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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 Z.J., a Person Coming Under the Juvenile Court Law.	B269467 (Los Angeles County Super. Ct. No. CK66750)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. N.R., Defendant and Appellant; Z.J., Objector and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Marguerite D. Downing, Judge. Affirmed in part, reversed in part, and remanded.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant.

Marissa Coffey, under appointment by the Court of Appeal, for Objector and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

N.R. (mother) and her minor son, Z.J., appeal from an order removing Z.J. from mother's custody under Welfare and Institutions Code section 387[1] after the dependency court sustained a supplemental petition filed by Los Angeles County Department of Children and Family Services (Department). Mother and Z.J. contend the court's removal order was not supported by substantial evidence. Mother also contends the court erroneously concluded that the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901, et seq.) did not apply without first requiring ICWA notice to a tribe identified by father.

We affirm the court's removal order, reverse the court's ICWA finding, and remand for proper notice under ICWA.

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

FACTUAL AND PROCEDURAL BACKGROUND

On May 29, 2013, a social worker came to mother's home to investigate a report of child abuse regarding the infant child of Z.J.'s adult sibling, Derrick S. Derrick was heavily under the influence of drugs. The social worker observed marijuana bongs and pipes stored in Z.J.'s room. Z.J., who was 13 years old at the time, acknowledged that Derrick used drugs and his mother was aware of Derrick's drug use, but he denied using drugs himself and denied that mother used drugs. Mother was not home. The social worker was told mother spends most of her time at her boyfriend's place. The family has a history of three prior referrals to the Department. Allegations of general neglect from 2010 and 2002 were deemed unfounded, and a referral based on alleged emotional abuse of the children by maternal grandmother was closed as inconclusive.

On June 3, 2013, a different social worker came to the home. She observed that mother had thrown away the drug paraphernalia and cleaned up the home. Mother admitted that she and Derrick used marijuana, but denied using around Z.J. Mother agreed to be tested for drugs that day, but then did not appear for testing. When mother eventually tested on June 14, 2013, her results came back positive for both marijuana and cocaine.

In late June 2013, the Department filed a petition under section 300. The court detained Z.J. from his mother's custody and ordered services and drug testing for mother

and father.[2] In August 2013, the court declared Z.J. a dependent under section 300, subdivision (b), based on mother's drug abuse and the fact that mother allowed Z.J.'s adult sibling Derrick to live in the home when mother knew that Derrick used illicit drugs, alcohol, and prescription medication in Z.J's presence, placing Z.J. at risk of harm. The court ordered mother to complete a drug program with after care, random drug testing, a 12-step program with a court card and sponsor, and individual counseling to address substance abuse and family stability. Mother was granted monitored visitation with Z.J., who was suitably placed with maternal grandmother. Mother did not appeal.

At the six-month review hearing in April 2014, the court found mother to be in partial compliance with her case plan. At the 12-month review hearing in August 2014, it found mother to be in compliance and estimated Z.J. could be returned to mother's custody by December 2014. After finding mother in partial compliance with the case plan, the court returned custody of Z.J. to mother at the 18-month review hearing, which was initially scheduled for December 2014, but continued a number of times to April 2015.

The court's findings at the various review hearings do not reflect the extent to which mother was failing to comply with her case plan. According to the Department's 18-month status review report, there was still a "high" risk to Z.J.'s

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[2] The court found J.J. to be Z.J.'s presumed father, but he has never sought custody of Z.J. and is not a party to this appeal.

safety if he were to return home. Mother's visits had gone well, and Z.J. very much wanted to live with his mother, but the Department had concerns about the absence of any documentation that mother was participating in court-ordered programs like AA meetings and individual counseling. Mother enrolled in the Blessed Drug and Alcohol Treatment program on August 19, 2013, and obtained a completion certificate in February 2014. But during that time, she tested positive for marijuana once on August 23, 2013, and then missed 10 consecutive drug tests. The treatment program did not test her because she had reported to program staff that she was testing through the Department. After she obtained a certificate of completion from the drug treatment program, she had seven missed drug tests and seven tests returned with positive results for marijuana between February 27, 2014, and August 11, 2014. Mother was reportedly using marijuana to sleep at night, but the social worker expressed concern that her test levels were higher than what might be expected.

