Filed 6/18/15 In re A.T. Ca2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A.T., et al., Persons Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANGEL T., Defendant and Appellant.	B260042 (Los Angeles County Super. Ct. No. CK99964)

APPEAL from an order of the Superior Court of Los Angeles County, Debra Losnick, Judge. Reversed and remanded with instructions.

Michelle Anne Cella, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel and Jessica Paulson-Duffy, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Angel T. (Father) contends the juvenile court abused its discretion in summarily denying his Welfare and Institutions Code section 388 petition for modification, filed on the day of the hearing that terminated parental rights over his 16-month old son Angel T. (Angel). Father further contends the court and the Department of Children and Family Services (DCFS) failed to comply with the requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq., ICWA) prior to terminating parental rights.[1] We affirm the court's order summarily denying the section 388 petition. However, we find that the court and DCFS failed to comply with their duty to thoroughly inquire into Angel's possible status as an Indian child and to definitively resolve whether ICWA applied. Accordingly, we conditionally reverse and remand for ICWA compliance.

FACTUAL AND PROCEDURAL BACKGROUND

Angel was detained shortly after his birth in June 2013, after DCFS received information that Mother and Angel had tested positive for methamphetamine. Mother and Father admitted they smoked methamphetamine regularly during the pregnancy. Mother said she had started two years previously. Father, who was 23, said he started smoking when he was 19. Angel was placed with foster mother Nancie K.[2]

The caseworker provided the parents referrals for appropriate programs, including weekly drug testing. Neither parent contacted any of the referrals or drug tested prior to the jurisdictional hearing. They also failed to appear for a scheduled meeting with the caseworker. At the August 2013 jurisdictional/dispositional hearing, the court found jurisdiction based on the

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

[2] Mother also had a four-year old son with a different father. That child was placed with his father and is not a subject of this appeal. Mother is not a party to this appeal.

parents' drug abuse, and ordered both parents to participate in a substance abuse treatment program and regular drug testing.[3]

In reports filed in November 2013 and February 2014, the caseworker reported that neither parent was enrolled in services or drug testing, and that neither was visiting Angel regularly.[4] Mother reported she was still using drugs. In April 2014, the caseworker reported that Father and Mother had visited Angel only three times since the February report. Neither was drug testing. Father had completed an intake appointment at El Nido Family Services and had attended one parenting class. In the meantime, Angel was doing well in his foster home. His foster mother had enrolled him in occupational therapy, child development and physical therapy. On April 29, 2014, the court terminated reunification services.

In August 2014, Mother gave birth to another child, a girl. The baby tested positive for amphetamine and methamphetamine. Hospital personnel stated that when visiting, Father appeared to be under the influence as well. The baby was detained shortly after birth, and placed in a different foster home. The caseworker interviewed Father and Mother, and confirmed they had yet to enroll in a drug treatment program. DCFS recommended a "no family reunification services" order for the new baby.

Later in August, DCFS filed a section 366.26 report for Angel recommending that parental rights be terminated. His foster family, who had cared for him since his birth, wished to adopt. The section 366.26 hearing was continued

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[3] The court found that Mother had a history of illicit drug use, was an occasional user of methamphetamine and amphetamine, had used drugs during her pregnancy with Angel, and had been under the influence while caring for Angel's older half-brother. The court found that Father was an occasional user of methamphetamine, which periodically rendered him incapable of providing regular care for Angel. Jurisdiction was asserted under section 300, subdivision (b) (failure to protect).

