Filed 5/5/17 In re William R. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re WILLIAM R. et al., Persons Coming Under the Juvenile Court Law.	B275775
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	(Los Angeles County Super. Ct. No. CK91741)
Plaintiff and Respondent,	
v.	
J.R.,	
Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Benjamin R. Campos, Juvenile Court Referee. Conditionally affirmed and remanded.

Maryann M. Goode, under appointment by the Court of Appeal, for Objector and Appellant.

Tarkian & Associates and Arezoo Pichvai for Plaintiff and Respondent.

In this dependency action, appellant J.R. (mother) appeals from a juvenile court order terminating her parental rights to three of her four children: William R., C.R., and A.R. (Welf. & Inst. Code, § 366.26.)[1] Appellant contends the juvenile court erred in not applying the benefit exception (§ 366.26, subd. (c)(1)(B)(i)), and that the matter must be remanded to allow respondent Los Angeles County Department of Children and Family Services (department) to comply with the juvenile court's orders to provide proper notice under the federal Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.R. § 1901 et seq.). We agree only with the latter contention, and remand for further proceedings under ICWA and applicable state law (§ 224 et seq.). (See *Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 268.)

FACTUAL AND PROCEDURAL BACKGROUND

Because the department concedes that a remand in order to comply with ICWA notice requirements is appropriate, our discussion focuses on facts relevant to the benefit exception.

Mother has three sons—William R., born in May 2005; K.D.R., born in October 2006; and C.R., born in December 2008—and a daughter, A.R., born in June 2012. Neither Ruben N., the

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

alleged father of William, nor Clifton H., the presumed father of K.D., C.R., and A.R., is a party to this appeal.

In March 2011, Clifton committed acts of domestic violence against mother while William R., K.D.R., and C.R. (the boys) were present in the home. Police were called, and a referral was made to the department on behalf of the boys. Mother and Clifton entered into a voluntary family maintenance agreement with the department.

In February 2012, police alerted the department that K.D.R. had a cigarette burn on his back. The department's child social worker (CSW) interviewed William R., who said that Clifton had burned K.D.R. with a cigarette. K.D.R. told the CSW that "'daddy did it and he lied.'" Mother, who was pregnant with A.R., denied that Clifton was hurting the boys.

Based on allegations that Clifton had physically abused K.D.R. by burning him with a cigarette, physically abused the boys by hitting them with belts, and committed acts of domestic violence against mother, who failed to protect the children, the department took the boys into protective custody and filed a section 300 petition on their behalf. At the February 6, 2012 detention hearing, the juvenile court found a prima facie case had been established for removing the boys from the custody of mother and Clifton.

The juvenile court sustained an amended petition at the April 16, 2012 jurisdictional hearing, and found the boys to be dependent minors under subdivisions (a), (b), and (j) of section 300. After finding by clear and convincing evidence that the boys were at substantial risk of physical harm and severe emotional damage, and that there were no reasonable means to protect them short of removing them from their parents' custody, the

boys were ordered detained in foster care. The court granted reunification services to mother.

Two months later, in June 2012, mother gave birth to a baby girl, A.R. The department allowed mother, who was working on the reunification plan for the boys, to keep A.R. in her custody.

In January 2013, mother was arrested on a warrant for the February 2012 child abuse incident in which K.D.R. was burned with a cigarette. Mother made arrangements for A.R. to stay with her maternal grandmother during mother's incarceration. In February 2013, mother pled guilty to corporal injury to a child. (Pen. Code, § 273d, subd. (a).) (Case No. NA094436.) The superior court sentenced mother to 90 days in county jail with five years of formal probation. The superior court issued a stay away order that precluded mother from seeing the boys until she completed a parenting class and obtained a court order reinstating her visitation rights.

