Filed 8/25/15 In re Sean T. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re SEAN H., a Person Coming Under the Juvenile Court Law.	B260457
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MCKENZIE T., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK79986)

APPEAL from an order and a judgment of the Superior Court of Los Angeles County, Julie Fox Blackshaw, Judge. Affirmed in part and reversed in part.

Frank H. Free, under appointment by the Court of Appeal, for Defendant and Appellant McKenzie T.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent Los Angeles County Department of Children and Family Services.

INTRODUCTION

Mother McKenzie T. appeals the juvenile court's judgment terminating parental rights to her son, Sean H. Mother contends the juvenile court erred by summarily denying her Welfare and Institution Code section 388 petition, and by finding the Indian Child Welfare Act (ICWA) did not apply in this case and failing to ensure compliance with ICWA. We affirm the juvenile court order denying the section 388 motion because Mother alleged no new facts to support findings that providing additional reunification services or changing Sean's permanency plan to legal guardianship was in Sean's best interests. We also conclude that the juvenile court's ICWA notice determination was not supported by substantial evidence, and the court failed to ensure compliance with ICWA. We reverse the judgment terminating parental rights for the limited purpose of determining compliance with the further inquiry and notice requirements of ICWA.

FACTS AND PROCEDURAL BACKGROUND

The juvenile court detained two-month-old Sean from Mother's and Father's custody in July 2013 because the family was living in squalid conditions and Mother was abusing drugs. At the time of the detention hearing, Mother filed with the court a signed ICWA-020 form, stating that she may have Cherokee American Indian ancestry. The court asked Mother about her Indian ancestry at the hearing, and Mother informed the court that the maternal grandmother consistently claimed Indian ancestry. Mother stated that she lacked further information and needed to follow up with the maternal grandmother regarding her Indian ancestry. The court found that it had no reason to believe that ICWA applied and ordered DCFS to investigate Mother's Indian heritage and report back to the court. There is no evidence in the record indicating that DCFS ever investigated the Indian heritage claim or provided the court with additional information regarding the Mother's Indian heritage.

In August 2013, the juvenile court found jurisdiction over Sean pursuant to Welfare and Institutions Code[1], section 300, subdivision (b), sustaining allegations that (1) Mother's history of illicit drug use rendered Mother incapable of providing regular care and supervision to Sean and endangered his health and safety, and (2) the parents placed Sean at risk of physical harm by allowing Sean to live in hot, filthy, and unsanitary conditions. The court ordered reunification services for the parents. The court ordered Mother to attend a drug treatment program with drug testing and a 12-Step program, hands-on parenting classes, and mental health counseling to address childhood trauma, healthy relationships, relapse prevention, and other case issues. The court also ordered Mother to take all prescribed medications, and granted her three visits with Sean per week. The record does not reflect an ICWA finding at this juncture.

Mother had an extensive history as a dependent of the juvenile court, which involved Mother leaving her placements numerous times, and Mother was still a minor at the time of Sean's detention. DCFS attempted to place Sean together with Mother at two locations but Mother was uncooperative. DCFS also had concerns about placing Sean with Mother because on the day DCFS detained him, Sean was severely dehydrated, had a bad rash, and suffered from diarrhea, and Mother appeared to be under the influence of methamphetamine. Mother also had a history of mental health issues, including a diagnosis for bipolar disorder for which she had been prescribed medication.

DCFS placed Sean in a foster home. From July 2013 to February 2014, Mother made only six visits with Sean. During that time, Mother missed DCFS appointments, lacked stable housing, failed to go to therapy for various issues, and consistently missed drug tests. Mother did not take medication or attend individual therapy to address her bipolar disorder.

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

In March 2014, DCFS placed Sean with the paternal grandmother, who lived in Texas. Mother failed to have a goodbye visit with Sean prior to his placement with the paternal grandmother. In the months that followed Sean's placement in Texas, Mother only called the paternal grandmother once to inquire about Sean. As of August 2014, Mother periodically texted or emailed with the paternal grandmother to check up on Sean. DCFS continued to have great difficulty getting in touch with Mother, as she failed to answer her phone, her phone was disconnected, or her phone did not have voicemail set up. At that point, Mother still had not drug tested for DCFS.

In August 2014, the court found that the parents were not in compliance with their case plans and terminated reunification services. DCFS noticed the section 366.26 hearing, and petitioned for termination of parental rights. DCFS identified the paternal grandmother, who had been taking good care of Sean and who wanted to raise him, as the prospective adoptive parent.

