Filed 1/30/26 In re A.H. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re A.H., et al., Persons Coming Under the Juvenile Court Law.	B345869
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. B.B., Defendant and Appellant.	(Los Angeles County Super. Ct. No. 19CCJP03598)

APPEAL from orders of the Superior Court of Los Angeles County, Annabelle G. Cortez, Judge. Reversed.

Sarah Vaona, under appointment by the Court of Appeal, for Defendant and Appellant.

Dawyn R. Harrison, County Counsel, Kim Nemoy, Assistant County Counsel and Kelly G. Emling, Deputy County Counsel, for Plaintiff and Respondent.

B.B. (Mother) appeals from the juvenile court's orders denying her Welfare and Institutions Code section 388 petitions, contending the court should have conducted a hearing on the petitions and we must conditionally reverse an earlier finding that the Los Angeles County Department of Children and Family Services (DCFS) conducted an adequate inquiry under the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) and the California statutes implementing ICWA (Welf. & Inst. Code, § 224 et seq.) (Cal-ICWA).[1] We agree with the first contention and disagree with the second, and thus reverse.

BACKGROUND

We summarize only those facts relevant to this appeal.

A. Dependency Proceedings

The family is comprised of Mother, M.H. (Father), who is not party to this appeal, and their children A.H. (born 2014) and L.H. (born 2017). Although this family unit had no DCFS history, Father had been involved in a prior dependency proceeding concerning his two children with another woman.

In May 2019, Mother told Father she was leaving him because her friend, R.G., had told her that Father was cheating on her. Father, armed with a gun, forced Mother to drive him to R.G.'s house, where he shot at a van in which R.G. and her children were seated.

DCFS became involved after police executed an arrest warrant at Mother's residence, where she lived with the children and their maternal aunt but not with Father. The children were well dressed and clean. A.H. reported that Father disciplined her

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

by giving her a "whooping" with his hand or a shoe or belt, that Mother did nothing to intervene, and that the maternal aunt kept marijuana in the house. Mother reported that Father had threatened her at gunpoint while the children were present. A finding in Father's prior dependency proceeding that he had left a loaded gun accessible to his child added support to her report.

Mother was charged with attempted murder for being Father's accomplice in the shooting at R.B. The record does not reflect the offense of which she was convicted, but she was sentenced on November 14, 2019, with a parole eligibility date in January 2025.

DCFS filed a section 300 petition, which as amended alleged that Father inflicted inappropriate corporal punishment on A.H. and threatened Mother at gunpoint in the minors' presence, that Mother failed to protect her children from Father or from their maternal aunt's marijuana use, and that Father had endangered another of his children by leaving an accessible loaded gun in his car.

On September 18, 2019, the juvenile court adjudicated the petition based on exhibits and argument. Mother's counsel asked that A.H. and L.H. be placed with Mal.B., Mother's brother, and Mo.B., his fiancée and Mother's best friend, representing they had bonded with the children.

The court sustained the petition and ordered the children placed with Mal.B. and Mo.B. It ordered monitored visits, phone calls, and counseling for the children if deemed appropriate, and ordered Mother to complete a parenting course and individual counseling to address domestic violence, substance abuse, and the effects of her criminal behavior on the children.

On November 14, 2019, Mother was transferred to prison. In jail, prior to her transfer to prison, Mother participated in programs which addressed trauma, anger management, job development, parenting, healing family systems, stages of development, and wellness/exercise. On October 10, 2019, she received certificates for participating in the following groups: relationships, criminal addictive thinking, mindfulness, helping women recover, orientation keys for change, cinema therapy, rational thinking, breakthrough parenting, financial literacy and 12-step meetings. Mother successfully completed individual therapy in November 2019.

Mother had one monitored visit with the children before she was transferred to prison. While in jail, she made 15-minute calls to the children three to four times per day. A.H. told a social worker she missed her parents and asked when Mother would get out of jail. A social worker observed that A.H. had a bond with Mother. A caregiver reported that A.H. was experiencing trauma caused by Mother's absence.

At a review hearing in October 2020, the juvenile court found that Mother's progress had been substantial but the court terminated reunification services due to the anticipated length of her incarceration.

In February 2021, DCFS reported that A.H. was at the top of her first-grade class academically and had completed therapy. Mal.B. and Mo.B. reported that they remained committed to caring for the children as long as needed but hoped Mother would regain custody when she was released. DCFS reported that A.H. wished to be with her parents and missed them, but she was also happy with the caregivers and wanted to continue living with them if she could not be with her parents.

