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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Adoption of S.G.

C.D. et al.,
Plaintiffs and Respondents,
v.
N.G.,
Defendant and Appellant.

A132721

(Marin County Super.
Ct. No. FL095622)

N.G. (Mother) appeals from a judgment terminating her parental rights to her 15-year-old son, S.G., under Probate Code section 1516.5.¹ She contends: (1) substantial evidence does not support the termination of parental rights under the Family Code; (2) section 1516.5 is unconstitutional as applied; and (3) the court failed to comply with the notice requirements of the Indian Child Welfare Act (the ICWA; 25 U.S.C. § 1901 *et seq.*) We reject the first two contentions but remand the matter for purposes of compliance with the notice and inquiry provisions of the ICWA.

FACTUAL BACKGROUND

S.G. was born in December 1996. In August 2003, Mother was jailed while S.G. was visiting his maternal aunt, D.D., and her husband, C.D. (together, the D.s). S.G.

¹ All further statutory references are to the Probate Code unless otherwise stated.

stayed with the D.s during the approximately 60 days that Mother was in jail and continued to live with them after Mother's release.

Mother was jailed again in January 2004. Upon her release, she picked S.G. up from his school and took him to her brother's house in South Lake Tahoe. Later, she placed S.G. in the custody of his paternal grandfather. She explained to S.G. that she "was having troubles with [her] drug addiction and . . . needed to have him be in a safe place for his own good"

D.D., who found S.G. living with the grandfather under conditions she did not believe were safe or appropriate for a child, filed a guardianship petition together with another sister, C.G., seeking to be appointed S.G.'s co-guardians. The court granted their petition and authorized them to remove S.G. from his grandfather's custody and place him in the D.s' home pending the hearing on the permanent guardianship petition. The grandfather also filed a petition seeking to be appointed S.G.'s permanent guardian. On May 17, 2004, after an evidentiary hearing on the competing petitions, the court granted D.D. and C.G.'s petition, naming them permanent co-guardians of S.G. The court authorized unsupervised visits for the grandfather and ordered him not to remove S.G. from the county or allow him to have any contact with Mother.

In late August 2008, Mother, through an attorney, wrote to D.D. and C.G. asking for a visit with S.G. In September 2008, Mother filed a request for court-ordered visitation. She attached documents showing she had completed parenting and vocational rehabilitation classes and residential treatment in 2005, and had volunteered for the residential treatment program in 2006 and 2007. She stated she had contacted her sisters in an attempt to contact S.G. but had been unsuccessful. On December 15, 2008, the court ordered four monthly therapeutic visits between Mother and S.G. At review hearings, the court increased the visits and eventually ordered unsupervised visits.

On November 5, 2009, the D.s filed a petition to declare S.G. free from the custody and control of his parents. They requested that S.G.'s father's (Father) parental rights be terminated because he had met S.G. only once, when S.G. was a baby, had not maintained contact with him, had not supported him, and did not contact the guardians until

June 2009. The D.s also requested that Mother's parental rights be terminated because she had abused and neglected S.G., had been convicted of a felony, and had failed to support him. They declared that S.G. wished to be adopted by them and that his "best interests will be served by giving him the permanent home that he desires, with the two people [who] are giving him the love, nurturing and parental guidance that he deserves." They submitted a declaration stating Mother had been verbally abusive to S.G. during visits that occurred on June 17, 2009, and July 1, 2009, causing him emotional distress and tension. Mother's behavior during these visits was consistent with her past behavior when she was under the influence of drugs and alcohol. They further declared that a family member had observed Mother smoking marijuana on August 20, 2009, and that C.G. and her husband had observed Mother intoxicated and "reeking of marijuana" at a wedding reception on August 22, 2009. S.G. had refused to participate in visits that were scheduled for September 7 and October 12, 2009, stating he was "done with the visits, they are not beneficial, [and] he doesn't see the point."

Mother opposed the petition, stating that despite her "drug problem," she had never abandoned S.G.; rather, in "moments of clarity," she had placed him with relatives or very close family friends, believing it was in his best interest to do so. She stated, "What I've been trying to do is slowly heal the wounds of our family" through writing letters, calling, and visiting S.G. She stated, "The very most chilling[] reason" she opposed the petition was because the D.s are Jehovah's Witnesses and "some of their beliefs are just not allowable for instance, [if S.G.] were to get hurt critically," they would not allow him to get a blood transfusion in order to save his life. "That is indeed a key factor as to why I would need my parental rights to step in and save him."

