Filed 3/19/18 In re E.Z. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 E.Z., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B284808 (Super. Ct. No. 17JD-00104) (San Luis Obispo County)
SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, , Plaintiff and Respondent, v. M.Z., Defendant and Appellant.	

M.Z. appeals from August 23 and 25, 2017 disposition orders entered after the juvenile court sustained a dependency petition and declared appellant's 12-month-old son, E.Z. a ward of

the court. (Welf. & Inst. Code, § 300, subds. (b) & (g).)[1] Appellant contends, among other things, that the trial court erred in removing the child from her care, in granting the biological father a 35-day extended visit, and in ordering that the supervised visits take place in San Luis Obispo County. We affirm.

Facts and Procedural History

On April 24, 2017, San Luis Obispo Department of Social Services (DSS) detained 12-month-old E.Z. after appellant physically abused the child, leaving finger marks on the child's lower back. Appellant claimed the injury was due to a diaper rash and that E.Z. fell out of a walker. A doctor determined that the finger marks were due to physical abuse and noted that E.Z.'s skull was flat, a condition caused by leaving the infant on his back for long periods of time. Witnesses reported that appellant yelled and hit E.Z. on numerous occasions and there were police reports about yelling and screaming in the house. A social worker visited the home and found that it was unkempt with debris on the floor and cigarette butts next to E.Z.'s food.

DSS filed a petition for serious physical harm (§ 300, subd. (a)), failure to protect (§ 300, subd. (b)), and no provision for support (§ 300, subd. (g)). The petition alleged that appellant suffered from untreated Bipolar Disorder, had stopped taking her medication, and had anger issues. Appellant had a long mental health history. At age 11, she pulled a knife on her mother and was hospitalized for Oppositional Defiant Disorder, a possible precursor to Bipolar disorder. At age 18, appellant stopped taking her medications and was unable to control her anger.

---

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

At the detention hearing, appellant was not candid about the identity of E.Z.'s father. Appellant requested that E.Z. be placed with maternal relatives in Glendale where appellant lived. The trial court stated that it would not place E.Z. in the same home where appellant was living and ordered supervised visitation, twice a week in San Luis Obispo County.

At the May 17, 2017 jurisdiction hearing, appellant reportedly moved to Sunland but failed to show for a home inspection with the social worker. Appellant requested that E.Z. be placed with the maternal grandfather in Glendale and that the dependency proceeding be transferred to Los Angeles County. The trial court deferred ruling on the matter because the grandfather's home had an unfenced swimming pool that had not been safety-proofed for children. The trial court declined to transfer the case until it received more information about placement and E.Z.'s biological father.

On June 28, 2017, B.W. appeared as the potential father and requested paternity testing.[2] A month later, DSS submitted a DNA test report establishing B.W.'s paternity and reported that B.W. was visiting E.Z. twice a week.

Appellant insisted that B.W. was not the biological father and requested a contested disposition hearing, which was conducted on August 23, 2017. The trial court found that B.W. was the biological father and that it was in the child's best

---

[2] In July 2015, B.W. was living with appellant while appellant was pregnant with E.Z. Appellant said there was "no way he was the father" but in October 2015 filed an application for a domestic violence restraining order stating that appellant and B.W were living together months earlier. The restraining order application contained medical records concerning appellant's pregnancy.

interest to provide reunification services to both parents. The court removed E.Z. from appellant's care (§ 361, subd. (c)(1)), ordered appellant to submit to a psychological evaluation, and ordered supervised visitation in San Luis Obispo County subject to the condition that DSS could allow appellant unsupervised visits. The trial court also granted B.W. (father) a 35-day extended visit but found that placement with father would be detrimental to the child.

35-Day Visitation Order

Appellant argues that the trial court erred in ordering a 35-day extended visit with father and simultaneously finding that placement with father would be detrimental to the child. The trial court stated that it had to consider whether father was a noncustodial parent and whether it was appropriate under section 361.2, subdivision (a) "to place [E.Z.] with his father at this time. *And the court isn't going to do that*." (Italics added.) Father was a noncustodial parent and "I don't want to move too fast for [E.Z.]" "[W]hat I'm going to do at this point is place [E.Z.] on a 30-day visit with his father." The order was later changed to a 35-day visitation order.

"'Welfare and Institutions Code section 361.2 deals specifically with the removal of a child from a custodial parent when there also exists a noncustodial parent. . . .'" (*R.S. v. Superior Court* (2007) 154 Cal.App.4th 1262, 1270.) If the noncustodial parent requests custody, "the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) Rather than place the child with father, the trial court ordered a 35-day

extended visit so that E.Z. and father could develop a relationship.

Appellant cites *Savannah B. v. Superior Court* (2000) 81 Cal.App.4th 158, 162 for the principle that a dependency court may not remove the child from the physical custody of a parent and simultaneously grant the parent extended visitation. (See Cal. Juvenile Dependency Practice (Cont.Ed.Bar 2017) § 5.22, p. 337.) But that is not what happened here. The trial court removed E.Z. from appellant's custody, and placed E.Z. in foster care with extended visitation to father.