As a result of the superior court's stay away order, the department temporarily suspended mother's visitation with the boys. It also filed a section 300 petition on behalf of A.R., alleging that her siblings had been abused by Clifton, and mother had failed to protect the boys. In its detention report, the department stated that mother, who was incarcerated, had endangered the boys by leaving them with Clifton, knowing he was under the influence of drugs, was impatient with the boys, and had a history of violence. The department reported that mother was in partial compliance with the case plan for the boys (she was participating in a parenting class and a domestic violence support group), but had not completed the mental health services requirements. At A.R.'s detention hearing, the juvenile court

found a prima facie case for removal had been established, and ordered that A.R. be detained in shelter care.

Four months later, on June 13, 2013, the juvenile court held a contested 12-month review hearing for the boys and a combined jurisdictional/dispositional hearing for A.R. The department sought to terminate mother's reunification services based on her failure to complete the case plan for the boys. Mother sought additional reunification services based on her attendance at 18 domestic violence support group sessions from February 2012 to January 2013, and participation in an "intake" session for her mental health evaluation in May 2011. However, mother needed to complete eight more sessions in a 12-week parenting course before the no-contact order could be lifted, and her attorney acknowledged she was not prepared to regain custody at that time.

The juvenile court denied mother's request for additional services for the boys. It found she had not maintained regular or consistent contact, made significant progress in resolving the problems that led to their removal, or demonstrated a capacity or ability to complete the objectives of the case plan by the 18-month date, which was to expire on August 6, 2013. The court terminated her reunification services and scheduled a section 366.26 permanency planning hearing for the boys.[2]

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[2] The section 366.26 hearing was continued multiple times while the department sought a suitable home that could accommodate all four siblings. As we discuss, *infra*, the department had not found a single home for all four siblings when the contested section 366.26 hearing began on June 6, 2016.

After encouraging mother to complete the parenting classes, obtain a lifting of the protective order, and resume visiting the boys, the court held a jurisdiction and disposition hearing for A.R. Based on the sustained section 300 petition for the boys, the court found that A.R. was a dependent child under subdivision (j) as a result of the abuse of her siblings. It also found by clear and convincing evidence that A.R. would be at substantial risk of harm if returned to her parents, and there were no reasonable means to protect her physical health short of removal. A.R. was ordered suitably placed by the department, preferably with her siblings. The court granted mother reunification services as to A.R., and adopted the siblings' existing case plan. This allowed mother to simultaneously complete the reunification requirements for all four children.

At the August 8, 2014 contested 12-month review hearing as to A.R., mother testified that she was participating in individual counseling, had completed the parenting class and domestic violence counseling requirements, and was visiting the children. However, in response to questions by counsel for the department, mother testified she was unaware of the reasons for the children's removal. In particular, she denied that Clifton had committed acts of domestic violence against her, and claimed she did not know of findings that Clifton had physically abused the boys and burned K.D.R. with a cigarette. In addition, mother admitted she was still in contact with Clifton, and was planning to allow him to see the children upon his release from custody.

Citing mother's continued contact with Clifton and lack of insight regarding the reasons for the removal of her children, the department requested that mother's reunification services be terminated. Counsel for A.R. joined in the department's request,

and expressed concern for A.R.'s safety in light of mother's lack of progress in addressing the problems that precipitated this case.

The juvenile court stated that mother did not appear to understand the problems she needed to address in order to keep her children safe. The court found that because mother and Clifton were still "an intact couple in some form or fashion," there was cause to be concerned about the safety of the children. Notwithstanding the reasonable services that mother had received for over two years, the court found she had not made sufficient progress in correcting the problems that led to the removal of the children, and had not advanced beyond monitored visits. Finding that it would be detrimental to return A.R. to mother's custody, the court continued A.R.'s placement in her fifth foster home with Ms. W., terminated mother's reunification services for A.R., and set the matter for a permanency planning hearing under section 366.26.

Mother continued visiting the children in August and September 2014. But in September 2014, the caregiver for William R. and C.R. expressed concern that mother was making false allegations against her. Because of the caregiver's concerns, William R. and C.R. were moved to a new home. A's caregiver expressed similar concerns. In November 2014, mother told the children that they were going to be returned to her custody. This caused confusion for William R.

