilliana to have a relationship with her extended family members, and had arranged and supervised visits with the siblings.

Father stated that he was drug free and had enrolled in Dependency Drug Court after his nine-year-old son (William) was declared a dependent of the court. Father's case plan with William included NA and AA meetings and drug tests. Father said that he had not used drugs for five months, was still on felony probation for sale of methamphetamine, and was living with mother who was pregnant with his child. On cross-examination, father admitted that Lilliana has never lived with him and that he never advanced beyond supervised visitation.

The trial court denied the section 388 petition and terminated parental rights based on clear and convincing evidence that Lilliana would be adopted. The court found that the beneficial parent-child relationship exception did not apply (§ 366.26, subd. (c)(1)(B)) and that Lilliana's "need for permanence would

outweigh any possible benefit that could come to her from continuing the relationship with her dad."

Section 388 Petition

Father asserts that the trial court erred in denying his petition to reinstate services. Mother joins in father's argument.

The grant or denial of a section 388 petition is committed to the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is clearly established. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.) The parent bears the burden to show *both* a change of circumstances and that modification of the prior order would be in the best interest of the child. (*In re S. J.* (2008) 167 Cal.App.4th 953, 959) "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point, 'the focus shifts to the needs of the child for permanency and stability' . . . . [Citation.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

Father concedes that he had an unresolved drug problem, missed scheduled visits, and dropped out of a drug program when reunification services were terminated in March 2011. Father, however, had a change of heart and enrolled in Drug Dependency Court after his nine year-old son (William) was declared a dependent of the court.

The trial court found a change in circumstances but that it would be "a big gamble" to reinstate services and put Lilliana's permanency at risk. Father had a 13-year history of substance abuse and "doesn't have a track record of making it. . . . [¶] . . . There is no evidence before the court that it's in Lillian[a]'s best interest to wait and see if [father] fulfills his commitment to sobriety. . . . [¶] For the first 13 months of this case, he chose not to do that."

No abuse of discretion occurred. Drug addiction is an intractable problem often marked by periods of sustained sobriety and relapse. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 48-49 [nine months of sobriety insufficient to

warrant section 388 modification]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423 [seven months of sobriety since relapse, "while commendable, was nothing new"]; *In re Angel B.* (2002) 97 Cal.App.4th 454, 463 [parent's sobriety very brief compared to many years of addiction].) Renewed attempts to facilitate reunification are not in the child's best interests where the parent is a chronic drug user and has resisted prior treatment. (*In re Levi U.* (2000) 78 Cal.App.4th 191, 200.)

No credible evidence was presented that reinstating services was in Lilliana's best interest or outweighed Lilliana's right to a stable and permanent adoptive placement. Lilliana has lived most of her life with her grandmother and is closely bonded to her. The trial court reasonably concluded that reinstating services in the hope that father could stay clean and sober would be detrimental to Lilliana and undermine the permanency and stability of an adoptive placement that Lilliana so badly needs. Childhood is fleeting and does not "wait until the [] parents grow up." (*In re Rikki* D. (1991) 227 Cal.App.3d 1624, 1632.)

ICWA

After the appeal was filed, DSS determined that the ICWA notice was not sent to the Bureau of Indian Affairs. At the detention hearing, mother signed a Parental Notification of Indian Status (ICWA-020) and indicated that she has Native American Indian ancestry but did not know with what tribe.

The parties have entered into a written stipulation for a conditional reversal to comply with the ICWA inquiry and notice provisions. We reverse the order terminating parental rights for the limited purpose of complying with the ICQA inquiry and notice provisions. (See e.g., *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1389-1390 [limited remand with directions to comply with ICWA].)

Conclusion

The order denying the section 388 petition is affirmed. The order terminating parental rights is conditionally reversed for the limited purpose of complying with the inquiry and notice provisions of ICWA. If no Indian tribe

declares Lilliana to be an Indian child or if no timely response is received, the trial court shall reinstate the judgment terminating parental rights. If, however, after proper inquiry and notice, a tribe determines that Lilliana is an Indian child as defined by ICWA, the trial court shall proceed in compliance with ICWA and the Welfare and Institutions Code. (*In re Justin S.* (2007) 150 Cal.App.4th 1426, 1437-1438; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 704-705.)

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Ginger Garrett, Judge

Superior Court County of San Luis Obispo

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