Filed 8/18/17 In re M.T. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re M.T. et al., Persons Coming Under the Juvenile Court Law.	B280236 (Los Angeles County Super. Ct. No. DK02508)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.P., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Michael A. Whitaker, Judge. Affirmed and remanded.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Peter Ferrera, Principal Deputy County Counsel, for Plaintiff and Respondent.

M.P. (mother) appeals from the findings and order terminating her parental rights under Welfare and Institutions Code section 366.26.[1] Mother contends the court erred in concluding the parental relationship exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i) did not apply. She also contends the court erroneously failed to order the Los Angeles County Department of Children and Family Services (Department) to inquire and provide notice to the Cherokee tribe under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.), based on information provided by father about potential tribal membership. The Department argues the court correctly found the parental relationship exception inapplicable, but concedes the court erred in failing to order inquiry and notice. We remand for the limited purpose of permitting the court to order inquiry and notice in accordance with ICWA.

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

FACTUAL AND PROCEDURAL BACKGROUND

Mother is a drug user with two children. The children were born in August 2010 and August 2013. This dependency case began after mother was arrested for possession of methamphetamine in November 2013. She later tested positive for methamphetamine, amphetamine, and marijuana. Father was incarcerated for drug possession, and mother no longer had a relationship with him.[2] Mother was living with maternal grandmother until about two weeks before her arrest. Maternal grandmother shared details of mother's ongoing history of drug abuse, noting that mother did not test positive for drugs at the time her older son was born, only because she refrained from using drugs for the last two months of her pregnancy. Mother participated in an inpatient drug program for some time, with her older son living with her, but she did not finish the program. The Department took custody of the two children and filed a petition based on the parents' drug use, mother leaving drug paraphernalia within reach of the children, and violence between mother and father.

Father claimed his maternal great-grandmother had Cherokee heritage. Reasoning that a child's great-great-grandparents fall outside of ICWA, the court found ICWA inapplicable.

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[2] Father is not a party to this appeal.

In January 2014, the court sustained an amended petition and ordered reunification services for both parents. The children were placed with non-related, extended family members. The Department provided therapy services to the children and their caretakers. Mother visited the children twice a week at the park. She began programs for drug and alcohol treatment, parenting, and individual counseling. Mother transferred from one residential drug treatment program to another in April 2014, and reported she was doing much better at the new program. However, she tested positive for amphetamines four times in late April and early May. At a six-month review hearing in July 2014, the court ordered unmonitored visits at the treatment program so long as mother continued to test negative for drugs.

During an unmonitored weekend visit with her children in October 2014, mother asked another resident to watch the children while she went on a date. Mother was arrested while she was out on her date, and remained incarcerated for 12 days. The Department then required mother's visits to be monitored, but she had an unmonitored visit with the children in December 2014, and another resident informed a counselor she had seen mother smoking marijuana during the visit. Mother's residential drug treatment program reported that mother was attending parenting classes, but was not participating and was not intervening with the children at the onsite playground. By January 2015, mother had been on two behavior contracts, her participation in the program was provisional, and she

was on the verge of being discharged. Mother visited the children consistently, and the children were comfortable with her, but the Department observed that mother would take a more passive role, allowing the caregivers to give directions to the children.

According to the Department's 18-month review report, mother continued having difficulties in her second drug treatment program, missing two scheduled drug tests due to illness in February 2015. The program put mother on an agreement requiring her to have an escort at all times, because mother was leaving the grounds when she was supposed to be on bed rest. The program discharged mother after she tested positive for methamphetamine in March 2015. Her case manager did confirm mother had completed her parenting class. Mother enrolled in a third residential drug treatment program on April 15, 2015. She maintained consistent weekend visits with the children, except for an initial 30-day period in her new drug treatment program when she was not allowed to leave the grounds. According to the Department's report, mother was permitted to have the children visit her at the new drug treatment program, but the caregivers had not taken the children to visit mother. The children's caregivers were willing to adopt the children.

At the 18-month review hearing on May 27, 2015, the court terminated mother's reunification services and set a hearing under section 366.26 for termination of parental rights and selection and implementation of a permanent plan for the children.

At the scheduled section 366.26 hearing on September 16, 2015, mother was present, but the hearing was continued to give father notice and to permit the Department to complete its report. Mother's counsel informed the court that mother had maintained sobriety for five months and hoped the court was "looking forward to her [section] 388 motion as much as she is." No section 388 petition appears in the record.

The section 366.26 hearing was continued a number of times, and did not take place until January 12, 2017, a year and a half after mother's reunification services had been terminated. Mother contested the termination of her parental rights. The court admitted the Department reports into evidence and heard testimony from mother about the consistency and nature of her weekly visits with her children. After hearing argument from counsel for mother, the children, and the Department, the court found that mother had not met her burden of showing a compelling reason that there would be detriment to the children if mother's parental rights were terminated.

DISCUSSION

Parental Relationship Exception

Mother contends the dependency court erred when it found the parental relationship exception under section 366.26, subdivision (c)(1)(B)(i) inapplicable, and seeks

reversal of the order terminating her parental rights. We find no error.