[4] There had been no visits at all between August 2013 and February 2014.

to September 26, to complete the home study and to obtain a supplemental report on the parents' progress. The jurisdictional/dispositional hearing for the new baby was set on same day. In a last-minute information for the court filed September 26, 2014, the caseworker reported that the parents remained difficult to contact and had missed drug tests, as well as scheduled visits with Angel and the caseworker. He also reported that Father had been assessed by a substance abuse program and was scheduled for an intake appointment in a few days. The section 366.26 hearing was continued to October 28 for a contest.[5]

In the October 2014 status review report, the caseworker stated that Angel was healthy and thriving in the care of his foster family, who continued to ensure he received occupational therapy, child development and physical therapy. Father and Mother had visited Angel only once since April 2014. In a last-minute information for the court filed October 28, 2014, the caseworker reported that Mother had failed to appear for a scheduled evaluation at a substance abuse program. Father had appeared on September 29 for his intake evaluation and had begun the substance abuse program that day.

On October 28, 2014, Father filed a section 388 petition seeking custody of Angel or additional reunification services. He presented evidence of his September 29, 2014 enrollment in the substance abuse program discussed in the caseworker's reports and completion of a parenting class on October 22, 2014. According to the evidence submitted in support of the petition, the substance abuse program required three 90-minute group meetings per week, individual counseling sessions and random drug testing, and required attendance at three Narcotics Anonymous meetings per week. The petition did not identify which parts of the program Father had begun or completed, but the caseworker's report stated that as

[5] Jurisdiction over the baby girl was established on September 26. The court continued the disposition to October 28.

of October 21, 2014, Father had attended seven group sessions out of eight, and had had one drug test, which was negative. The court summarily denied the petition, stating that the proposed change of its prior orders did not promote the best interest of the child and that the petition was "[n]ot timely."

At the section 366.26 hearing, counsel for Father requested a continuance so that a hearing could be held on his section 388 petition. The court denied the request, finding no good cause. Over the objection of DCFS's counsel and the minor's counsel, the court granted Father reunification services for the new baby based on the minimal progress he had made since reunification services were terminated for Angel. The court explained that it generally provided parents who became involved in a second DCFS proceeding "an opportunity to show . . . that they have changed their ways since the [older] child was put into a permanent plan."[6] With respect to Angel, the court found that it would be detrimental to return custody to his parents and found by clear and convincing evidence that it was likely he would be adopted. The court terminated parental rights over Angel. Father's appeal followed.

DISCUSSION

A. *Summary Denial of Section 388 Petition*

"Section 388 permits '[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court' to petition 'for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court' on grounds of 'change of circumstance or new evidence.'" (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912, quoting § 388, subd. (a).) On receipt of a section 388 petition, the court may either "summarily deny the

[6] Mother, having shown no evidence of any effort to resolve her drug abuse problem, was not provided additional reunification services.

petition" or "hold a hearing." (*In re Lesly G.*, *supra,* 162 Cal.App.4th at p. 912.) Father contends the juvenile court erred in denying his section 388 petition without a hearing. We disagree.

A section 388 petition will be summarily denied unless the petitioner makes a prima facie showing in its favor. (*In re Lesly G.*, *supra,* 162 Cal.App.4th at p. 912.) "'There are two parts to the prima facie showing: The parent must demonstrate (1) [either] a genuine change of circumstances or new evidence, and . . . (2) [that] revoking the previous order would be in the best interests of the [child]. [Citation.]'" (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079, quoting *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) The prima facie requirement is not met unless the facts alleged "'will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.'" (*In re Lesly G.*, *supra*, at p. 912, quoting *In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) We review the juvenile court's summary denial of a section 388 petition for abuse of discretion. (*In re C.J.W.*, *supra,* 157 Cal.App.4th at p. 1079.)

Here, it was undisputed that Father did nothing to address the drug use that led to Angel's detention in the 10 months between the June 2013 detention and April 2014, when family reunification services were terminated. Not only did he fail to enroll in a substance abuse program or participate in drug testing, he rarely visited Angel and failed to appear for scheduled meetings with the caseworker. He continued this behavior for an additional five months following the termination of reunification services. He finally began a substance abuse program on September 29, and filed his section 388 petition a month later, on the day of the twice-continued section 366.26 hearing. The petition and caseworker report indicated Father had attended a few group sessions and submitted one negative drug test, but had not started individual counseling or a 12-step program. He provided no

explanation for delaying his enrollment in these programs or for his failure to take any action to address his drug problem earlier.