On April 23, 2021, the court held a section 366.26 hearing. It selected legal guardianship as the children's permanent plan, appointed the caregivers as the children's legal guardians, and terminated dependency jurisdiction with Kinship Guardianship Assistance Payment (Kin-GAP) funding in place.[2]

Mother did not appeal from the orders or findings made at the section 366.26 hearing.

On September 5, 2023, Mother filed a section 388 petition, seeking family reunification services based on her accomplishments while incarcerated. The court denied the petition without a hearing.

Mother was discharged from parole in August 2024. On March 14, 2025, she filed two section 388 petitions, one as to each of her daughters, asking the court to terminate guardianship and return the children to her or in the alternative to reinstate dependency and grant her six months of family reunification services.

Supported by documentation, Mother's petition declared that in December 2021, she began a "custody to community treatment re-entry program," a residential program designed to prepare participants to reenter the community. After her release from custody, she had remained free of the relationship with Father, participated in individual and group therapy, gained housing and employment, and worked toward an associate's

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[2] "The Kin-GAP program is a state program that provides ongoing funding for children who exit the dependency system to live with relative legal guardians. In order to receive funding under the program the county welfare agency must enter into a written binding agreement with the relative guardian and dependency jurisdiction must be terminated. (§§ 11386, 11387.)" (*In re Priscilla D.* (2015) 234 Cal.App.4th 1207, 1211 & fn. 2.)

degree. Mother rented a suitable apartment near the children's residence. She visited them daily, picked them up from school every day, and brought them to Mal.B.'s and Mo.B.'s home in the evenings. She took them to their medical and dental appointments, supported their school activities, and provided daily parenting support. The children spent weekends at her apartment.

Mother declared that the children remained bonded with her and wanted to live with her, and she intended to keep them in close contact with Mal.B. and Mo.B. Both guardians agreed that Mother should regain custody.

On April 4, 2025, the juvenile court denied Mother's section 388 petitions without a hearing on the ground that the proposed change of orders did not promote the children's best interests.

Mother appealed.

B. ICWA Proceedings

In June and July 2019, Mother and Father denied having any Native American ancestry. Mother soon thereafter reported that her mother may have Native American ancestry and her father, J.B., may have Cherokee ancestry. Mother's mother was deceased, but Mother provided the telephone number for her maternal aunt (the children's great-aunt), who might have more information. Mother had no contact information for J.B. and did not know who would know more about his ancestry. DCFS never contacted the maternal great-aunt. A year and a half later, Mal.B. (Mother's brother) reported there was no American Indian heritage in his family. The court concluded it had no reason to believe the children had Native American ancestry.

DISCUSSION

Mother contends the court abused its discretion by denying her section 388 petitions without a hearing, and challenges the adequacy of DCFS's ICWA inquiry. Respondent takes no position on the court's denial of Mother's section 388 petitions but argues she forfeited any appeal from the court's ICWA finding by not appealing from the order terminating jurisdiction.

A. Mother's 388 Petitions Merit a Hearing

"Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made." (§ 388, subd. (a).) "If it appears that the best interests of the child . . . may be promoted by the proposed change . . . the court shall order that a hearing be held." (§ 388, subd. (d).) A child's interests include safety, protection, physical and emotional well-being, and preservation of the family. (§ 300.2, subd. (a).) An evidentiary hearing is required when the petition makes a prima facie showing of changed circumstances and best interests. (*In re Zachary G.* (2000) 77 Cal.App.4th 799, 806.) We review a juvenile court's ruling on a section 388 petition for abuse of discretion. (*Id.* at p. 807.)

Here, Mother made a prima facie showing that her circumstances had changed. She presented evidence that she completed several counseling programs both while incarcerated and after her release, removed herself from her deleterious relationship with Father, completed parole, gained employment and housing, and pursued a college degree.

Mother also made a prima facie showing that her request promoted the best interests of the children. She was an active and positive participant in their lives, and they wished to return

to her custody. These facts, if established, demonstrated that the children's return to Mother's custody, or alternatively the reopening of dependency for the purpose of reunification, was in the children's best interests.

We therefore conclude the court abused its discretion by denying Mother's section 388 petitions without an evidentiary hearing.

B. Mother Forfeited Her ICWA Challenge

Mother also asks that we conditionally reverse the April 2021 legal guardianship order on the ground that the ICWA duty of inquiry was not met. DCFS argues Mother's challenge is too late; any defects in the ICWA inquiry should have been raised in an appeal from the guardianship order, and further, in postpermanency proceedings it no longer had a duty of inquiry. We agree with DCFS.