The matter was referred to the probation department and mediation manager Barbara Kob prepared a report filed February 8, 2010, recommending that the court terminate Mother and Father's parental rights, as it was in S.G.'s best interests to do so. Kob stated she had met with S.G. at the D.s' home. The family lived in a "very nice, well kept, middle class family home in Corte Madera." S.G. was "an articulate and friendly young teen" who had "a very comfortable and easy relationship with [the D.s] and talked

about their travels together.” S.G. said he never knew his biological father. He characterized his visits with Mother as “disruptive and stressful” and said he was uncomfortable when he was with her. He said the last few visits had been extremely stressful for him and that it upset him when Mother asked him why he wanted to be adopted and questioned whether he loved her. He knew Mother was his biological mother but did not think of her as a parent. S.G. said that adoption was his idea because he felt strongly about legally formalizing his family. He showed her a letter he had written to the court stating he wanted to be adopted by the D.s. He was “very forceful in stating his desire for the adoption,” and said he wanted to be with the D.s and have them be his “parents forever.”

Kob conducted a telephone interview of Father, who was living in New Mexico. Father said he was only 18 years old when S.G. was born and had never been able to support S.G. Father was homeless at times and the last time he had seen S.G. was in 2000. He was not in favor of the adoption and did not know why the D.s wanted to adopt S.G.

Kob also conducted a telephone interview of Mother, who was living in Meadow Vista, California. Mother was unemployed but was “constantly job searching” and was a trainee at a car dealership. She had struggled with addiction but was at that time sober and had another child who was four years old. She was opposed to termination of parental rights because she felt S.G. needed his mother. She wanted to show S.G. she was a changed person and did not want him to be resentful towards her because “it will lead to many bad things.” She was also concerned that S.G., as a Jehovah’s Witness, would not be allowed a blood transfusion if he needed one. She believed S.G. had been manipulated by the D.s into wanting to be adopted “through promises of houses, cars and businesses”

D.D. described herself as a “stay at home aunt” who helped with her husband’s business. She stated that adoption was S.G.’s idea and that she supported his decision. She and C.G. had had legal custody of S.G. since 2004 and felt blessed that they were able to offer S.G. a stable and loving family home. D.D. said that S.G. had endured many

difficulties before he came to live with them and that there was a period of about five years during which S.G. had no interaction with Mother.

C.D. was a contractor who owned his own business. He said that S.G. was a part of their family and he loved him. C.D. supported S.G.'s wish to be adopted so that he could legally protect him in all ways, including emotionally. C.D. felt that "going back and forth to court" for the last year had been "very stressful" for S.G. He did not want to restrict S.G.'s contact with his birth parents but wanted the contact to be beneficial, not detrimental, to S.G.'s emotional well being.

In February 2011, hearings were held on the D.s' petition to terminate parental rights. The court noted that in September 2010, the parties had "extensively briefed" the issue of whether the Probate Code or Family Code applied in the case. The court ruled it was clear the petition was governed by the rules and standard of proof set forth in the Probate Code, as the matter had originated in a guardianship proceeding and D.D. was S.G.'s guardian. The fact that the D.s, who were self-represented, had filed the petition in family court did not make it a family law matter.

D.D. testified it was in S.G.'s best interest to have a stable, secure and permanent home and to not have to be in fear of being removed from the home. At the time S.G. came to live with the D.s, he was a six-year-old boy who had been exposed to Mother's substance abuse and had spent time "on the street" with Mother. He understood what "sober" meant and was aware of when Mother was "in rehab and not in rehab." At the time of trial, he was a mature, well-spoken 14-year-old and D.D. and her husband wanted to adopt him because they loved him. D.D. testified she had not restricted either parent from having contact with S.G. and always told S.G. he was free to contact or visit them at any time. After becoming S.G.'s guardian in 2004, D.D. maintained contact with Mother by writing to her. Mother also periodically sent letters to the D.s' home and sent cards and a couple of gifts to S.G. When Mother requested visitation, S.G. was "quite upset" about the idea of visiting and said he "wasn't ready." D.D. asked Mother to consider S.G.'s feelings and wait until he was ready and not force the visitation on him.