In December 2014, mother filed a section 388 petition seeking additional reunification services. She argued the children had not been placed together, and her visits were not occurring. She requested three visits per week. In addition, mother asked that the department be required to comply with ICWA inquiry and notice requirements. The parents had

provided the names of several tribes mentioned by the children's ancestors.

On December 2, 2014, the court ordered the department to investigate the parents' claims of Indian ancestry and provide notice to the Blackfeet and Cherokee tribes. At the February 10, 2015 hearing on mother's section 388 petition, the court declined to provide additional reunification services, but granted as many weekly three-hour visits as could be managed by the monitor. The department was ordered to use its best efforts to place the children together in the same home and provide proper ICWA notice to the tribes.

The department sent ICWA notices to the tribes on March 18, 2015. However, the record does not contain return receipts or responses from the tribes.

Mother visited the children in April, May, and June, 2015, and had several missed visits.[3] In July 2015, mother filed another section 388 petition for reinstatement of reunification services, which was denied. She again alleged that the children had not been placed together in the same home (the record shows that C.R. and A.R. were living with Ms. W., William R. was living with Ms. S., and K.D.R. was living with Ms. P.). Between September and December 2015, mother had no visits with William R., but had some phone contact with him.

According to the department's December 8, 2015 interim review report, Ms. W. was interested in adopting A.R., C.R., and William R. Ms. W. was not certain about adopting K.D.R., who had behavioral issues and had confronted Ms. W. in an angry

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[3] Mother was arrested for carrying a concealed weapon on January 12, 2015. She pled guilty and was placed on formal probation for three years.

manner during a visit. Ms. W. had two other children, and the addition of A.R., C.R., and William R. would preclude her from adding another child without an exemption. Ms. W. was concerned whether the needs of all of the children could be met if she were to adopt K.D.R., who had special needs.

In its January 28, 2016 interim review report, the department stated that after searching for two years, it had not found an adoptive home for all four children. In anticipation that Ms. W. would adopt three of the siblings, William R. was placed in her home in January 2016. Ms. W.'s home was approved for the adoption of William R., C.R., and A.R., and she indicated her willingness to maintain their relationship with K.D.R.[4]

In its April 20, 2016 last minute information, the department reported that William R. had begun expressing anger toward mother for allowing the children to be placed in foster care and failing to reunify with them. William R. and C.R. had been making positive statements about Ms. W., whom they called "Mom." Ms. W. was looking for new activities for William R., who was enrolled in an equestrian program. Although Ms. W. was committed to being their adoptive parent, she was not interested in being their foster parent, and the department continued to believe that adoption was in the children's best interest.

During the contested section 366.26 hearing that began on June 6, 2016, mother was in custody for reasons not explained in the record. Mother testified that she had been regularly visiting

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[4] In order for Ms. W. to enter into a post adoption contract, K.D.R. would have to be in a permanent placement. Because K.D.R.'s foster parent, Ms. B., was not interested in a permanent plan, the department was looking for a placement for K.D.R. that would allow continued sibling contact.

the children twice a month at a McDonald's. At the beginning of each visit, the children would run and hug her, screaming "Mommy." During their visits, the children played together, told stories, made videos, and talked about their school, their friends, and any problems they were having. The children told her that they loved her and wanted to go home with her. They hugged mother three to four times at the end of each visit. On cross-examination, mother admitted that the visits were monitored, and she had missed some visits due to miscommunication with the caregiver or illness.

C.R. testified that he is in first grade, lives with Ms. W., and sees mother once a week at McDonald's. He is excited to see her and would be sad if the visits were to stop. They talk about school. He calls her Mom and hugs her. He says "goodbye" at the end of the visits. He likes playing with William R. and K.D.R., and would feel sad if he did not see K.D.R. anymore.

William R., who testified by stipulation, stated that he has monitored visits with mother every other Saturday at McDonald's. He looks forward to seeing mother and his siblings, and enjoys playing with them. He loves mother and wishes he could be with her. He would be sad if he could not visit her anymore.

