Filed 4/19/17 In re Z.G. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 Z.G., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B276331 (Super. Ct. No. 14JV00377) (San Luis Obispo County)
SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. PAUL G., Defendant and Appellant.	

Paul G. (Father) appeals from two postjudgment orders: (1) a June 22, 2016 order denying two requests for a change in his son's foster placement (Welf. & Inst. Code, § 388)[1];

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

and (2) a June 29, 2016 order selecting tribal customary adoption as the permanent plan and the current foster parents as the prospective adoptive parents (§ 366.26). He contends the trial court did not comply with the Indian Child Welfare Act (ICWA) adoptive placement preferences. (25 U.S.C. § 1901 et seq.)

We affirm the June 22 order denying a change in foster placement because the placement complies with ICWA's foster placement preferences.[2] We dismiss the appeal from the June 29 order as moot because the tribe did not file a tribal adoption order and the court set the matter for hearing to select a new permanent plan. (§ 366.24, subd. (c)(6); Code Civ. Proc., § 909; Evid. Code, § 459.)

BACKGROUND

The San Luis Obispo County Department of Social Services (the Department) removed three-year-old Z. from his parents' care in October 2014 after he watched Father overdose on heroin in the home of his paternal aunt, Nikea G. (Aunt). (*Paul G. v. Superior Court* (June 15, 2016, B270222) [nonpub. opn.].) Z.'s mother was in jail.

Z.'s paternal grandfather (Grandfather) is an enrolled member of the San Pasqual Band of Mission Indians (the tribe). Father and Aunt are not enrolled. The tribe approved Z.'s

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[2] Father's opening brief states he appeals "orders entered on June 29," and states his "appeal . . . is exclusively concerned with the selection of an appropriate permanent placement for [Z.] under ICWA." We review both orders, however, because Father's notice of appeal identifies both the June 22 order (in which the court denied two requests for change in placement pursuant to section 388) and the June 29 order (selecting a permanent plan of tribal customary adoption), and Father's arguments focus on the section 388 decisions.

placement in the care of a nonrelative Indian foster family.

At the time of removal, extended family members were interested in Z.'s care but unavailable for placement. Grandfather requested placement, but he lived in Louisiana. He later withdrew his request in support of Z.'s current foster placement. Z.'s maternal grandmother (Grandmother) and maternal grandfather attended all hearings and visited Z. regularly, but they lived in senior housing in Eureka. Aunt expressed an interest in placement, but she did not complete the paperwork and there were sustained allegations of drug abuse in her home, including Father's overdose. The court considered and denied relative placement.

The tribe investigated Z.'s eligibility for tribal enrollment and determined that "this child is a descendent of [the tribe]." Before the six-month review hearing, the Department reported it was "seeking clarification as to whether [Z.] can become an enrolled member of [the tribe]." At the hearing, counsel for the Department told the court, "now he is a member of [the tribe]." Karen Kolb, director of the Tribal Family Social Services and the Indian Child Welfare Act Program, declared that, "[Z.] is considered a member of their Tribe."

Based on that information, the trial court found Z. "is an Indian child" and that ICWA applies. We assumed Z. was an Indian child when we considered, and denied, Father's petition for extraordinary relief from a February 2016 order terminating reunification services and setting a hearing to select a permanent plan. (*Paul G. v. Superior Court*, *supra*, B270222.) After we issued our decision, the California Supreme Court invalidated former rule 5.482(c) of the California Rules of Court which required courts to treat a child as an Indian child if the tribe

indicates the child is eligible for membership. (*In re Abbigail A.* (2016) 1 Cal.5th 83, 92.)

Father's 388 Request for Placement with Aunt

Before the 12-month review, Father filed a request to change Z.'s placement to Aunt's home with Father, or in the alternative to Aunt with a goal of "transition to family maintenance," (Father's 388 request). The court denied the request for placement with Father, and reserved for later ruling Father's request for placement with Aunt. Father had not successfully addressed his drug use and Aunt had not been cleared for placement. The court terminated reunification services, and set the matter for a hearing to select a permanent plan. (§ 366.26.)

Mother's 388 Request for Placement with Grandmother

Mother filed a request to change Z.'s foster placement to Grandmother with the permanent plan of adoption "(if parental rights are terminated)," (Mother's 388 request).

Hearing and Decision on 388 Requests

The court heard both 388 requests on June 10, 2016. Grandmother testified she moved from Eureka and was living with her uncle in Paso Robles "at the moment," where there was a room for Z. She visited Z. twice weekly, was present for every hearing, and hoped to adopt him. She and her uncle cleared background checks but her husband refused to submit to one. They were living separately. He was "living out of his car," and was "talking about" moving to Nevada. She could not "answer . . . at this time" whether she intended to reunite with him. She had been at her uncle's house for two weeks. Her uncle was also going through a marital separation.

Aunt acknowledged that Father overdosed three times at her home, and that her son and Z. were present when he overdosed.

The tribe reported that it approved the foster parents and their home was suitable for consideration for a tribal customary adoption. At the conclusion of the hearing the court granted de facto parent status to the foster parents. It did not rule on a request to designate them as the prospective adoptive family.

On June 22, 2016, the court denied Mother and Father's 388 requests, because it was "clear" that neither petition was in Z.'s "best interests." It found both "petitions are a vehicle for the family to assist [Father] to keep his son in his life, although he has not legally done what's required for that to occur." The court stated, "the law prefers[] to place children in family placement," but "the court [did] not have realistic placement options for that to take place." Neither counsel nor the court discussed ICWA preferences.

