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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re L.W. et al., Persons Coming Under
the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

SAMANTHA S.,

Defendant and Appellant.

C067535

(Super. Ct. Nos.
JD230588, JD230589)

Samantha S., mother of the minors, appeals from orders of the juvenile court terminating her parental rights.¹ (Welf. & Inst. Code, §§ 366.26, 395.)² Mother contends there was

¹ The last name of mother and of the father of L.W. are unusual, and in this instance we use initials for their last names. (See Cal. Rules of Court, rule 8.401(a)(3).)

² Undesignated statutory references are to the Welfare and Institutions Code.

insufficient evidence to support the juvenile court's findings that the minors were likely to be adopted in a reasonable time. Mother also contends, as to L.W., that there was a lack of compliance with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) in both accuracy of the notice and inquiry efforts.

We conclude substantial evidence supports the juvenile court's finding that the minors were adoptable, but reverse for further proceedings relating to ICWA for L.W.

FACTUAL AND PROCEDURAL BACKGROUND

The dependency proceedings began in Solano County in August 2007. The case was eventually transferred to Sacramento County in March 2010 and accepted for transfer by Sacramento County in June 2010.

In August 2007, L.W., who was then five months old, was detained due to mother's incarceration, criminal history and substance abuse. Mother identified Kenneth W. as the father of L.W., but the social worker was unable to locate him. In November 2007, the juvenile court ordered reunification services for mother to address the addiction issues that interfered with her ability to raise L.W. The services also included sessions for L.W. with a developmental specialist to address his delays. In time, those developmental services were terminated because L.W. had "progressed nicely." In March 2008, the social worker recommended further reunification services for mother. The juvenile court adopted the recommendation.

In August 2008, mother gave birth to J.K., who was also detained. J.K. was premature and was referred for assessment of possible developmental delays.

The status review report for L.W. in September 2008 recommended termination of mother's services. The report characterized Kenneth W. as an alleged father and stated that mother had said he should not be identified as L.W.'s biological father.

In the October 2008 jurisdiction/disposition report for J.K., the social worker recommended that mother be offered reunification services. The report for J.K. notes case No. FFL 100059, a prior Solano County child support case, for L.W.

At the November 2008 hearing, the parties reached an agreement to extend services to 18 months as to L.W. and to offer six months of services as to J.K. In December 2008, the minors were returned to mother and the juvenile court ordered family maintenance services.

In an April 2009 review report, the social worker stated she had had contact with Kenneth W. for the first time when he accompanied mother to a drug court hearing. Shortly thereafter, mother relapsed into drug use. The minors were removed from her custody and a supplemental petition was filed. A copy of L.W.'s birth certificate identifying Kenneth W. as the father was attached to the petition.

In June 2009, Kenneth W. made his first appearance in L.W.'s case and provided a Parental Notification of Indian Status form, which stated that he may have Indian ancestry

through the "maternal grandmother & great-grandmother" (actually his mother and grandmother), but the tribal affiliation was unknown. The Solano County Health and Social Services Department (Solano County Department) requested that the court order Kenneth W. to submit to a paternity test. The court asked Kenneth W. if he opposed a paternity test. His counsel indicated Kenneth W. did oppose it at that point because there were some existing child support orders and there may already have been an existing order regarding paternity.

On July 8, 2009, the court sustained the supplemental petition. Kenneth W. again declined a blood test but asked to be considered a presumed father based on the judgment of paternity. Counsel represented that there was a judgment of paternity in a Solano County child support case, but that he did not have a copy of it. The court apparently attempted to locate the case in its computerized system but found "[t]here's a ton of Ken [W.s]," and could not be sure which was the correct case, even with Kenneth W.'s middle name. The court was apparently unaware of or had forgotten that the October 2008 jurisdiction/disposition report identified the child support case and case number. The Solano County Department had never attempted to obtain a copy of the judgment of paternity. Kenneth W. told the court he had a copy of the paternity judgment and the court ordered Kenneth W. to bring a copy to the next hearing.

