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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

In re M.S. et al., Persons Coming Under the
Juvenile Court Law.

SAN FRANCISCO HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

AMY S.,

Defendant and Appellant.

A141918

(San Francisco City & County
Super. Ct. Nos. JD12-3218, JD12-
3218A, JD12-3218B)

Amy S. (Mother) appeals from an order terminating her parental rights to three of her children, M.S., E.S., and A.S. She alleges the San Francisco Human Services Agency (Agency) failed to provide adequate notice to comply with the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.; ICWA). She further asserts there is insufficient evidence to support the finding of adoptability. We issue a limited reversal of the court's dispositional order and remand for a determination of proper compliance with the notice provisions of ICWA.

I. BACKGROUND

In August 2012, three-year-old M.S., two-year-old E.S., and six-month-old A.S. were subjects of a dependency petition under Welfare and Institutions Code Section¹ 300, subdivision (b). The petition alleged the children had suffered neglect through their

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

parents' inadequate provision of food, clothing, shelter, and medical care, and were subject to emotional abuse due to their parents' domestic violence. The family was homeless and had repeatedly been asked to leave shelters because of the domestic violence. The parents had failed to provide adequate food and the children had gone periods of nearly 24 hours without eating. The children were removed from the custody of their parents and placed in the foster care system.

A. ICWA Notification

Maurice S., the children's father (Father), completed the parental notification of Indian status form and stated he may have Indian ancestry. Notifications for each of the children were sent to the Bureau of Indian Affairs (BIA) and they included Mother's and Father's names and birth dates but no other family information. In response, the BIA sent letters to the Agency stating the family had provided insufficient information and the family must provide a history back to the year 1900 with names, birth dates and/or birthplaces of their ancestors.

At a settlement conference on October 24, 2012, Father provided additional information about ICWA, stating his Uncle Lamar told him he was 40 percent Cherokee from his maternal grandmother. Father provided the child welfare worker his uncle's name and phone number but stated she had never called. Father asserted his uncle could "tell her more" and he would know his grandmother's birth date.

On November 13, 2012, the Agency sent a second set of notices to the BIA with the following additional information: identification of the Cherokee tribe, name of Father's mother, and E.S.'s place of birth.

From November 2012 to January 2013, the Cherokee Nation sent the Agency three letters stating it needed the complete names and dates of birth of the paternal grandparents and great-grandparents. The third letter stated without more complete information, the Cherokee Nation could not determine tribal eligibility.

At a jurisdiction and disposition hearing on February 27, 2013, the court inquired about ICWA notification. The Agency counsel stated it provided notice to the Cherokee tribes and the BIA, it had received letters from the United Keetoowah Band of Cherokee

Indians, the Eastern Band of Cherokee Indians, the Cherokee Nation, and the BIA, and “they have all indicated that the children are not eligible for enrollment.” She stated the Cherokee Nation had requested further information and they did not have it. She then asked if all counsel would stipulate ICWA did not apply and counsel for mother and father both agreed. The court stated: “So ICWA has been complied with; is that correct?” Counsel for the children stated he would submit and the court found “ICWA does not apply.”

B. Dispositional Decision

In its report prepared for the six-month status review hearing, completed in mid-February 2014 and filed on March 4, 2014, the Agency recommended the juvenile court terminate the parents’ reunification services and set the matter for a hearing under section 366.26, based on a finding neither parent had made substantive progress in their court-ordered reunification plans. (See § 366.21, subd. (e).)

The March 2014 report detailed the current medical, educational, developmental and mental/emotional status of each child. The report described M.S. as “a playful boy who struggles with tantrums.” M.S. can follow directions and is helpful with little chores. He is attending Head Start full time but continues to have a problem with “meltdowns.” M.S. is attending speech therapy twice a week and his verbal skills “have greatly improved.” He still struggles with toilet training and still has incidents where he smears feces on the wall.

E.S. is “an adorable little girl who craves attention.” She has “behavioral issues” including tantrums and difficulty calming down after a meltdown. E.S. is attending Head Start full time and she understands the school routine but sometimes has difficulty following instructions. E.S. attends speech therapy twice a week and her speech is improving.