Mother claimed to have enrolled in individual counseling at Bernie's Lil Women Center (the Center) in July 2014. She was initially unable to provide any proof of enrollment or participation. A counselor at the Center told the social worker mother was enrolled, but had missed a few sessions and was occasionally late. He was unable to provide an enrollment letter to the Department. In the meantime, mother missed three drug tests, and tested positive for marijuana five times between August 29, 2014,

and December 29, 2014. In early 2015, mother claimed she had completed her parenting education, as well as her substance abuse, individual, and group counseling at the Center. Mother provided to the social worker a slip of paper on the Center letterhead with mother's name handwritten on a form purporting to certify that mother had attended 90-minute sessions on August 7, 2014, and January 15, 2015. The social worker made several unsuccessful attempts to contact anyone at the numbers listed on the paper. Finally, on March 6, 2015, the social worker made an unannounced visit to the Center. Staff reported that mother had not completed her program.

Between May 29, 2013, and April 9, 2015, mother missed 24 drug tests. Interspersed with her missed tests were 17 positive marijuana tests, including the time she tested positive for marijuana and cocaine on June 14, 2013. The only time she tested negative for any substance during that time frame was on March 25, 2015.

During the first part of a contested 18-month review hearing on March 23, 2015, the court noted that two years after the petition was filed, mother was still using drugs and had not completed the programs ordered by the court in August 2013, including a drug treatment program, a 12-step program, after care, or individual counseling to address case issues. Mother claimed she had been attending individual counseling, group counseling, and an after-care program, but the Department did not have documentation of her attendance. Ultimately, the court continued the hearing to

give mother a chance to gather evidence that she had completed her court-ordered programs, telling mother, "I expect the drug tests to be clean and I expect you to continue your efforts to get a progress report from [the Center]."

At the continued hearing on April 23, 2015, mother still did not have documentation of her compliance with court-ordered services. Mother's drug test results on March 25, 2015, were negative, but she failed to appear for drug tests on three other occasions, including April 9, 2015. The court returned Z.J. to mother's custody, emphasizing the importance of mother continuing to have negative drug test results. Mother acknowledged her understanding that she needed to test negative, stating: "Weed is not that important to me. It's not my world. My world is this young man sitting right here next to me. [¶] When I heard from your mouth, myself, that you wanted my levels to be zero, this is what I'm bringing you. My next test will be zero, after that will be zero. Never have another positive test." The court even pointed out to mother, "You do understand that if you don't test or positive test, the Department is going to run in here and ask me to detain?" Mother agreed. Over the Department's objection, the court ordered family maintenance services for mother and Z.J.

Mother resumed her pattern of failing to drug test. Other than on May 9, 2015, when she tested negative for all substances, she had eleven missed tests between April 23, 2015, and October 22, 2015. The Department informed mother that a missed test is considered to be a dirty test.

According to the Department, mother acknowledged she was not in compliance with any court-ordered services, explaining her work schedule did not allow her to participate. When the Department advised mother that if she did not engage in services, a removal warrant would be filed for the child, "mother reported her attorney is aware of her noncompliance and . . . stated it would be fine."

In October 2015, the Department filed a supplemental petition and obtained a removal warrant authorizing Z.J. to be removed from mother's custody. When the Department contacted maternal grandmother, she was upset and threatened to record her calls with the Department because she did not see mother's noncompliance as an issue as "she only missed drug tests." On November 3, 2015, mother stated to the social worker that the court had found she had complied with all court orders and that was the reason her child had been returned to her care. Mother walked out of her interview with the social worker.

On December 22, 2015, the court sustained the allegations of the section 387 supplemental petition and removed Z.J. from mother's custody. Mother argued that her work schedule had prevented her from testing. However, the work schedule entered into evidence showed she was not working on a number of the testing dates. The court granted mother another six months of family reunification services, again over the Department's objection. Mother appealed.