Based upon Kenneth W.'s claim of Indian ancestry, the social worker sent notice of the proceedings to the Bureau of Indian Affairs (BIA). The form identified Kenneth W. as the biological father, indicated that the "[b]iological birth father is named on [the] birth certificate" and further indicated that the "[b]iological birth father has acknowledged parentage." The notice further indicated that the minor's birth certificate was attached to the notice. The notice included the names and addresses of the biological parents with the notation that Kenneth W. "reported Indian Ancestry but did not note any tribes. The father did not have specific information regarding relatives, however, he was able to provide his mother's name." The notice contained L.W.'s paternal grandmother's name, Martha B., and stated she was born and died in Valdosta, Georgia, although a later report indicated she had relocated to Vallejo, California, when Kenneth W. was nine and "has resided there ever since." A letter from the BIA in July 2009 acknowledged receipt of the notice and returned it, stating "The family has provided insufficient information substantiating any federally recognized tribe."

The social worker's disposition report on the supplemental petition stated that mother had identified Kenneth W. as the father of L.W. and later claimed he was not the father. However, Kenneth W.'s name was on L.W.'s birth certificate and he held the minor out as his own. Using the court's computerized system, the social worker located a child support case involving mother, Kenneth W. and L.W., case No. FFL 100059.

However, the social worker made no notation of any attempts to obtain copies of any documentation from the court's child support file and no documentation was attached to the report. The social worker spoke to Kenneth W.'s niece about the present case and assessed her and Kenneth W.'s sister for placement. At that time, both minors had developmental issues and J.K. showed signs of poor attachment due to neglect. The social worker was concerned that Kenneth W. had been aware of the dependency proceedings and did not come forward to assert paternity or seek reunification until recently.

Kenneth W. was not present at the hearing on July 22, 2009. His counsel informed the court that Kenneth W.'s name was on the birth certificate. The court observed "that would tend to indicate that he has executed a declaration of paternity." However, counsel also represented that the date of birth for Kenneth W. on L.W.'s birth certificate was incorrect. In light of the inaccurate birth date, the court asked counsel to verify with Kenneth W. that he had actually signed a declaration of paternity, and emphasized, "we . . . want to make sure we have a valid declaration of paternity." Counsel did not have a copy of the child support judgment because Kenneth W. had failed to appear at the hearing. The court told counsel to have Kenneth W. bring a copy on the next court date. The juvenile court stated that Kenneth W.'s parentage had to be established to proceed with both the recommendation for services and the ICWA requirements. The court praised the Solano County Department for getting a "head start" on the ICWA noticing

before biological paternity was established, but noted that additional inquiries would be required if Kenneth W. was determined to be L.W.'s biological father. The court continued the hearing, and on July 28, 2009, found Kenneth W. to be a presumed father. There was no finding as to his status as a biological father.³

At the hearing in September 2009, the juvenile court ordered services for Kenneth W., terminated services for mother as to both minors, and subsequently set a section 366.26 hearing as to J.K. The Department requested that the court find that ICWA did not apply to L.W. based on the BIA's response to the initial notice. Without the determination of biological parenthood and the additional inquiry the court had earlier indicated would be needed, the court made the finding that ICWA did not apply to L.W.

The report for J.K.'s section 366.26 hearing recommended a six-month continuance to assess whether the current placement would be an adoptive home or whether a new home had to be found. The report stated J.K. was continuing to receive services to address developmental delays. J.K. was doing well and sessions were only to monitor him and support his development. The minors had been placed together since April 2009. The minors'

³ The record before us does not include a reporter's transcript for this hearing. The clerk's minutes do not reveal whether Kenneth W.'s status as a biological father was discussed or whether he was accorded presumed status based on the parties' ultimate agreement to provide him services.

caretaker had expressed uncertainty about a permanent plan of adoption and the social worker wanted time to assess the current provider with regard to the permanent plan or to locate another adoptive home for J.K.

The six-month review report for L.W. filed in March 2010 recommended additional services for Kenneth W. L.W. was healthy, developmentally on target, and making progress in therapy. The minors' caretaker decided she was unable to follow through with adoption. Overall, Kenneth W. had not fully complied with the case plan and was not consistently visiting L.W. However, the social worker recommended further services for Kenneth W. based on his current level of compliance. Kenneth W. filed a change of address to Sacramento County. The report indicated that mother and Kenneth W. had moved to Sacramento and were living with Kenneth W.'s sister, that they were moving into their own apartment, and that they planned to get married.

On April 2, 2010, the issues between the parties were resolved by stipulation. The stipulation included an additional six months of services for mother, transfer of the case to Sacramento County, and placement of the minors in Sacramento County in a concurrent plan home. The court adopted the recommendation of further services for Kenneth W., granted additional services to mother, and transferred the case to Sacramento County.