In January 2009, Mother saw S.G. for the first time since the guardianship was established. S.G. was “nervous” about visiting but “went at it with a lot of courage,” and “things seemed to be going along okay for some time.” However, on June 17, 2009, S.G. said he did not want to go for a scheduled visit, and D.D. asked if he could “perhaps . . . at least go to the movies with [Mother],” who had “driven down so far.” When S.G. returned from the visit, he was extremely upset and rushed into the house and had a big tear coming down from his eye. He was clenching his fists as he told D.D. that Mother did not respect his feelings.

At some point, S.G. said he wanted to write a letter and dictated the letter to the D.s. As he did so, he “all of the sudden . . . said the words that he wanted to be adopted.” The D.s were “shocked” but “it was wonderful that he felt that way about [them],” and they “were thrilled.” D.D. was not sure why S.G. came up with the idea of adoption when he had already been living with them, but she “guess[ed]” it was because they had gone out to dinner with a couple who talked about their adopted daughter and showed the D.s and S.G. pictures of her. D.D. testified she opposed S.G.’s visitation with Mother after C.G. told her she saw Mother “drunk and reeking of marijuana at a family wedding.”

On cross-examination, D.D. testified that S.G. went with her and her husband “wherever [they] went,” including Jehovah’s Witness meetings. C.D. served as an elder in the congregation. She testified that Jehovah’s Witnesses do not use blood transfusions but “have no problem with organ transplants.”

S.G. testified in chambers, in the presence of the attorneys and Mother’s expert witness, Cathleen Mann, Ph.D. (Dr. Mann). S.G. recalled having about three or four visits with Mother in the last year. The visits “started out with a lot of nervousness, and . . . didn’t end up very well” because the questions Mother asked made him frustrated and not “feel very well.” S.G. did not want to continue seeing Mother because “it’s just too much of a stress,” and he wanted to be adopted by the D.s so that he would have permanence and would not have to worry about “the next court date or what’s happening or anything like that.” He would be able to focus on “what’s happening today.” He recalled writing a letter to the court stating he wished to be adopted. He dictated the letter and C.D. typed it

for him because S.G. does not “know how to type very well.” He said he composed the letter and used “big words” because he hears a big word being used, “figure[s] out what it means, and then sometimes . . . just use[s] it.” He was interested in seeing his half-brother (Mother’s other son) “maybe sometimes occasionally.” S.G. testified that Mother had told him his half-brother was “in CPS [Child Protective Services] due to my mom . . . being pulled over . . . and then the police seeing . . . she was intoxicated”

Mother testified that she is the youngest of 13 children. D.D. is the second oldest. She initially used drugs recreationally, but after a tragic family incident occurred, she was “greatly impacted as far as [her] emotional well-being” and began using substances in a non-recreational way. She severely intoxicated herself on various types of drugs, was not able to function, and was arrested. While she was in jail and S.G. was at the D.s’ home, she communicated about S.G. with D.D. through letters and collect calls. When Mother was arrested again in January 2004, D.D. told her that Mother and S.G. would never see each other again. This frightened Mother, who “took charges . . . instead of fighting them . . . and got out of jail immediately so that [she] could pick up [her] son and get away from there.” She left S.G. with his grandfather, where she believed he would be safe. After S.G. returned to the D.s’ home, Mother tried to maintain contact with him by writing letters and trying to speak to him over the telephone. She called “several times” and “several years” and “kept trying” to talk to him but was unsuccessful in her attempts. She sent him cards, letters and gifts but did not believe all of them reached him because she knew the D.s were Jehovah’s Witnesses and did not celebrate birthdays and holidays. She recalled that shortly after S.G. began living with the D.s, he became very upset that Mother was not going to go to paradise because she was not a Jehovah’s Witness. Mother was concerned that S.G. would not get a blood transfusion if he needed one.

Mother testified she was no longer under the influence of any illegal substances and had become “clean” after participating in various recovery programs. She was not verbally abusive to S.G. during any of the visits. She recalled that both she and S.G. were upset after one of the unsupervised visits, but that another unsupervised visit went well. She testified she received a letter from S.G. in or about the end of 2007 in which S.G. wrote

that he loved her and missed her every day and thanked her for the gifts she had sent to him. Mother testified she had recently married a man against whom she obtained a restraining order because he was physically violent toward her and “came at [her] with a knife.” She further testified that she had recently been arrested and that her younger son had been removed from her care.