A.S. is an “active little boy.” A.S. attends preschool full time and his teachers describe his behavior positively. His only issue is perhaps not being as verbal as he should be.

The report's assessment of adoption states M.S., E.S, and A.S. "deserve a stable and permanent home free from domestic violence and homelessness." An adoptive home had been identified and a home study was accepted by the Agency. The prospective family had cleared the criminal history and child welfare system checks. A disclosure meeting took place addressing the social history of the family and the children's needs.

The court held hearings over two days to address the mother's reunification motion under section 388 and termination of parental rights under section 366.26. At the hearings, the child welfare worker, Rachel Krasno, discussed the children's progress. She stated an adoptive family had been identified and the children had begun visits. She said the visits were "going well. There is still the typical tantruming that the kids exhibit, but the caregivers are—the prospective adoptive parents are very much in love with these children." The children call the prospective adoptive parents "mommy" and "daddy."

Krasno stated the children "definitely have behavioral issues. They have continued to have these issues since removal" from Mother. The children have poor self-regulation and difficulty calming themselves down. M.S. still has tantrums that can last 45 minutes. All three children were undergoing speech therapy, but M.S. had met his goals and no longer needed to participate. The children had been receiving psychological counseling to address the tantrums for three weeks.

The court found: "These are young children. We do have a forever family that will step in to provide a forever home for them and for all three of them, which is remarkable and a wonderful thing." The court terminated the parental rights and referred the children to the Agency for adoptive placement. The court's order finds for each child there is clear and convincing evidence it is likely the child will be adopted.

II. DISCUSSION

A. ICWA Compliance

ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) When the notice provision is violated, an Indian child, parent, Indian custodian, or the Indian

child's tribe may petition the court to invalidate the proceeding. (25 U.S.C. § 1914; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 735 (*Marinna J.*))

1. ICWA Notice Has Not Been Waived

The Agency asserts Mother has waived her ICWA claims because she did not object before the juvenile court and cannot raise ICWA notification on appeal. “The purposes of the notice requirements of the ICWA are to enable the tribe to determine whether the child is an Indian child and to advise the tribe of its right to intervene. The notice requirements serve the interests of the Indian tribes “irrespective of the position of the parents” and cannot be waived [or forfeited] by the parent.’ ” (*Guardianship of D.W.* (2013) 221 Cal.App.4th 242, 249, quoting *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267 [citing cases holding the notice requirement is meant to protect the tribe so parents cannot waive it].) The child is entitled to ICWA's protection irrespective of the actions of the parents. (*Marinna J., supra*, 90 Cal.App.4th at p. 736.)

2. Timeliness of the Appeal

The Agency contends Mother's appeal must be dismissed as untimely because the court's dispositional order became final 60 days after it was announced on February 27, 2013. Mother did not file this appeal until May 21, 2014.

There is a split of authority whether an untimely appeal bars consideration of defective ICWA notice and the Supreme Court recently granted a petition for review of the issue. The Fifth Appellate District has held a failure to raise a timely appeal barred a mother's claim of insufficient ICWA notice. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 189 (*Pedro N.*)) In *Pedro N.*, the mother did not raise the question of ICWA notice until the court terminated her parental rights approximately two years later. “Here, the mother could have challenged the court's decision to proceed at the dispositional hearing and did not do so. We therefore conclude she is foreclosed from raising the issue now on appeal from the order terminating her parental rights.” (*Ibid.*)

The Fourth Appellate District disagreed with *Pedro N.* and concluded: “[G]iven the court's continuing duty throughout the dependency proceedings to ensure the requisite notice is given ([Cal. Rules of Court,] rule 1439(f)(5)), and the protections the

ICWA affords Indian children and tribes, the parents' inaction does not constitute a waiver or otherwise preclude appellate review." (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 251 (*Dwayne P.*)). The *Dwayne P.* court followed the Third Appellate District's analysis in *Marinna J.* and concluded "the parent's failure to appeal the jurisdictional and dispositional order does not divest us of jurisdiction or otherwise constitute a waiver of appellate review of the notice issue." (*Dwayne P.*, at p. 260; *Marinna J.*, *supra*, 90 Cal.App.4th at p. 739 ["where the notice requirements of the [ICWA] were violated and the parents did not raise that claim in a timely fashion, the waiver doctrine cannot be invoked to bar consideration of the notice error on appeal"].)