Order Selecting Permanent Plan

The court set a hearing for June 29, 2016, to select a permanent plan. (§ 366.26.) It selected continued foster placement with a specific goal of tribal customary adoption, following the recommendations of the tribe and the Department. It continued the selection and implementation hearing for receipt of the tribe's adoption order. (§ 366.24, subd. (c)(6).)

It appears from minute orders submitted by the Department that the tribe did not file a tribal customary adoption order. The parties represent that questions have arisen whether Z. is actually an Indian child.

DISCUSSION

Request for Judicial Notice

We grant the Department's request to take judicial notice of the trial court's minute orders dated October 27, November 16, and December 22, 2016. (Evid. Code, §§ 452, subd. (d), 459.) These orders demonstrate that no tribal adoption order was filed with the court within 120 days of the June 29 order, the court did not grant an extension, and the court set a hearing for March 10, 2017, to select a new permanent plan. (§ 366.24, subd. (c)(6).) Section 366.24, subdivision (c)(6) provides, "If the child's tribe does not file the tribal customary adoption order within the designated time period, the court shall make new findings and orders pursuant to subdivision (b) of [s]ection 366.26 and this subdivision to determine the best permanent plan for the child."

We deny the Department's request to take additional evidence of the fact that the tribe will not go forward with a tribal customary adoption order, as reported in the October 27 minute order, and the Department's "Second Addendum Report." The social worker's report is hearsay, no transcript of the tribal expert's testimony is provided, and our authority to take additional evidence in the interest of justice should be used sparingly. (Evid. Code, § 1200; Code Civ. Proc., § 909; Cal. Rules of Court, rule 8.252(b) & (c); *In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

ICWA Preferences

In a dependency proceeding involving an Indian child, the social service agency does not have its usual broad authority to select an appropriate placement for a minor. (See, e.g., § 361.2, subd. (e).) Instead, ICWA mandates specific placement preferences for both foster care and for adoption. (25

U.S.C. § 1915(a) [adoption] & (b) [foster care].) A party who seeks departure from ICWA preferences must demonstrate good cause by clear and convincing evidence. (§ 361.31, subd. (j); Cal. Rules of Court, rule 5.484; 25 C.F.R. § 23.132(b) (2016); *In re Alexandria P.* (2016) 1 Cal.App.5th 331, 347; *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1354.) We assume for discussion, but do not decide, that ICWA applies.

The ICWA preferences for placement in foster care are: (1) first to extended family members; (2) next to a foster home licensed, approved or specified by the child's tribe; (3) next to a licensed Indian foster home; and (4) then to an approved institution. (25 U.S.C. § 1915(b); § 361.31, subd. (b); Cal. Rules of Court, rule 5.484.) Because no extended family members were available, the court properly selected a foster family approved by the tribe near Z.'s home. (See *In re K.B.* (2009) 173 Cal.App.4th 1275, 1290.)

Father did not object to findings that the current foster placement complies with ICWA at the six- and 12-month review hearings. He has forfeited any challenge to those findings. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 [failure to object to nonjurisdictional error forfeits claim on appeal].)

Father argues the court should have applied ICWA's adoptive placement preferences when it ruled on Father and Mother's 388 requests. The adoptive preferences are: (1) first to extended family members; (2) next to members of the tribe; and (3) then to other Indian families. (25 U.S.C. § 1915(a); § 361.31, subd. (c).) But parental rights had not been terminated when Father appealed, and Z. remained in "foster" placement. (25 U.S.C. § 1903(1)(i).)

Father characterizes the 388 requests as "motions . . . regarding the adoptive placement of the minor." But the 388 requests concerned Z.'s foster and preadoptive placement, i.e., "temporary placement in a . . . home or institution . . . where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." (25 U.S.C. § 1903(1)(i).) The 388 requests were filed months before the court selected adoption as the permanent plan and the court denied them on June 22, before it selected a permanent plan on June 29. The order denying the requests was therefore not governed by ICWA's adoptive preferences.

Father states his "appeal . . . is exclusively concerned with the selection of an appropriate permanent placement for [Z.] under ICWA." Z.'s permanent placement has not yet been determined. (§ 366.24, subd. (c)(6).)

We do not reach Father's contention that the current foster parents are not an Indian family within the meaning of the adoptive placement preferences unless at least one of them is a member of a recognized tribe. (*In re Interest of H.N.B.* (Iowa 2000) 619 N.W.2d 340, 344.) First, Tribal expert Kolb testified the current foster parents are a "third placement preference," an "Indian home," and "members of other tribes," without objection or contrary evidence. Second, Z. is not yet placed for adoption.

DISPOSITION

We grant the Department's request to take judicial notice of the trial court's minute orders dated October 27, November 16, and December 22, 2016. We deny its request to take judicial notice of its Second Addendum Report filed in the trial court on October 26, 2016. We deny its alternative request to take additional evidence. (Code Civ. Proc., § 909.)

We affirm the order dated June 22, 2016.

We dismiss the appeal from the order dated June 29, 2016.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Linda D. Hurst, Judge

Superior Court County of San Luis Obispo

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant.

Rita L. Neal, County Counsel, Leslie H. Kraut, Deputy County Counsel, for Plaintiff and Respondent.