On October 23, 2014, the date of the hearing for the section 366.26 hearing, Mother's attorney filed a section 388 petition, indicating that Mother was residing at St. Anne's, a housing program for pregnant or parenting teenagers and young adults. The petition did not state when Mother had entered the placement or how long she had been there. The petition alleged that Mother had "worked to enroll herself in school and has developed a much more stable life." The petition requested that the court order six more months of reunification services, or in the alternative, order legal guardianship as the permanent plan for Sean. The petition asserted that it was in Sean's best interest "to leave an option open, if the mother/parents are appropriate, for him to have a relationship with the bulk of his family (including future siblings) in California." The petition did not contain any documentary evidence. The juvenile court denied the section 388 petition without a hearing, stating that the request did not state new evidence or a change of circumstances and the proposed change of order did not promote Sean's best interest.

The court then held the contested section 366.26 hearing, for which Mother did not appear. The juvenile court accepted into evidence two DCFS reports; no other evidence was introduced. The court found by clear and convincing evidence that Sean was adoptable, that it would be detrimental to return him to the parents' custody, and that there were no applicable exceptions to adoption. The court terminated parental rights and identified adoption as the permanent plan for Sean.

DISCUSSION

I. The Court Did Not Abuse Its Discretion In Denying Mother's Section 388 Petition

Mother asserts that the juvenile court committed reversible error when it summarily denied her section 388 petition without a hearing. We review the juvenile court's decision to deny a section 388 petition without a hearing for abuse of discretion. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) "The parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' [Citations.] There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the [child]. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) Factors relevant to whether the change would be in the child's best interest include "the seriousness of the reason leading to the child's removal, the reason the problem was not resolved, the passage of time since the child's removal, the relative strength of the bonds with the child, the nature of the change of circumstance, and the reason the change was not made sooner." (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616.)

A parent is entitled to a hearing on a section 388 petition when the petition alleges a change in circumstance that justifies changing the juvenile court's prior orders. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 592.) However, more than "general, conclusory allegations" are required to compel a hearing. (*Id.* at p. 593.) The petition must allege facts which would sustain a favorable decision if the evidence submitted in support of the allegations were credited. (*Ibid.*) A hearing may be denied when a petition fails to reveal any change of circumstance or new evidence that would support a change of existing orders. (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413–1414.)

We conclude that the juvenile court did not abuse its discretion in denying Mother's petitions without a hearing because Mother failed to establish a prima facie showing that granting her six more months of reunification services, or in the alternative, ordering legal guardianship as the permanent plan for Sean would be in Sean's best interests. Mother's allegations of changed circumstances were limited to the fact that she was now living in a placement for pregnant and parenting teens, had worked to enroll herself in school, and had developed a much more stable life. Although these alleged facts showed that Mother was, at that time, living in a safe place rather than being homeless, they fail to show how further reunification services or a change in Sean's permanency plan would be in Sean's best interests in the context of the facts of this case.

Throughout the dependency case, Mother missed all of her drug tests, refused to engage in counseling and therapy, and failed to regularly visit Sean in foster care. Mother's petition does not address her existing and problematic substance abuse and mental health issues, i.e. the very issues that led to Sean's dependency. In addition, Mother's section 388 petition did not reveal how long she had been in this more stable position. Based on DCFS's August section 366.26 report, it appears that Mother could not have been in this placement for very long. Given Mother's unresolved mental health and substance abuse issues and Mother's history of running away from placements and refusing to cooperate with DCFS, Mother's recent placement is insufficient to show that Mother has made a significant enough change such that altering the court's previous

orders would be in Sean's best interests. Thus, the court did not abuse its discretion in denying Mother's section 388 petition without a hearing.

Mother' arguments on appeal as to the section 388 petition focus in part on legal guardianship. Mother argues that "the juvenile court's refusal to hear the case for legal guardianship was not supported by the evidence in the social workers' reports." Mother asserts that "[i]t is quite possible that the decision by the paternal grandmother . . . to adopt was prompted by fear that her grandson would be raised outside the family unless she did so." It is unclear to this Court how these arguments show that Mother made a prima facie case that her circumstances had changed and that additional reunification services or legal guardianship were in Sean's best interest. Mother's speculation on appeal regarding the paternal grandmother's motivation for wanting to adopt Sean is not relevant to the termination of Mother's reunification services. Nor is it relevant to the termination of Mother's parental rights as the availability of prospective adoptive parents "waiting in the wings" is not a prerequisite to finding Sean adoptable at a section 366.26 hearing. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.)