As we previously held in *In re B.R.* (2009) 176 Cal.App.4th 773 at page 779: "We agree with *In re Marinna J.* and *Dwayne P.* that the parents' failure to raise the ICWA issue now before us does not prevent us from considering the issue on the merits." We conclude Mother's failure to timely appeal the juvenile court's order regarding ICWA notice does not bar our review of ICWA compliance.

3. ICWA Notification

Mother argues the Agency and the juvenile court failed to provide meaningful notice to the Cherokee Tribe pursuant to ICWA. The forms provided here lacked information about Father's Cherokee relatives that could have been provided by his uncle.

"Although the notice forms included notification of the pendency of the proceedings and an advisement of the right to intervene, they provided scant information to assist the BIA and the tribes in making a determination as to whether the minors were Indian children. In fact, other than the names, birth dates, and birthplaces of the minors and their parents, no information was provided to assist the tribes in making this determination." (*In re D.T.* (2003) 113 Cal.App.4th 1449, 1454.) In *D.T.*, the notices failed to include information that was already known to the social worker such as the tribe affiliation and names of the minors' grandparents. "[T]he social worker's affirmative duty to inquire whether the minors might be Indian children mandated, at a minimum, that she make some inquiry regarding the additional information required to be

included in the ICWA notice.” (*Id.* at p. 1455.) The tribes and BIA were deprived of “any meaningful opportunity” to determine if the minors were Indian children and thus the error was prejudicial. (*Ibid.*)

Mother relies on *In re Jennifer A.* (2002) 103 Cal.App.4th 692, where the court found a failure to properly determine the applicability of ICWA. The birthplaces of the mother and father were listed as unknown and the birthplace of the child was listed as California but the parents were participating in the proceedings and may have been available to provide the information. “[I]t would appear [the social services agency] made little effort to provide the tribe with sufficient information for a thorough examination of tribal records.” (*Id.* at p. 705.)

While there are limits on the investigatory burden placed on the agency, the agency must make reasonable efforts to obtain known family history. (*In re C.D.* (2003) 110 Cal.App.4th 214, 225 [holding the agency has a duty to inquire about and obtain, if possible, all of the information about a child’s family history including information about grandparents and great-grandparents]; *In re Louis S.* (2004) 117 Cal.App.4th 622, 630 [“The burden is on the Agency to obtain all possible information about the minor’s potential Indian background and provide that information to the relevant tribe or, if the tribe is unknown, to the BIA.”].)

In this case, Father provided the name and contact information for his uncle who he believed could provide more information about the children’s grandmother who was alleged to have Cherokee ancestry. There is no evidence in the record the Agency contacted the uncle. Further, the agency did not respond to the repeated requests from the Cherokee Nation for additional information. The Agency failed to make reasonable efforts to obtain any additional family history. Under these circumstances, we find the ICWA notice was inadequate because the Cherokee Nation was deprived of a meaningful opportunity to determine if M.S., E.S., and A.S. were Indian children.

B. Adoptability

Mother contends there is insufficient evidence to support the court’s finding the children are adoptable. She asserts the children were not generally adoptable because of

their behavioral problems and the fact they are part of a sibling group. She argues there was no evidence they were specifically adoptable and whether the prospective adoptive parents could meet their needs.

“Although a finding of adoptability must be supported by clear and convincing evidence, it is nevertheless a low threshold: The court must merely determine that it is ‘likely’ that the child will be adopted within a reasonable time.” (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292.) We review the finding to determine if there is evidence from which a reasonable court could find adoptability. (*Ibid.*) Moreover, we review the record in the light most favorable to the juvenile court’s findings, and draw all inferences from the evidence to support the court’s determination. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1177.)

“The adoptability issue at a section 366.26 hearing focuses on the dependent child, e.g., whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt.” (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1311.) If the child is considered generally adoptable, we do not examine the suitability of the prospective adoptive home. (*In re Scott M.* (1993) 13 Cal.App.4th 839, 844.)