William R.'s counsel, Ms. Schroeder, joined with the department's request that mother's parental rights be terminated. Ms. Schroeder acknowledged that mother loves and cares for her children, and the children love their mother and want to be with her, but that is not possible right now. It would be tragic to deny William R. a permanent home with his prospective adoptive parent. He deserves a stable, loving and permanent home with his two siblings.

Mr. Kim, attorney for mother, argued for the benefit exception to termination of parental rights. He argued that mother has had regular and consistent contact with the children, who love her. Mother provides appropriate discipline, such as time outs, as well as hugs and positive interactions. The children are strongly bonded with mother, and because their relationship is significant, it should not be terminated.

C.R.'s counsel, Ms. Yee, joined with the department and Ms. Schroeder in requesting termination of mother's parental rights. Ms. Yee argued that the benefit of continuing the parental relationship would not outweigh the benefit of providing C.R. with a permanent adoptive home.

The attorney for A.R., Ms. Stahl, also joined in requesting termination of parental rights. Ms. Stahl argued that mother's visits with A.R. were not sufficiently parental in nature to warrant the application of the benefit exception. A.R., the youngest child, has been in eight different placements before her second birthday. She is doing very well in her current placement, and separating her from Ms. W. would be detrimental. Because Ms. W. is committed to allowing K.D.R. to have continued contact with his siblings, adoption would not sever the siblings' relationships.

Ms. Alexander, attorney for K.D.R., argued against the termination of parental rights. She argued that K.D.R. has a substantial relationship with his siblings. Because K.D.R. does not have a permanent placement, a post-adoption contract is not feasible, and thus it is not possible to assure he would have continued contact with his siblings after they are adopted.

Mr. Linares argued on behalf of the department to terminate the parents' parental rights to William R., C.R., and

A.R., and free them for adoption. He argued that the benefits of having a permanent home outweighed the incidental benefit to be had from maintaining contact with mother and K.D.R.; mother has not acted in a parental role toward her children for several years; and whether K.D.R. would be harmed by having his siblings adopted is not the applicable test.

The court found that none of the exceptions to termination of parental rights had been proven. The court acknowledged the children are bonded with mother, but concluded they do not look to her for the stability and continuous care that a parent provides. The court found the benefits the children would gain from having a stable, loving, and permanent home with an adoptive parent far outweighed the harm they might suffer from the termination of mother's parental rights. After finding by clear and convincing evidence that returning William R., C.R., and A.R. to their parents would be detrimental, and that the children were adoptable, the court terminated the parental rights of mother, Ruben, and Clifton.

DISCUSSION

I

On appeal, mother challenges the juvenile court's denial of her request to apply the benefit exception. (§ 366.26, subd. (c)(1)(B)(i).) There is a split of authority as to the standard of review that applies in reviewing such orders. Many courts have applied the substantial evidence standard (see, e.g., *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953), others have applied the abuse of discretion standard (see, e.g., *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351), and still others have applied a hybrid that incorporates both standards (see *In re Bailey J.* (2010) 189

Cal.App.4th 1308, 1314–1315). Under any of these standards, we affirm the trial court's ruling.

At a permanency planning hearing under section 366.26, adoption is the preferred permanent plan when there is no probability of reunification with a parent. (*In re K.P.* (2012) 203 Cal.App.4th 614, 620.) "To implement adoption as the permanent plan, the juvenile court must find, by clear and convincing evidence, that the minor is likely to be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) Then, in the absence of evidence that termination of parental rights would be detrimental to the child under statutorily specified exceptions (§ 366.26, subd. (c)(1)(A)-(B)), the juvenile court 'shall terminate parental rights' (§ 366.26, subd. (c)(1))." (*Ibid.*)

The benefit exception applies "when '[t]he court finds a compelling reason for determining that termination would be detrimental to the child' (§ 366.26, subd. (c)(1)(B)) because '[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.' (§ 366.26, subd. (c)(1)(B)(i).) The 'benefit' prong of the exception requires the parent to prove his or her relationship with the child 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; see also *In re Derek W.* [(1999)] 73 Cal.App.4th [823,] 826 ['parent has the burden to show that the statutory exception applies'].) . . . The relationship that gives rise to this exception to the statutory preference for adoption 'characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child

relationship.' (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) Moreover, '[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement.' (*In re Jasmine D.*[, *supra*,] 78 Cal.App.4th [at p.] 1350.)" (*In re K.P., supra,* 203 Cal.App.4th at p. 621, italics omitted.)