A social worker for the Sacramento County Department of Health and Human Services (the Department) prepared a transfer-

in report which stated that the Department had provided referrals for services to both mother and Kenneth W. The report also indicated that ICWA did not apply.

At the transfer-in hearing on May 11, 2010, the court acknowledged the prior finding by the Solano County Juvenile Court that Kenneth W. was L.W.'s presumed father. According to the clerk's minutes, the court found that ICWA had been addressed in Solano County. However, the reporter's transcript indicates the court had observed, "We established paternity and there's ICWA information -- actually I think it's information on the lack of information -- already in the file." The court accepted the transfer on June 28, 2010.

The review report filed in September 2010 recommended termination of reunification services. Mother and Kenneth W. had been evicted and their whereabouts were unknown. The minors had been together in the current foster home since April 2010. The minors were meeting developmental milestones, had no behavioral issues, and L.W. was no longer in counseling. Neither mother nor Kenneth W. had participated in services, nor had either visited the minors since June 2010. The current foster parent was willing to provide long-term foster care; however, the projected plan was to place the minors together in an adoptive home. The court adopted the recommendation and set a section 366.26 hearing.

The report for the section 366.26 hearing stated that mother and Kenneth W. had had two visits with the minors in December 2010. Both minors were in good health and had no

developmental or behavioral concerns. The minors showed a strong sibling bond. The current caretaker was not interested in adoption. An adoptive placement needed to be found and the social worker had begun the process. Several maternal and paternal relatives were contacted, but none were available or suitable for placement. The social worker assessed the minors as generally adoptable given their young ages, good health, and lack of developmental or behavioral issues. The report recommended termination of parental rights.

The court set a contested section 366.26 hearing to be held on February 17, 2011. Neither mother nor Kenneth W. appeared at the hearing but their attorneys generally objected to the social worker's recommendation and submitted the matter. The court took judicial notice of prior findings in the proceedings. The court found the minors were likely to be adopted and terminated parental rights.

DISCUSSION

I. Adoptability

Mother contends there was insufficient evidence to support a finding that the minors were likely to be adopted in a reasonable time because the minors constituted a bonded sibling set, had not yet been placed in a foster home willing to adopt them, and no home had been identified as a prospective adoptive placement.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing

court must determine if there is any substantial evidence--that is, evidence which is reasonable, credible and of solid value--to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination, we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. (*Jason L., supra*, 222 Cal.App.3d at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.)

"If the court determines, based on the assessment . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. *The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted.*" (Italics added.) (§ 366.26, subd. (c)(1).)

Determination of whether a child is likely to be adopted focuses first upon the characteristics of the child, "e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 (*Sarah M.*)). "[I]t is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.'" (*Ibid.*; accord, § 366.26,

subd. (c)(1).) “[T]here must be convincing evidence of the likelihood that adoption will take place within a reasonable time.” (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.)

Here, the sibling set consisted of only two minors, who were two years old and three years old at the time of the hearing. Both were healthy. They had no behavioral issues and their developmental issues had resolved with time and therapeutic intervention. J.K. was described as “affectionate and sweet” by the foster mother. L.W. was described as “well mannered” by the foster mother. The social worker’s opinion, based on this evidence and her observations of the minors, was that the minors were likely to be adopted.

There was currently no adoptive placement for the minors, but as we have noted, a placement is not required to support a finding that the minors are likely to be adopted. Moreover, the lack of an adoptive placement here appears to be solely due to the Department’s failure to place the minors in a concurrent home when the transfer from Solano County was accepted, and not attributable to any characteristics of the minors. The record does not enlighten us on the reasons for this circumstance and we will not speculate on it. Apparently, by the time of the hearing, no significant effort (beyond assessment of relatives) had yet been made to place the minors in an adoptive home. The failure of the potential adoptive placement in Solano County, which did not appear to be due to the minors but rather a caretaker’s change of mind, is of little relevance since it was necessary to change the minors’ placement when the case was

transferred. Moreover, when the case was in Solano County, the focus primarily had been on reunification. While the existence of a prospective adoptive home may support a finding that a child is likely to be adopted (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154; *Sarah M.*, *supra*, 22 Cal.App.4th at pp. 1649-1650), the lack of such a home under circumstances such as those presented does not undermine the juvenile court's finding.