A petition for modification filed at the last minute must do more than indicate that the offending parent has, at long last, begun efforts to comply with the reunification plan and address the problems that led to the child's removal. By the time the section 366.26 hearing is scheduled, the court's focus must shift from the parents' rights to custody of and authority over their children to "the needs of the child for permanency and stability." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "Childhood does not wait for the parent to become adequate. [Citation.]" (*Id*. at p. 310; see *Cresse S. v. Superior Court* (1996) 50 Cal.App.4th 947, 954-955 [parent's "flurry of activity on the eve of" the 18-month review hearing, where she had failed in every respect until then to comply with the reunification plan, did not require court to extend reunification services or delay section 366.26 permanent planning hearing]; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 641 [summary denial of section 388 petition filed shortly before section 366.26 hearing affirmed where father presented evidence of his completion of a 90-day alcohol treatment program and a brief period of sobriety]; *In re Jeremy S*. (2001) 89 Cal.App.4th 514, 521, disapproved on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396 [summary denial of petition filed day before permanency hearing affirmed where father established only that he was attending substance abuse group therapy twice a month].) Under the evidence presented in support of the petition, there was no basis for the court to find a genuine change in Father's circumstances or that preventing Angel from achieving permanence and stability with the family who had cared for him all his life and wished to adopt him would have been in Angel's best interests.

Father contends the court's statement that the petition was "untimely" suggests that the court imposed an arbitrary cutoff date to his section 388 petition.

He contends such petitions may be filed "at any time" between the jurisdictional finding and the issuance of the order terminating parental rights. (See *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *Amber R. v. Superior Court* (2006) 139 Cal.App.4th 897, 902.) We view the court's statement as a comment on the minimal progress established by Father in the petition for modification, as well as the fact that the petition was filed on the date of the section 366.26 hearing, not a determination that a specific statutory deadline had been missed.

Father contends the court's decision was unreasonable because on the same day it summarily denied the petition, it ordered DCFS to provide Father six months of reunification services with respect to Angel's newborn sister. Angel and his sister were not similarly situated. The baby had been separated from her parents for only two months at the time of the hearing. Angel was detained in June 2013 and had been in the custody of his foster family for 16 months. He was bonded to them and doing well in their custody and care. They wished to adopt him. He had no bond with his sister, with whom he had never lived. The court explained that it ordered reunification services -- over the objections of DCFS and the sister's counsel -- not because Father had succeeded in overcoming his addiction, but because it had a policy of providing a second chance to any parent making an effort to combat the problems that led to the removal of an older child. That the court provided Father an opportunity for a fresh start with a much younger child is not evidence that it abused its discretion in denying Father's petition for modification.

B. *ICWA*

At the time of Angel's detention, Father filled out a standard "Parental Notification of Indian Status" form. He checked the box stating he might have Indian ancestry, and recommended contacting his mother, for whom he provided a

local telephone number. At the June 11, 2013 detention hearing, the court asked Father why he believed he might be an American Indian and whether his family was enrolled in a tribe. Father responded: "I don't know"; "I asked my mom"; and "I heard . . . ." The court stated: "Right now I don't have enough to know that [ICWA] would apply to the case," and instructed DCFS to evaluate Father's claim of Indian ancestry. The court's June 11 order stated: "The court finds that there is no reason to know that this is an ICWA case." The August 2013 jurisdiction/disposition report indicated that on July 18, 2013, Father told the caseworker he had no American Indian heritage. There was no explanation for Father's about-face, and no indication that DCFS contacted the paternal grandmother or anyone else to inquire about the family's possible Indian heritage. The court did not make a final determination of Angel's Indian status or the applicability of ICWA to the proceeding.[7] Father contends the order terminating his parental rights must be conditionally reversed due to failure to comply with ICWA.[8] We agree.