In short, Mother alleged no new facts to support findings that reunification services or a change in Sean's permanency plan to legal guardianship were in Sean's best interests as Mother had not addressed her underlying mental and drug abuse issues. We conclude that the court did not abuse its discretion in denying the petition without a hearing.

II. The Court Erred in Failing to Ensure Compliance with ICWA

Mother asserts that the court failed to comply with the notice requirements of ICWA. ICWA protects the interests of Indian children and promotes the stability and security of Indian children and Indian tribes by establishing minimum standards for, and permitting tribal participation in dependency proceedings. (25 U.S.C. §§ 1902, 1903(1) & 1911(c).) The question in this case is whether this requirement of tribal notice or the duty of further inquiry into Sean's status as an Indian child was triggered. "We review the trial court's findings . . . whether ICWA applies to the proceedings for substantial evidence." (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.)

California Rule of Court rule 5.481 provides that if the Department "knows or has reason to know that an Indian child is or *may be* involved, [it] must make further inquiry as soon as practicable by[,]" among other things, "[i]nterviewing the parents, Indian custodian, and 'extended family members' " and "[c]ontacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility." (California Rules of Court, rule 5.481(a)(4)(A) and (C), italics added.) Both the California and federal ICWA statutes mandate that the social welfare agency notify the child's tribe "[w]hen a dependency court has reason to know the proceeding involves an Indian child . . . ." (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 383; §224.2.)[2]

" 'Indian child' means 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).) California Rules of Court, rule 5.481(a)(5) states: "The circumstances that may provide reason to know the child is an Indian child include the following: [¶] (A) The child or a person having an interest in the child, including an Indian tribe, an Indian organization, an officer of the court, a public or private agency, or a member of the child's extended family, informs or otherwise provides information suggesting that the child is an Indian child to the court, the county welfare agency, the probation department, the licensed adoption agency or adoption service provider, the investigator, the petitioner, or any appointed guardian or conservator." "Where there is reason to believe a dependent child may be an Indian child, defective ICWA notice is 'usually prejudicial' [Citation], resulting in reversal and remand to the juvenile court so proper notice can be given." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 850.)

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[2] The "is or may be involved" standard of certainty, which triggers the duty to inquire of the Indian child status of a child in a dependency proceeding under court rule, is a lesser standard than the "is involved" standard requiring formal notice to the Indian tribes. (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200.)

Here, the court's finding that ICWA did not apply is not supported by substantial evidence. Mother informed the court under penalty of perjury on July 3, 2013, in a document titled "Parental Notification of Indian Status," of her Cherokee Indian ancestry. On that document, she checked the box that stated "I may have Indian ancestry," and listed Cherokee as the name of the tribe. That same day, the juvenile court asked Mother whether she thought she may have Cherokee ancestry, and Mother explained to the court that she remembered the maternal grandmother telling her about her Indian ancestry but that she did not have any other information. Mother stated that she needed to follow up with maternal grandmother about her ancestry. Mother admitted that she did not think the maternal grandmother lived on a reservation and stated that she never knew the maternal great-grandparents. Nonetheless, Mother asserted that the maternal grandmother "always says [she is] Indian."

Based on the foregoing, the juvenile court stated that it "has no reason to know that the child would fall under the Indian Child Welfare Act. However, [DCFS] is ordered to contact the mother who is claiming possible Indian heritage and investigate the claim that she may have Indian heritage, possibly Cherokee heritage. The social worker is to provide the court a supplemental report regarding that information. [¶] [DCFS] should include the details of who was interviewed, dates and places of births of relatives as far back as could be ascertained. The court will then determine whether or not that information should trigger notice requirements." There is no evidence in the record that DCFS ever engaged in this court-ordered investigation or provided the court with any additional information regarding the family's Indian heritage. Rather, DCFS stated to the court in subsequent reports that the court found at the July 3, 2013 hearing that ICWA did not apply.