Dr. Mann testified regarding the characteristics of “high-demand groups,” including authoritarian leadership, deceptive recruiting practices, and undue influence. She believed Jehovah’s Witnesses were “not only harmful to children,” but were also “harmful to relationships that are outside of the organization.” She testified that “they scare children, for example, telling them that their parents who are not part of the organization will die in Armageddon and will not make it to paradise” Dr. Mann did not “have an issue” with the beliefs of Jehovah’s Witnesses, but found it problematic that they “scare children who don’t have the ability to chose” and are unable to “say, well, I don’t want to be part of this organization.” She believed, and there was “ample evidence,” that Jehovah’s Witnesses “alienate[] parents from children, especially if one is in the group and one is not.” She was concerned that some of their practices could harm the healthy development of a child, including not celebrating holidays or birthdays, not allowing children to salute the flag, and not allowing blood transfusions. Dr. Mann testified she was surprised at how “meek” S.G. was when he testified and had expected him to be “a little bit more forceful about his opinions.” She believed it was possible his testimony was “coached.” She opined that terminating parental rights “at [that] stage and under th[o]se circumstances” was “overkill” and “unnecessary.”

The court granted the D.s’ petition, finding all of the requirements of terminating parental rights under section 1516.5 had been met. First, the court found the parents lost legal custody in 2004 when D.D. and C.G. became S.G.’s guardians. Second, the court found that S.G. had been in the D.s’ custody for seven years—longer than the requirement that a child be in the guardian’s custody for at least two years. Third, the court found that S.G. would benefit from being adopted by the D.s. S.G. regarded the D.s as his parents and they shared a warm, loving relationship. He was attending public school, was healthy,

and appeared to be well cared for. The court acknowledged Mother's concern regarding blood transfusions but noted that courts are authorized by the Probate Code to issue orders requiring appropriate medical care, even in the absence of consent by the parent or guardian. The court also noted that S.G. spoke clearly, frequently, and unequivocally that he wished to be adopted. Although there was evidence the D.s had communicated their disapproval of Mother's lifestyle to S.G., they did so as parental figures and their acts fell "far short of alienation."

DISCUSSION

Family Code provisions

Mother contends that substantial evidence does not support the termination of parental rights under the Family Code. The trial court, however, did not terminate parental rights under the Family Code. As noted, the parties "extensively briefed" the issue of whether the Probate Code or Family Code applied. The court ruled the petition was governed by the Probate Code, and Mother does not challenge that ruling on appeal. She also does not challenge the sufficiency of the evidence for terminating parental rights under the Probate Code. Rather, she requests that we review the court's findings as if they had been made under the Family Code because minor's counsel argued for termination of parental rights under the Family Code "as an alternative ground," and because the question of whether Mother "abandoned" S.G., which is relevant to an analysis under the Family Code, was at issue in the case. The fact that minor's counsel argued an alternative basis for terminating parental rights, or the fact that abandonment was discussed in the context of what was in S.G.'s best interests under the Probate Code, did not turn this matter into a Family Code case. Mother also points out that the court stated when rendering its decision, "if the Court had been proceeding under Family Code section 7820 . . . the result would [have been] no different." The court's comment, however, does not show it based its order terminating parental rights on the Family Code, and does not require us to conduct a substantial evidence review under the Family Code.

Constitutionality of section 1516.5 as applied

Section 1516.5 authorizes the termination of parental rights if one or both parents do not have legal custody of the child, the child has been in his or her guardian’s physical custody for a period of not less than two years, and the child would benefit from being adopted by the guardian. (See also *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1124 (*Ann S.*.) In making the determination whether the child would benefit from being adopted, “the court shall consider all factors relating to the best interest of the child, including, but not limited to, the nature and extent of the relationship between all of the following: [¶] (A) The child and the birth parent[;] [¶] (B) The child and the guardian, including family members of the guardian[;] [¶] (C) The child and any siblings or half siblings.” (§ 1516.5, subd. (a).)

Evidence of parental unfitness or that termination of parental rights is the “least detrimental alternative” for the child is not required in a proceeding under section 1516.5. (*Ann S.*, *supra*, 45 Cal.4th at p. 1128.) “By that stage, the parent-child family unit has ceased to exist and the parent’s entitlement to custody is not at issue. It would be anomalous to require proof in every case, by clear and convincing evidence, that a mother or father who has had no custodial responsibilities for two or more years is currently an unfit parent.” (*Id.* at p. 1135.)