ICWA "protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions." (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1197.) "When a court 'knows or has reason to know that an Indian child is involved' in a juvenile dependency proceeding, a duty arises under ICWA to give the Indian child's tribe notice of the pending proceedings and its

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[7] The jurisdiction/disposition report erroneously stated "[o]n 06/11/13 the Court found that [ICWA] does not apply." This assertion was repeated verbatim in several reports filed thereafter. Beginning with the August 2014 section 366.26 report, the reports more accurately stated: "On 06/11/2013 '[the court found] that there is no reason to believe this is an ICWA case.'"

[8] Such claims are cognizable on appeal notwithstanding the parent's failure to raise the issue in the juvenile court. (*In re Z.N.* (2009) 181 Cal.App.4th 282, 296-297; *In re J.T.* (2007) 154 Cal.App.4th 986, 991.)

right to intervene." (*In re Shane G*. (2008) 166 Cal.App.4th 1532, 1538, quoting 25 U.S.C. § 1912(a).)[9] Once there is "reason to know that an Indian child is involved," the required notices "shall be sent . . . unless it is determined that [ICWA] does *not* apply . . . ." (§ 224.2, subd. (b), italics added.)

As explained in *In re H.B.* (2008) 161 Cal.App.4th 115, "ICWA itself does not expressly impose any duty to inquire as to American Indian ancestry; nor do the controlling federal regulations." (*Id*. at p. 120.) "But ICWA provides that states may provide 'a higher standard of protection to the rights of the parent . . . of an Indian child than the rights provided under [ICWA].'" (*Ibid*, quoting 25 U.S.C. § 1921.) The governing California statute specifically provides that the juvenile court and DCFS have "an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . has been filed is or may be an Indian child in all dependency proceedings . . . ." (§ 224.3, subd. (a); see *In re L.S.*, *supra*, 230 Cal.App.4th at p. 1197; Cal. Rules of Court, rule 5.481(a).) This statutorily-imposed duty to inquire includes a requirement that the caseworker "make further inquiry regarding the possible Indian status of the child . . . as soon as practicable" after the issue arises, "by interviewing the parents, Indian custodian, and extended family members . . . and contacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility." (§ 224.3, subd. (c); see *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1466; Cal. Rules of Court, rule 5.481(a)(4).)

Very little is required to trigger the duty to inquire. Inquiry is necessary where even "vague or ambiguous information is provided regarding Indian

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[9] Under ICWA, an Indian child is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) In case of doubt whether a child is eligible for membership, determination is made by the tribe, not the juvenile court or DCFS. (*In re B.R.* (2009) 176 Cal.App.4th 773, 781-783.)

heritage or association," such as "'I think my grandfather has some Indian blood'" or "'My great-grandmother was born on an Indian reservation in New Mexico.'" (*In re Alice M*. (2008) 161 Cal.App.4th 1189, 1200.) "Failure to . . . determine whether . . . ICWA applies is prejudicial error." (*In re L.S.*, *supra*, 230 Cal.App.4th at p. 1197.)

Here, the court received information on the parental questionnaire and from its questioning of Father at the detention hearing that Angel was or could be an American Indian. The questionnaire stated that further information could be obtained from the paternal grandmother. At the hearing, Father confirmed that any information he had was from his mother. At that point, the court had no reason to know that it was an ICWA case, but could not affirmatively conclude that it was not. The court instructed DCFS to make further inquiry. It appears from the jurisdiction/disposition report, that the caseworker did not question the grandmother, whose contact information was provided. Instead, the caseworker re-questioned Father, who allegedly denied American Indian heritage. There was no explanation and no indication that this information was brought to the attention of the court, or that the court made a final ruling on the ICWA issue. Limited reversal is required to correct these omissions.[10]