DISCUSSION

Section 387 supplemental petition

Mother contends substantial evidence does not support the court's decision to sustain the Department's supplemental petition and remove Z.J. from her custody. We disagree.

"We review the court's jurisdictional and dispositional findings on a supplemental petition for substantial evidence. [Citations.] Evidence is substantial if it is ""reasonable, credible, and of solid value'; such that a reasonable trier of fact could make such findings.'" [Citation.] [Mother], as the party challenging the juvenile court's findings and orders, bears the burden to show there is no evidence of a sufficiently substantial nature. [Citation.]" (*In re F.S.* (2016) 243 Cal.App.4th 799, 811–812.)

An agency will file a supplemental petition under section 387 when it seeks to change the placement of a dependent child from a parent's care to a more restrictive placement. (*In re T.W.* (2013) 214 Cal.App.4th 1154, 1161.) "The petition must allege facts that establish by a preponderance of the evidence that a previous disposition order was ineffective, but it need not allege any new jurisdictional facts or urge additional grounds for dependency because the juvenile court already has jurisdiction over the child based on its findings on the original section 300 petition. [Citation.] If the court finds

the allegations are true, it conducts a dispositional hearing to determine whether removing custody is appropriate. [Citations.] "'The ultimate 'jurisdictional fact' necessary to modify a previous placement with a parent or relative is that the previous disposition has not been effective in the protection of the minor.'" [Citation.]" (*In re F.S., supra*, 243 Cal.App.4th at p. 808.)

At the 18-month status review hearing, the Department argued that mother's lack of compliance with court-ordered programs constituted prima facie evidence that it would be detrimental to return Z.J. to her custody. (§ 366.22, subd. (a)(1) ["The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental"].) Nevertheless, the court returned Z.J. to mother's custody, expressly admonishing mother that she needed to test negative for drugs to avoid having Z.J. removed again and ordering individual and conjoint counseling for mother. The court continued to actively exercise jurisdiction over the case, including ordering family maintenance services over the Department's objection.

Had mother tested negative for drugs during the review period between April and October 2015, there would have been no need for a supplemental petition. Instead, mother had only one negative test and missed 11 tests over a six-month period. Each of her missed tests is "properly considered the equivalent of a positive test result." (*In re*

Christopher R. (2014) 225 Cal.App.4th 1210, 1217.) Mother acknowledged at the 18-month review hearing that she understood the court wanted negative drug test results, and she committed to delivering the expected results. Then, after only one negative drug test, she missed 11 tests and openly flouted the Department's efforts to remind her that a missed test was the equivalent of a dirty test, claiming her attorney was aware of her non-compliance and said it would be fine. At the contested hearing on the supplemental petition, mother argued her work schedule prevented her from testing, but her own evidence contradicted her argument. When the court pointed out the discrepancy to mother, the excuses continued, with mother claiming that the workers "change shifts a lot."

Z.J. had already been out of mother's custody for 18 months when the court expressed its frustration that it did not know what it would take to get mother to test. Ultimately, the court's decision to return Z.J. to mother's custody did not have its intended effect, since mother continued to miss her drug tests. Mother's continued excuses and her failure to comply with court-ordered services constitute substantial evidence in support of the court's decision to sustain the supplemental petition and remove Z.J. from mother's custody.

ICWA findings

Mother also seeks reversal of the court's ICWA

findings, contending the court erroneously concluded ICWA was inapplicable. We agree that a limited reversal is necessary in order to provide notice under ICWA.

At the June 2013 detention hearing, father filed a Parental Notification of Indian Status claiming he may have Indian ancestry, identifying the "NazPrez" tribe in Oregon on his paternal side. He also informed the court that he did not have the correct spelling, and the court responded that it would have the Department conduct further inquiry and see if it was on the list of protected tribes. Father later told the Department he did not know which tribe he may have heritage in and did not want to claim any Indian heritage. He denied knowing of any family members registered with any Indian tribe. Based on the Department's report, the court found ICWA to be inapplicable on October 3, 2013.