We conclude that the court erred in finding that it had no reason to believe that ICWA applied to this case, and by not ensuring DCFS engaged in further inquiry as to Mother's Indian heritage claim. Mother clearly alerted DCFS and the court to her claim of Cherokee Indian ancestry in the ICWA-020 form and further reiterated that claim when she stated on the record that the maternal grandmother consistently claims Indian heritage. (See *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167 [the father's claim of Indian heritage on the ICWA-020 form triggered the social services agency's duty to engage in further inquiry].) Pursuant to California Rules of Court, rule 5.481, subdivision (a)(4), DCFS had a duty to make further inquiry regarding whether Sean was an Indian child, by interviewing the maternal grandmother and extended family, and/or by communicating with the tribe. "On receiving information of a claim of Indian heritage, the court and the Agency must inquire as to the tribal connection and ancestry of the parent. The Agency is then required to notice any federally recognized tribe of the proceeding including all known information. [Citation.] [¶] In order for the court to make a determination whether the notice requirements of the ICWA have been satisfied, it must have sufficient facts, as established by the Agency, about the claims of the parents, the extent of the inquiry, the results of the inquiry, the notice provided any tribes and the responses of the tribes to the notices given. Without these facts, the juvenile court is unable to find, explicitly or implicitly, whether the ICWA applies." (*In re L.S.*, (2014) 230 Cal.App.4th 1183, 1198.) DCFS failed to engage in this further inquiry and the court failed to ensure compliance with ICWA.

DCFS argues that Mother's sworn statement in the ICWA-020 form that she may have Cherokee Indian ancestry was too vague to trigger ICWA notice requirements, citing *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520, and *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467. The Courts of Appeal in those cases determined that ICWA notice requirements did not apply because the claim of Indian ancestry was too attenuated or uncertain. Notably, in *In re Jeremiah G.*, at pp. 1519-1520, the father failed to provide his possible tribal affiliation and subsequently retracted his claim of Indian heritage. In *In re Hunter W.*, at p. 1467, the mother was uncertain whether she was biologically

related to the person claiming Indian heritage, and she failed to identify the tribe. These cases are clearly distinguishable, as Mother has provided the name of the tribe in making her Indian heritage claim, is biologically related to the maternal grandmother through whom she claims the Indian ancestry, and has not retracted her statements regarding her Indian ancestry. Mother has been unequivocal in her claim that she may have Cherokee ancestry.

DCFS also cites *In re Z.N.* (2009) 181 Cal.App.4th 282, 297-298, in arguing that ICWA notice requirements were not triggered. In *In re Z.N.*, the mother suggested that the maternal great grandmothers of the twin children at issue in the case were Cherokee and part Apache. (*Id.* at p. 297.) The court held that ICWA did not apply because the fact that the great grandmothers may have been Indian "did not suggest that the twins were members or eligible for membership as children of a member." (*Id.* at p. 298; see 25 U.S.C. § 1903(4) [" 'Indian child' means 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."].) This court's holding is an outlier within the case law dealing with ICWA, and fails to take into account well establish principles regarding how membership in an Indian tribe is defined.

"The decision whether a child is a member of, or eligible for membership in, the tribe is the sole province of the tribe." (*In re Jack C.* (2011) 192 Cal.App.4th 967, 980; *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72 fn. 32 [The United States Supreme Court stated that a "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."].) In dependency proceedings, "the determination whether the child is an Indian child within the meaning of ICWA depends in large part on the tribe's membership criteria. Because of differences in tribal membership criteria and enrollment procedures, whether a child is an Indian child is dependent on the singular facts of each case." (*In re Jack C.*, at p. 979.) Thus, it is not for the court to make a finding as to the child's or the parent's status as a member of the tribe based on evidence that an extended family member is Indian, as the court did in *In re Z.N.* Rather, the tribe must determine

whether the child at issue or his or her biological parent is a member when there is some evidence of Indian ancestry.

DCFS further argues that ICWA does not apply because in previous dependency cases where Mother was the child at issue, the court found ICWA did not apply. Yet, we lack information regarding the factual basis for that juvenile court's finding, and whether the Indian ancestry claim was raised in that proceeding. Furthermore, "[t]he court, county welfare department, and the probation department have an affirmative and *continuing* duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in all dependency proceedings . . . ." (§ 224.3, subd. (a), italics added.)

Therefore, we conclude that the juvenile court's ICWA notice determination was not supported by substantial evidence, and the court failed to ensure compliance with ICWA. The termination order must be reversed for the limited purpose of determining compliance with the further inquiry and notice requirements. (See *In re Brooke C.*, *supra*, 127 Cal.App.4th at p. 385; *In re Karla C.* (2003) 113 Cal.App.4th 166, 180.)

DISPOSITION

The juvenile court's order denying Mother's section 388 petition is affirmed. The judgment terminating parental rights is conditionally reversed and the case is remanded to the juvenile court with directions to order DCFS to comply with inquiry and notice provisions of ICWA. If after receiving proper notice, no tribe indicates Sean is an Indian child within the meaning of ICWA, the juvenile court shall reinstate the order terminating parental rights.

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KITCHING, J.

We concur:

EDMON, P. J.

JONES, J.*

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