Respondent suggests that because the jurisdiction/disposition report stated Father denied Indian heritage in an interview with the caseworker a month after the detention hearing, we may safely assume ICWA is not applicable. Recent authority establishes that merely obtaining a statement contradicting a parent's earlier assertions of Indian heritage does not satisfy the duty of inquiry. In *In re*

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[10] Limited reversal for failure to comply with ICWA "'does not mean the trial court must go back to square one'" (*In re Gabriel G*. (2012) 206 Cal.App.4th 1160, 1168); it means that it regains jurisdiction to determine "the one remaining issue." (*In re Francisco W*. (2006) 139 Cal.App.4th 695, 705.)

Gabriel G., supra, 206 Cal.App.4th 1160, the father indicated in the ICWA form that the paternal grandfather was a member of the Cherokee tribe, but when subsequently interviewed by the social worker, reportedly stated that he did not have Indian heritage. The report "did not provide any specifics regarding the inquiry [the social worker] made of father as to his Indian heritage . . . . Nor did the social worker state whether he specifically asked father to elaborate on the information provided in the ICWA-020 form or to explain any discrepancy between its contents and father's statement to the social worker." (*Id*. at p. 1167.) The court of appeal concluded that on the record, it was unclear what the father intended to convey, and that "[h]aving received conflicting information," both the social worker and the court had a duty to inquire further. (*Id*. at pp. 1167-1168.)

Similarly, in *In re L.S., supra*, 230 Cal.App.4th 1183, after failing to claim Indian heritage in a prior dependency proceeding, the mother claimed and then denied "Blackfoot" heritage, and subsequently either stated that she had Cherokee heritage or said she had no Indian heritage -- the facts were unclear. (*Id*. at pp. 1196-1197.) The juvenile court "never clarified the facts regarding claims of Indian heritage" and "never ruled on whether . . . ICWA applied." (230 Cal.App.4th at p. 1197.) The court of appeal concluded that the agency "may have performed its duty of inquiry," but "failed in its duty to document it and to provide clear information to the court so the court could rule on the question . . . whether . . . ICWA applied." (*Id*. at p. 1198.) The appellate court further found that the juvenile court failed to comply with its duty: "Given the conflicting and inadequate information on mother's claim of Indian heritage, the court had a duty either to require the Agency to provide a report with complete and accurate information regarding the results of its inquiry and notice or to have the individual responsible for notice to testify in court regarding the inquiry made, the results of the inquiry, and the results of the notices sent. Only then could the court determine

whether . . . ICWA applied." (*Ibid*.) The court reversed and remanded for determination whether ICWA applied and if so, whether the agency complied with its notice provisions. (*Id*. at p. 1201.)

Here, the court similarly failed to resolve the conflicting information received from Father or determine which of Father's contradictory statements was true. On remand, the court should hold a hearing to resolve the factual conflict and determine whether ICWA applies. (See *In re Jeremiah G*. (2009) 172 Cal.App.4th 1514, 1517-1519 [remand unnecessary where father filled out two ICWA forms, one claiming Indian heritage and one stating he had none: court held a hearing to resolve the discrepancy and specifically found minor was not an Indian child].) If Father is unable to satisfactorily explain why he claimed and then denied Indian heritage, DCFS may be required to interview the paternal grandmother concerning the family's possible Indian heritage. If information about the family's possible connection to a recognized Indian tribe is uncovered, DCFS must give notice in compliance with ICWA. If the court determines the family has no connection to a recognized tribe or if, after notice, no tribe seeks to intervene, the order terminating parental rights may be reinstated.

DISPOSITION

The October 28, 2014 order terminating parental rights over Angel is reversed. The matter is remanded to the juvenile court with directions to resolve whether Angel is or may be an Indian child covered by ICWA. If so, the court is to ensure that DCFS gives notice in compliance with ICWA. If the court determines there is no tribal connection or if, after notice, no tribe seeks to intervene, the order terminating parental rights may be reinstated.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.