The Supreme Court in *Ann S.*, *supra*, 45 Cal.4th 1110, upheld section 1516.5 against a constitutional challenge to the facial validity of the statute but stated that “[i]n limited circumstances, . . . the best interest of the child cannot justify terminating the rights of a parent who has demonstrated a full commitment to parental responsibility, but whose efforts to secure custody have been thwarted.” The Court quoted language from *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849, that when a parent who has no custodial rights “ ‘promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.’ (*Ibid.*)” (*Ann S.*, *supra*, 45 Cal.4th at pp. 1130-1131.)

Mother contends section 1516.5 is unconstitutional as applied because she did not consent to the guardianship, had “successfully rehabilitated” herself, and had “demonstrated full commitment to her parental responsibilities.” We disagree. Although Mother did not explicitly consent to a guardianship by D.D. and C.G., she did not file an opposition to their petition and did not appear in the initial guardianship proceedings. (See *In re Sean S.* (1996) 46 Cal.App.4th 350, 353 [parent who failed to appear at a selection and implementation hearing in a dependency case was deemed to have demonstrated “no true interest in raising their children”].) She did not attempt to reassume parental responsibility or have the guardianship terminated at any point, despite the fact that there were periods during which she was sober, employed, and had a stable home. (See *Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1540 [failure to take legal action to terminate the guardianship is a factor in concluding section 1516.5 was not unconstitutional as applied].) She did not seek visitation through the courts until late 2008, more than four years after the guardianship was established.

Mother asserts she successfully rehabilitated herself but there was evidence she was intoxicated and “reeking of marijuana” in August 2009 and was arrested shortly before trial for driving under the influence with her younger son in the car. She complains she was unable to “maintain significant in-person communication and contact with [S.G.]” only because the guardians prevented her from doing so. However, D.D. testified regarding the minimal contact Mother made during the years of guardianship and also denied ever restricting either parent from having contact with S.G. Mother testified she called “several times” and “several years” and “kept trying” to talk to S.G., but the court nevertheless found Mother made “little effort” to maintain contact with S.G. It is the trial court’s role to assess the credibility of witnesses and resolve any conflicts in the evidence. (See *In re A.S.* (2011) 202 Cal.App.4th 237, 244.) We decline to reweigh the evidence on appeal.

“A prolonged guardianship, during which all parental rights and custodial responsibilities are suspended, with the possible exception of visitation rights, is generally *inconsistent* with ‘a full commitment to . . . parental responsibilities’ ” (*Ann S.*,

supra, 45 Cal.4th at pp. 1131-1132.) Mother has not shown that the application of section 1516.5 in this case violated her constitutional rights.²

The ICWA

Mother contends the trial court failed to comply with the notice requirements of the ICWA. Minor’s appellate counsel concedes, and we agree, that a limited remand is necessary.

Section 1516.5, subdivision (d), provides: “This section does not apply to . . . any Indian child.” Thus, when the petition to terminate parental rights was filed, the court, the court-connected investigator, and the petitioners in this case had the affirmative and continuing duty to inquire whether S.G. was or might be an Indian child. (See *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1387, citing Cal. Rules of Court, rule 5.481(a).) There is, however, nothing in the record indicating the requisite inquiry was undertaken or even considered. We therefore remand the matter for the limited purpose of effectuating proper inquiry and complying “with the notice provisions of the ICWA if Indian heritage is indicated.” (See *id.* at p. 1390 [declining to reverse the judgment terminating parental rights under section 1516.5 and ordering a limited remand].) If, after proper inquiry and notice, S.G. is found to be an Indian child, the parents may petition the trial court to invalidate the termination of parental rights upon a showing that such action violated the provisions of the ICWA. (See *id.* at p. 1395.)³

DISPOSITION

The matter is remanded to the trial court to comply with the notice and inquiry provisions of the ICWA. If, after proper inquiry and notice, S.G. is found to be an Indian child, the parents may petition the trial court to invalidate the termination of parental rights

² In reaching our conclusion, we have considered the legislative history of section 1516.5, of which we hereby take judicial notice as requested by Mother.

³ Mother filed a motion seeking to have us consider new evidence purporting to show that S.G. is an Indian child. We hereby deny the motion on the grounds the issue was not presented below and there are no “ ‘exceptional circumstances’ ” warranting the taking of additional evidence. (See *In re Noreen G.*, *supra*, 181 Cal.App.4th at p. 1389.)

upon a showing that such action violated the provisions of the ICWA. If S.G. is not found to be an Indian child, the judgment is affirmed.

McGuiness, P.J.

We concur:

Pollak, J.

Jenkins, J.