In *In re A.A.*, the children were physically healthy three- and four-year-olds. Both children had delayed language skills requiring therapy but they were making progress. The children also displayed aggressive behavior and required intervention and redirection during play. (*In re A.A., supra*, 167 Cal.App.4th at p. 1312.) “Given the children’s positive attributes, the progress they were making in overcoming their behavioral and emotional problems, as well as the current and former caregivers’ willingness to adopt them, the court properly could find that it was likely the children would be adopted. (§ 366.26, subd. (c)(1).)” (*Id.* at pp. 1312–1313.)

Similarly, in *In re Helen W.* (2007) 150 Cal.App.4th 71, the court found substantial evidence for a general adoptability finding where the children had more significant mental and physical challenges than presented here. The infant suffered from developmental delays, a potential neurological disorder, and delays in his gross motor skills. The two-year-old was diagnosed with autism, below-average intelligence, and

speech disabilities. She was often violent and aggressive, and had problems with toilet training and smearing feces. (*Id.* at pp. 74–75.) The court noted, however, the agency’s “report included details of the children’s appealing characteristics, including their young ages [(about two and five years old)], affectionate personality traits, positive interactions with others, and attractive physical appearances, that made adoption likely.” (*Id.* at p. 80; see *In re I.I.* (2008) 168 Cal.App.4th 857, 864, 870–871 [describing positive qualities made siblings generally adoptable despite serious behavior problems].) M.S., E.S., and A.S. are physically healthy children who are “active” and “playful.” M.S. and E.S. suffer with tantrums and require speech therapy but both are improving. A.S. has no identified behavioral issues. The children’s positive attributes and progress support a finding of adoptability.

Mother contends due to the children’s behavioral challenges and speech delays they could only be deemed specifically adoptable. The evidence does not, however, support Mother’s contention the children are not generally adoptable. Further, even if the children’s tantrums and developmental issues rendered them not generally adoptable, the adoptability finding would be supported by the fact a family wanted to adopt them. A prospective adoptive parent serves as evidence a child is likely to be adopted within a reasonable time either by the prospective adoptive parent or some other family. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649–1650.)

Mother argues this case is analogous to *In re Valerie W.* (2008) 162 Cal.App.4th 1, where the court held the deficiencies in the adoption assessment report were sufficiently egregious to require reversal. (*Id.* at p. 4.) The *Valerie W.* court found the adoption assessment lacking because it failed to consider whether the adoptive parents were qualified and it failed to adequately consider one child’s potential neurological and genetic conditions. (*Id.* at p. 15.) In *Valerie W.* the deficiencies identified in the assessment report went primarily to the suitability of the prospective parents and whether there were legal impediments to adoption. Here, the record supports a finding of general adoptability with a focus on the children, not the potential adoptive parents.

Mother further contends there was insufficient evidence to support the adoptability finding because the children were a sibling group who should not be separated. While membership in a sibling group is a potential barrier to adoption (§ 366.26, subd. (c)(1)(B)(v)), this did not appear to present an issue here as the Agency had identified at least one potential adoptive family for all three siblings.

Finally, Mother argues the juvenile court's finding of adoptability was based on a theory of specific adoptability relying on the particular prospective adoptive family's willingness to adopt the three children. However, Mother points to nothing in the record indicating the court's finding of adoptability was solely dependent on a specific family's willingness to adopt them. Given the children's positive attributes, the progress they were making in overcoming their behavioral problems, as well as the interest shown by the prospective adoptive family, the juvenile court properly found it was likely the children would be adopted. (§ 366.26, subd. (c)(1).)

III. DISPOSITION

The juvenile court's order terminating parental rights and referring the minors for adoptive placement is conditionally reversed. The matter is remanded to the juvenile court with directions to proceed in compliance with the notice provisions of ICWA. If, after proper notice to the Cherokee Nation, the court finds the minors are Indian children, the juvenile court shall proceed in accordance with ICWA. If, however, the juvenile court finds the minors are not Indian children, the court shall reinstate the order terminating parental rights.

Margulies, J.

We concur:

Humes, P.J.

Dondero, J.

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In re M.S.