The record shows that although there were periods during which mother had regular visits with the children, she did not advance beyond monitored visits. The legislative preference for adoption is difficult to overcome where, as here, the parent never "advanced beyond supervised visitation. The difficulty is due to the factual circumstances of the parent[] in failing to reunify and establish a parental, rather than caretaker or friendly visitor relationship with the child." (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.)

Mother has not met her burden of proof for the benefit exception. The evidence shows she has not occupied a parental role in the lives of her children for many years. A.R., who was only six months old when mother was incarcerated, is now almost five years old and has lived in foster care almost her entire life. C.R., who is almost nine years old, was detained at age three, and has spent two-thirds of his life in foster care. William R., who was detained at age six, will be 12 years old in May of this year. He has lived nearly half his life in foster care.

The fact that the children are bonded with mother and would miss her if they are adopted does not require reversal of the juvenile court's ruling. "The parent must do more than demonstrate 'frequent and loving contact[,]' (*In re Beatrice M.*

[(1994)] 29 Cal.App.4th [1411,] 1418) an emotional bond with the child, or that parent and child find their visits pleasant. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) Instead, the parent must show that he or she occupies a 'parental role' in the child's life. (*Ibid.*; see also *In re Beatrice M.*, *supra*, 29 Cal.App.4th at pp. 1418–1419.)" (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) Here, the record does not demonstrate that mother has occupied a parental role in the lives of William R. and his siblings.

Mother's reliance upon a December 2, 2014 email written by Lauren Calton, former counsel for the minors, is misplaced. In the email, Ms. Calton stated that if all four children were not placed with Ms. J., "we need to seriously look at release to mom especially since MGM said today that she no longer lives with mom." To our knowledge, this message, which was written 18 months before the section 366.26 hearing, was not mentioned at that hearing. By then, Ms. Calton was no longer counsel for the minors, and the attorneys for the three siblings who lived with Ms. W. were in favor of adoption.

II

Mother contends the matter should be remanded to allow the department to comply with ICWA inquiry and notice requirements. Although notices were sent to several tribes, the record does not contain return receipts or responses from the tribes. (See § 224.2, subd. (d) ["[n]o proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs"].)

The department states that it "does not oppose a limited reversal of the termination of mother and father's parental rights

and remand to procure proper notice to any appropriate tribes. If no tribe deems the children Indian, the juvenile court shall reinstate the order terminating parental rights." (See *Tina L. v. Superior Court, supra,* 163 Cal.App.4th at p. 268.)

DISPOSITION

The matter is remanded to the juvenile court and the department is directed to conduct a meaningful investigation of mother's claim of possible Indian ancestry. The department is to make "genuine efforts to locate other family members who might have information bearing on the children's possible Indian ancestry. If that investigation produces any additional information substantiating [mother's] claim, notice must be provided to any tribe that is identified or, if the tribe cannot be determined, to the [Bureau of Indian Affairs]. The Department shall thereafter notify the court of its actions and file certified mail return receipts for any ICWA notices that were sent, together with any responses received. The court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether [the children are] Indian [children]. If the court finds they are Indian children, it shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and related California law. If not, the court's original section 366.26 order remains in effect." (*Michael V.*, *supra*, 3 Cal.App.5th at p. 236.)

The order terminating parental rights is conditionally affirmed. The matter is remanded to the juvenile court for compliance with ICWA inquiry and notice requirements as directed in this opinion.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.