Appellant asserts that the trial court misapplied section 361.2 and the matter should be remanded for a new disposition hearing. Appellant waived the issue by not objecting to the extended visitation order. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 502.) Waiver aside, there was no abuse of discretion. DSS recommended immediate placement with father but the trial court "didn't want to move too fast." It was too early to consider placement and father had "a different status" than appellant because E.Z. was not removed from father's care. As a non-custodial, non-offending parent, father needed time to bond with his son. The extended visitation order was made so that father could receive services and progress to presumed father status. Father was ordered to undergo a psychological evaluation to fine tune the case plan because father suffered from depression and as "a young father [would be] caring for a child for the first time." The trial court ordered reunification services for both parents because they were "consider[ing] coparenting. It's definitely not something that we can talk about now because [both of you] have a horrible relationship. But we will look at it in the future going forward."

We reject the argument that the trial court abused its discretion or that extended visitation is contrary to the best interests of the child. Appellant's concerns about extended visitation and the section 361.2, subdivision (a) detriment findings are moot because the extended visitation order expired six months ago. We have granted DSS's request for judicial notice that, on November 22, 2017, the trial court granted father family maintenance services and found that placement with father would not be detrimental to the child.

Removal of Child from Appellant's Custody

Appellant argues that less restrictive alternatives should have been implemented before removing E.Z. from appellant's care. (§ 361, subd. (c)(1).) "'A removal order is proper if it is based on proof of (1) parental inability to provide proper care for the minor and (2) potential detriment to the minor if he or she remains with the parent.' [Citation.]" (*In re Francisco D.* (2014) 230 Cal.App.4th 73, 83.) The focus of section 361 is to avert harm to the child. (*Ibid.*)

Removal was appropriate because appellant's mental health problems rendered her unable to supervise, care for, and protect E.Z. Appellant not only physically and verbally abused E.Z., but quarreled with maternal family members and refused to let father see the child. Appellant was convicted of filing a false report against father, made false statements in a restraining order application, and refused to disclose the identity of the child's father. The trial court reasonably concluded that appellant posed a serious risk of harm to E.Z. until appellant addressed her mental health and parenting issues. Placing E.Z. with the maternal grandfather was not a reasonable alternative because it was uncertain whether appellant was still living there

and the house had an unfenced swimming pool that posed a risk of harm.

Supervised Visits in San Luis Obispo County

Appellant argues that the trial court abused its discretion in not ordering supervised visitation in Los Angeles County, which would have required E.Z. to undergo a six-hour round trip for each visit. The trial court had broad discretion to determine what would best protect and serve the child's best interest. (§362, subd. (a).) Once visitation is granted, a trial court's order setting the time, place and manner of visits will be upheld absent a clear abuse of judicial discretion. (*In re Neil D.* (2007) 155 Cal.App.4th 219, 225.) "No visitation order shall jeopardize the safety of the child." (§ 362.1, subd. (a)(1)(B).)

Appellant moved to Los Angeles after E.Z. was removed and failed to provide verifiable information about her new residence. The social worker recommended that the case remain in San Luis Obispo to better assist with co-parenting and facilitate transition into father's home. The trial court did not err in concluding that it was in E.Z.'s best interest to schedule supervised visits in San Luis Obispo County where E.Z. and father lived, and where the child's medical providers and caregivers were located. Six hour trips to accommodate appellant's visitation schedule are not in the child's best interest.

ICWA Notice

Appellant argues, and DSS agrees, that notice under the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq) and California related statutes (§ 224 et seq.) was not given before the disposition hearing. When the trial court knows or has reason to know that an Indian child is involved, the party seeking to remove the Indian child from the custody of its parent must

notify the parent and the Indian child's tribe of the pending proceedings and of their right to intervention. (25 U.S.C. § 1912, subd. (a); § 224.2, subd. (a)(3); *In re Abbigail A.* (2016) 1 Cal.5th 83, 91.) Before the August 2017 disposition hearing, the maternal grandmother indicated that she had Cherokee Indian heritage but no ICWA notice was given.

We have taken judicial notice that ICWA notices were sent on November 7, 2017 and the tribes responded that E.Z. is not an Indian child. (See *In re Z.N.* (2009) 181 Cal.App.4th 282, 299-300 [judicial notice may be taken of post-judgment records to assess lack of prejudice from ICWA error].) On December 8, 2017, the trial court found that ICWA did not apply.

The tribes' determination that E.Z. is not a tribe member or eligible for membership is conclusive. (§ 224.3, subd. (e)(1); *In re K.P.* (2015) 242 Cal.App.4th 1063, 1074; see *In re I.W.* (2009) 180 Cal.App.4th 1517, 1530 [alleged deficiencies in an ICWA notice are harmless if dependent child is not an Indian child]; *In re Autumn K.* (2013) 221 Cal.App.4th 674, 715 [same].) Remanding the matter back to redo the ICWA notice would be an empty formality and a waste of scarce judicial resources. (*In re E.W.* (2009) 170 Cal.App.4th 396, 402.)

Disposition

The judgment (disposition orders) are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Linda D. Hurst, Judge

Superior Court County of San Luis Obispo

Janette Freeman Cochran, 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.