Mother's challenge to the court's October 3, 2013 findings is timely. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 10–12 [the court has a continuing duty in all dependency proceedings to determine whether a child is an Indian child, unless proper and adequate ICWA notice has been given].) "In 1978, Congress passed [ICWA], which is designed to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children 'in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.'" (*In re Marinna J.* (2001) 90

Cal.App.4th 731, 734, quoting 25 U.S.C. § 1902.) "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 (*Damian C.*).) To satisfy the notice provisions of ICWA and provide a proper record of such notice, the Department must first "identify any possible tribal affiliations and send proper notice to those entities." (*In re Marinna J.*, *supra*, at p. 739, fn. 4.)

"[O]ne of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child involved in the proceedings is an Indian child. [Citation.]" (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.) "The Indian status of the child need not be certain to invoke the notice requirement. [Citation.] Because the question of membership rests with each Indian tribe, when the juvenile court knows or has reason to believe the child may be an Indian child, notice must be given to the particular tribe in question or the Secretary [of the Interior]. [Citations.]" (*Id.* at p. 471.)

ICWA notice requirements are not triggered by the vague statement that a child "may" have American Indian ancestry because of where her great-grandmother was born and raised, or by family lore about being Indian. (See *In re*

Hunter W. (2011) 200 Cal.App.4th 1454, 1469 ["family lore" is not "reason to know" a child falls under ICWA]; *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1521 [ICWA notice requirement not triggered where the father stated he might have some Indian heritage but did not mention the tribe name, then later told the Department and the court that he did not have any Indian heritage, and his counsel retracted the claim].)

If a parent gives specific information about a potential tribal connection, however, there is a duty to inquire further and provide notice when possible. In *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1194, the mother wrote, "American Indian, Navajo-Apache," in response to a form asking whether the child "is or may be a member of, or eligible for membership in, a federally recognized Indian tribe." (*Id.* at p. 1194.) The court held that this information "gave the court reason to know that Alice *may be* an Indian child. . . . The ambiguity in the form and the omission of more detailed information, such as specific tribal affiliation or tribal roll number, do not negate appellant's stated belief that Alice may be a member of a tribe or eligible for membership." (*Id.* at p. 1198.) Similarly, in *Damian C.*, *supra*, 178 Cal.App.4th 192, mother filed a form indicating that the child's grandfather is descended from the Pasqua Yaqui. (*Id.* at p. 195.) When interviewed, the grandfather reported that he had heard his own father was Yaqui or Navajo Indian but had been later informed that the family did not have Indian heritage. (*Id.* at pp. 195–196.) His family had tried to

research their possible Indian heritage, but had been unsuccessful. (*Id.* at p. 199.) This information was "reason to know that an Indian child is or maybe involved" and triggered ICWA notice requirements. (*Ibid.*)

Father's signed statement claiming Indian ancestry through the "NazPrez" tribe in Oregon was sufficient basis to require notice to the federally-recognized Nez Perce tribe under ICWA. The specificity of father's claim, when considered together with the fact that he alerted the court that the spelling of the tribe's name was incorrect, was sufficient to require notice to the Nez Perce tribe, even though father later stated he did not want to claim Indian heritage.

Although the matter must be remanded to ensure compliance with ICWA's notice requirements, we need not reverse the disposition order removing Z.J. from parental custody because there has not yet been a sufficient showing that Z.J. is an Indian child. If a tribe later determines that Z.J. is an Indian child, "the tribe, a parent, or [the child] 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.)" (*Damian C.*, *supra*, 178 Cal.App.4th at p. 200.)

DISPOSITION

The court's December 22, 2015 order removing Z.J.

from mother's custody is affirmed. The court's October 3, 2013 ICWA finding is reversed, and the case is remanded with directions to comply with the notice requirements of ICWA to notify the Nez Perce tribe.

KRIEGLER, J.

We concur:

TURNER, P.J.

KUMAR, J.*

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