Congress enacted ICWA " 'to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.' " (*In re Dezi C.* (2024) 16 Cal.5th 1112, 1128–1129 (*Dezi C.*).) 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); former § 224.1, subd. (a) [adopting federal definition].)[3]

Under Cal-ICWA, the juvenile court and DCFS "have 'an affirmative and continuing duty' in every dependency proceeding to determine whether ICWA applies by inquiring whether a child is or may be an Indian child." (*Dezi C.*, *supra*, 16 Cal.5th at pp. 1131–1132.) "This continuing duty can be divided into three phases: the initial duty to inquire, the duty of further inquiry, and the duty to provide formal ICWA notice." (*In re D.F.* (2020) 55 Cal.App.5th 558, 566.)

The initial inquiry "includes, but is not limited to, asking the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child." (§ 224.2, subd. (b)(2).)

The juvenile court may find ICWA does not apply to a child's proceeding if it finds DCFS's "inquiry and due diligence were 'proper and adequate,' and the resulting record provided no reason to know the child is an Indian child." (*Dezi C.*, *supra*, 16 Cal.5th at p. 1134; see § 224.2, subd. (i)(2).)

Here, the court selected legal guardianship as A.H's and L.H.'s permanent plan at a section 366.26 permanency hearing in April 2021. Mother had the right to appeal the order and the court's implicit finding that it continued to have no reason to know the minors were Indian children and DCFS had satisfied its ICWA duty of inquiry. (See *In re Isaiah W.* (2016) 1 Cal.5th 1, 10 [parent may raise ICWA error for first time from order

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[3] Section 224.1 was amended effective September 27, 2024. (Stats. 2024, ch. 656, § 2.) We refer to the definitions in effect during Mother's earlier hearings.

terminating parental rights made at section 366.26 hearing].) Mother never appealed from the order, and the time to do so expired years ago. (See § 395, subd. (a)(1); Cal. Rules of Court, rules 5.585, 8.406(a)(1).)

A parent cannot use an appeal from denial of a postpermanency section 388 petition to challenge a legal guardianship order—and ICWA finding—made at the section 366.26 permanency hearing. (*In re N.F.* (2023) 95 Cal.App.5th 170, 180.) By failing to file a timely appeal from the court's guardianship order, Mother has forfeited her right to challenge the court's implied ICWA finding made as part of that order.

Mother argues that because the court maintains jurisdiction over the children as wards of guardianship (§ 366.4, subd. (a)), DCFS has an affirmative and continuing ICWA duty of inquiry through postpermanency proceedings. We disagree.

ICWA inquiries must be made and proper ICWA notices given in "child custody proceedings." (*Dezi C.*, *supra*, 16 Cal.5th at pp. 1129–1130; 25 U.S.C. § 1912(a) [notice in a "foster care placement or termination of parental rights proceeding"]; 25 C.F.R. § 23.107(a) [inquiry in a "child-custody proceeding"]; § 224, subd. (d).) A "child custody proceeding" is "a hearing during a juvenile court proceeding . . . that may culminate in" foster care or guardianship placement, termination of parental rights, and preadoptive or adoptive placement. (§ 224.1, subd. (d)(1); see also § 224.3, subd. (a) [ICWA notice must "be provided for hearings that may culminate in an order for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement"]; 25 U.S.C. § 1903(1).)

The postpermanency section 388 ruling was not pursuant to a child custody proceeding because none of the above outcomes was possible at that hearing—Mother was seeking to reunify with the children and have them ultimately returned to her care. (See *In re A.T.* (2021) 63 Cal.App.5th 267, 274 [ICWA not implicated in a proceeding when dependent child is placed with a parent].) ICWA thus did not apply. (*In re N.F.*, *supra*, 95 Cal.App.5th at p. 180 [ICWA did not apply to a postpermanency hearing because it was not an Indian child custody proceeding].)

Mother urges us to follow *In re T.R.* (2024) 107 Cal.App.5th 206, where the mother, in appealing from the juvenile court's jurisdiction findings and guardianship order, challenged the concomitant ICWA findings. Our colleagues in Division Seven held that "[u]nder the plain language of section 366.4, subdivision (a), [the minor] remains 'within the jurisdiction of the juvenile court' as a ward of the legal guardianship, notwithstanding the court's order terminating dependency jurisdiction. As such, the juvenile court has a duty to ensure compliance with ICWA." (*In re T.R.*, *supra*, at p. 215.)

In re T.R. is inapposite. There, the mother did not appeal from a postpermanency order nor contend DCFS and the juvenile court had ICWA duties after a permanent plan was implemented. The court held only that DCFS has an ongoing ICWA duty up to the permanency hearing, not during postpermanency proceedings.

DISPOSITION

The juvenile court's orders are reversed.
NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

BENDIX, J.

M. KIM, J.