We assess whether the court's order on the parental relationship exception is supported by substantial evidence. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1166.)[3] If supported by substantial evidence, the finding here must be upheld, even though substantial evidence may also exist that would support a contrary result and the dependency court might have reached a different conclusion had it determined the facts and weighed credibility differently. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

Under section 366.26, subdivision (c)(1)(B)(i), if the dependency court terminates reunification services and finds the child is adoptable, it must terminate parental rights unless it "finds a compelling reason for determining that

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[3] "[S]ome courts have applied different standards of review. (*In re K.P.* [(2012)] 203 Cal.App.4th [614,] 621–622 [question of whether beneficial parental relationship exists is reviewed for substantial evidence, whereas question of whether relationship provides compelling reason for applying exception is reviewed for abuse of discretion]; *In re C.B.* (2010) 190 Cal.App.4th 102, 122–123 [abuse of discretion standard governs review, but 'pure' factual findings reviewed for substantial evidence]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [(*Jasmine D.*)] [applying abuse of discretion standard].) On the record before us, we would affirm under either of these standards. (E.g., *Jasmine D.*, at p. 1351 [practical differences between substantial evidence and abuse of discretion standards are minor].)" (*In re G.B.*, *supra*, 227 Cal.App.4th at p. 1166, fn. 7.)

termination would be detrimental to the child due to [the circumstance that the parent has] [¶] . . . maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The parental relationship exception "does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent." (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.) "A parent must show more than frequent and loving contact or pleasant visits. [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child . . . .' The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.] Further, to establish the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show the child would suffer detriment if his or her relationship with the parent were terminated. [Citation.]" (*In re C.F.* (2011) 193 Cal.App.4th 549, 555, fn. omitted.) "The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.]" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

Substantial evidence supports the trial court's finding that mother's relationship with her children did not promote their well-being "'to such a degree as to outweigh the well-being the child[ren] would gain in a permanent home with new, adoptive parents.'" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; accord, *Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1347-1350.) Mother did little more than maintain consistent weekly monitored visits with the children. The children were 3 years old and 3 months old respectively when they were initially detained from mother's custody in November 2013. By the time the court held the section 366.26 hearing in January 2017, the children were attached to their foster parents, having lived with them since the older child was three years old and the younger one was an infant. Mother conceded that the children called her by her first name, and her oldest called the foster parents "mother" and "mom." When asked to describe the activities she engaged in during visits with her children, she testified she played with them and read to them, and she would sometimes bathe them or do homework with them. She did not present any evidence demonstrating the children were upset when her visits ended or how they reacted if a visit was cancelled. Thus, she provided no evidence of what detriment the children would suffer if her parental rights were terminated. On this record, the court reasonably determined mother had not carried her burden of demonstrating that the parental relationship exception

under section 366.26, subdivision (c)(1)(B)(i) did not apply to mother.

ICWA Determination

Mother also contends the court erred when it found ICWA inapplicable. The Department concedes the court's ICWA determination was erroneous.

ICWA reflects a congressional determination that it is in the best interests of Indian children to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations. (25 U.S.C. § 1902; *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1355–1356; see also § 224, subd. (a).) Under ICWA and California law, when a juvenile court knows or has reason to know that an Indian child is involved, notice to the tribe is required. (25 U.S.C. § 1912(a); § 224.3, subd. (d); see *In re S.B.* (2005) 130 Cal.App.4th 1148, 1157.) The circumstances that may provide reason to know the child is an Indian child include, without limitation, when a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's parents, grandparents or great-grandparents are or were a member of a tribe. (§ 224.3, subd. (b)(1); see also *In re B.H.* (2015) 241 Cal.App.4th 603, 606–607 ["a person need not be a *registered* member of a tribe to be a member of a tribe—parents may be unsure or unknowledgeable of their own status as a member of a

tribe"].) Information which *suggests* the child may be an Indian child is enough. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406-1408.)

Here, father provided information that his maternal great-grandmother had Cherokee heritage. Based on this information, the court should have directed the Department to investigate father's claims to determine whether the children fell under ICWA's protections. Because the court's termination of mother's parental rights incorporated an erroneous IWCA finding, it may only be conditionally affirmed. We do not reverse the order terminating mother's parental rights because there has not yet been a sufficient showing that ICWA substantive protections apply to mother's children. Upon remand, we direct the juvenile court to order additional inquiry into father's claims of Cherokee heritage and, if appropriate, send notice to any relevant tribe in accordance with ICWA and California law. (25 U.S.C. § 1912(a); §§ 224.1, 224.2, 224.3.) The Department shall thereafter notify the court of its actions and file relevant documentation with the court. The court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether ICWA is applicable.

If a tribe later determines that mother's children are Indian children, "the tribe, a parent, or [the children] may petition the court to invalidate an action of placement in foster care or termination of parental rights 'upon a showing

that such action violated any provision of sections [1911, 1912, and 1913].' (25 U.S.C. § 1914.)" (*In re Damian C.* (2009) 178 Cal.App.4th 192, 200.) Otherwise, the court's original section 366.26 order remains in effect.

DISPOSITION

The order terminating mother's parental rights is affirmed. The case is remanded with directions to comply with ICWA's inquiry and notice requirements.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.