In re B.D. (2008) 159 Cal.App.4th 1218, relied upon by mother, is factually distinguishable since it involved a sibling group of five minors, ranging in age from three to 10 years of age, with various delays and multiple placements. (*B.D.*, *supra*, at pp. 1222-1224.) For the same reason, mother's reliance on *In re Amelia S.* (1991) 229 Cal.App.3d 1060 is misplaced. That case involved a sibling set of 10 minors, ranging from newborn to age nine, with various developmental, emotional and physical problems, who were also in multiple placements. (*Amelia S.*, *supra*, at pp. 1061-1063.)

Mother also relies on *In re Brian P.*, another case that is materially distinguishable. In that case, there was no evidence to support the social worker's opinion the minor was likely to be adopted. In this case there is. In contrast to this case, the circumstances in *Brian P.* concerning the minor's "age, physical condition, and emotional state . . . raise[d] as many questions as assurances about his adoptability." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624-625.) The court noted, "While [the minor] had 'blossomed' into a healthy four-and-a-

half-year-old boy after his early developmental difficulties, he had only recently learned to dress himself. His speech and gait were still in the process of improving. He was unable to make a statement to his child welfare worker, who relied on facial expressions and gestures to infer that he was happy in his foster placement. This fragmentary and ambiguous evidence was not enough to buttress the Agency's position that [the minor] was adoptable." (*Brian P., supra*, at p. 625.) The evidence in the present case is neither fragmentary nor ambiguous.

Mother focuses on the fact that the minors represent a closely bonded sibling group and equates this circumstance to the unlikelihood of adoption for children with developmental delays.⁴ The group is small -- as small as a group can be -- and both minors are young. As far as sibling groups go, those circumstances make this group more desirable than larger groups. And we simply disagree with the argument that the circumstance of being a closely bonded sibling group presents the same challenges as obtaining adoption for minors with developmental delays.

⁴ It is clear that the intention in both counties has been to keep the minors -- who are strongly bonded -- together when selecting a permanent plan. The only time there was a suggestion to the contrary was when there was a possibility that L.W. would return to Kenneth W. if he were successful in services. The minors have always been considered a sibling set, albeit a small one.

Substantial evidence supports the juvenile court's finding that the minors are likely to be adopted within a reasonable time.

II. ICWA Notice Requirements

Mother contends the court and the Solano County Department failed to comply with the notice requirements of the ICWA as to L.W., in that there was insufficient inquiry into Kenneth W.'s Indian heritage and errors in the notice that was sent to the BIA.

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the BIA if the tribal affiliation is not known. (25 U.S.C. § 1912; Welf. & Inst. Code, § 224.2; Cal. Rules of Court, rule 5.481(b).)

Here, Kenneth W.'s claim of Indian heritage through his maternal ancestors would provide a reason to know an Indian child was involved only if there was evidence of a biological connection between Kenneth W. and L.W. Kenneth W. was found to be a presumed father. No finding was made as to biological parentage.

The ICWA makes the necessity of a biological connection clear in defining the terms relevant to the act. Thus, under

the ICWA, "(4) 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the *biological child* of a member of an Indian tribe; [and] [¶] . . . [¶] (9) 'parent' means *any biological parent* or parents of an Indian child It does not include the unwed father where paternity has not been acknowledged or established[.]"

(25 U.S.C. § 1903 (4) & (9), italics added.)

The record shows the evidence on the question of biological paternity was in conflict. Mother identified and then later denied that Kenneth W. fathered L.W. The birth certificate had an incorrect birth date for Kenneth W. No voluntary declaration of paternity or child support judgment showing biological paternity was ever produced; nor was it established whether such documentation even existed. (See Fam. Code, § 7571, subd. (a) [requiring that signed declarations of paternity be filed with the Department of Child Support Services]; see also Evid. Code, § 1284 [A writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record is admissible to prove the absence of a record in that office].) Kenneth W.'s refusal to submit to a blood test that would conclusively establish biological paternity left the question open. As the parties eventually resolved the question of services and the court found Kenneth W. was a presumed father, the question of biological paternity was never fully litigated. That finding, of course, cannot support the conclusion of biological paternity

since the status of presumed father may, but need not, be based on biology. (*In re Nicholas H.* (2002) 28 Cal.4th 56, 63 [presumed status not lost by admission that biological connection does not exist]; *In re Zacharia D.* (1993) 6 Cal.4th 435, 450, fn. 18.)

While the record contains indications that further inquiry might have produced better information regarding Kenneth W.'s Indian ancestry and his mother's status and location, none of that information is of any importance unless and until a biological connection between Kenneth W. and L.W. is established. Until that occurs, the provisions of the ICWA and related state statutes and rules simply do not apply to the case. (*In re E.G.* (2009) 170 Cal.App.4th 1530, 1532.)

It is true that the Solano County social worker proactively sent ICWA notice to the BIA. But, as the juvenile court pointed out, without a determination of the biological status of the claimant with respect to the child, ICWA provisions were not triggered. Moreover, even if paternity had been established, the juvenile court recognized that more inquiry would be required, and that did not occur here.

The litigation of the conflicting and incomplete facts on the issue of biological parentage was suspended by the agreements which led to providing services for Kenneth W., and seems to have fallen through the cracks notwithstanding the social worker's report and clerk's minutes indicating that ICWA did not apply. Consequently, we cannot make a determination of

Kenneth W.'s biological status on this record. The case must be remanded for further proceedings on the ICWA as to L.W.

Mother contends that because Kenneth W.'s name appears on L.W.'s birth certificate, no additional proof is required to establish paternity. On this point, mother relies on *In re Raphael P.* (2002) 97 Cal.App.4th 716 (*Raphael P.*). *Raphael P.* does not fully support mother's contention, but it does confirm our conclusion that the present case should be remanded for further proceedings. In *Raphael P.*, the appellant contended that the appearance of his name on the birth certificate proved he had signed a voluntary declaration of paternity. He grounded his argument upon Health and Safety Code section 102425, Family Code section 7571, subdivision (a), and Evidence Code sections 606, 660 and 664. (*Raphael P.*, *supra*, 97 Cal.App.4th at pp. 736-739.)

Health and Safety Code section 102425, subdivision (a)(4) provides in pertinent part: "If the parents are not married to each other, *the father's name shall not be listed on the birth certificate unless the father and the mother sign a voluntary declaration of paternity at the hospital before the birth certificate is prepared.*" (Italics added.)

Family Code section 7571, subdivision (a) provides in pertinent part: "[U]pon the event of a live birth, prior to an unmarried mother leaving any hospital, the person responsible for registering live births under Section 102405 of the Health and Safety Code shall provide to the natural mother and shall attempt to provide, at the place of birth, to the man identified

by the natural mother as the natural father, a voluntary declaration of paternity together with the written materials described in Section 7572. *Staff in the hospital shall witness the signatures of parents signing a voluntary declaration of paternity and shall forward the signed declaration to the Department of Child Support Services within 20 days of the date the declaration was signed. . . .*" (Italics added.)

Evidence Code section 664 provides in pertinent part: "It is presumed that official duty has been regularly performed." The presumption is one that affects the burden of proof and the party against whom it operates has the burden of proving the nonexistence of the presumed fact. (Evid. Code, §§ 606, 660.) *Raphael P.* held that Family Code section 7571, subdivision (a) imposes an official duty on hospital staff to forward signed declarations of paternity for filing. "Accordingly, once appellant provided prima facie proof that he signed a voluntary declaration of paternity, as he did by showing his name was on the birth certificate, he was entitled to rely upon the presumption of Evidence Code section 664 to establish that the document was properly filed, and it was the Department's burden to disprove this fact." (*Raphael P., supra*, 97 Cal.App.4th at p. 738.) Because the issue of whether the presumption was rebutted was not litigated, the court remanded the case back to the juvenile court for that purpose. (*Id.* at pp. 738-739.)

Here, as we have noted, the issue of paternity as a predicate to the ICWA requirements essentially fell through the cracks in Solano County before the case came to Sacramento. We

conclude that the case must be remanded to address the ICWA issues as to L.W.

DISPOSITION

The orders terminating parental rights as to J.K. are affirmed.

The orders terminating parental rights as to L.W. are reversed. L.W.'s case is remanded for the limited purpose of determining whether Kenneth W. is L.W.'s biological father and, if so, completing the ICWA inquiry. If it is determined that L.W. is an Indian child and the court determines the ICWA applies to this case, the juvenile court is ordered to conduct a new section 366.26 hearing as to L.W. in conformance with all provisions of the ICWA.

MURRAY, J.

We concur:

RAYE, P. J.

NICHOLSON, J.