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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

Adoption of G.C., a Minor.

D.R.,

Petitioner and Respondent,

v.

G.C.,

Objector and Appellant.

C068646

(Super. Ct. No.
09AD00144)

Mother G.C. (mother) appeals from a judgment under Probate Code¹ section 1516.5 terminating her parental rights to her daughter, G.C. (minor). On appeal, mother contends: 1) failure to comply with the notice provisions of the Indian Child Welfare Act (ICWA); 2) that the probate court employed an incorrect standard of proof; 3) that substantial evidence does not support

¹ Further undesignated statutory references are to the Probate Code.

the probate court's decision to terminate parental rights; and 4) due process violations. As we will explain, mother's contentions fail to persuade. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Establishment of the Guardianship

Minor was born in February 2006 to mother and her boyfriend, T.C. (father). In September 2006, mother became concerned that Child Protective Services (CPS) would remove minor because of mother's ongoing drug use. Mother contacted the paternal aunt, respondent D.R., who agreed to take minor into her home. Mother then signed a private agreement with D.R. relinquishing her parental rights to minor.

D.R. filed a guardianship petition in November 2006. Mother consented to the guardianship in January 2007. The probate court granted the petition on February 1, 2007 and issued a letter of guardianship appointing D.R. as guardian on May 16, 2007.

Petition to Terminate Guardianship/Adoption Petition

Mother apparently filed a petition to terminate the guardianship in February or March 2009, and the matter was set for hearing on March 26, 2009.² D.R. filed an adoption petition/petition to terminate parental rights pursuant to Family Code section 7822 (abandonment) on March 11, 2009.

² The petition itself is not in the record and the record contains conflicting information regarding the petition's filing date and ultimate disposition.

Probate investigator Bonnie Huffman filed a memorandum with the probate court on March 17, 2009, regarding mother's petition to terminate guardianship. According to Huffman, local rules prevented guardianship orders while adoption proceedings were pending.³ Huffman represented that mother understood that she would be able to reopen her "[p]robate petition" after the Family Court ruled on the adoption petition. Mother did not appear at the hearing on her petition to terminate guardianship, nor did she serve anyone; the matter was apparently "dropped" from calendar.

The July 2009 "Termination/Abandonment Report" prepared by the probation officer found that although mother frequently visited minor between September 2006 and early March 2007, D.R. allowed only supervised visits after mother started using illegal substances in April 2007. Mother stopped visiting and moved to New York in May 2007, where she stayed until February 2008. Minor lived with D.R. and her husband J.R. throughout this entire time.

Mother resumed her relationship with father after returning to California, and by September 2008, they were employed and seemed to have stabilized; D.R. let them visit minor again. However, by January 2009 they had been evicted from their residence and stopped contact with minor after February 1, 2009.

³ The probate court later found that Huffman was incorrect--the applicable local rule (subsequently repealed) provided that a guardianship could not be *granted* while adoption proceedings were pending.

The report noted that minor's bedroom at D.R.'s house was very age-appropriate and that minor interacted well with D.R. and J.R., who were extremely committed to minor. However, since in the opinion of the probation officer the parents had not "willfully abandoned" minor under Family Code section 7822, the report recommended denying D.R.'s petition.

Amended Adoption Petition

On March 11, 2010, D.R. and J.R. filed an amended adoption petition/petition to terminate parental rights pursuant to section 1516.5 or Family Code section 7822.

A supplemental report was filed by the probation department in May 2010. According to father, he last saw minor in February 2009, but talked to her "on several occasions" by phone. Father said he had not used illegal substances since 2006. He had no new criminal cases since 2006, and his recent incarcerations resulted from not reporting to his parole agent.

Mother's parental rights had previously been terminated as to one of her three other children; the remaining two lived with their biological father. Although mother had a history of methamphetamine use, she denied using drugs since 2003. She was still in a relationship with father and wanted minor returned to her care.

D.R. had recently given birth to a daughter and was seeking employment. J.R. had started working as a delivery driver. The report noted that minor continued to interact very well with the guardians, who were very supportive of her. Minor knew D.R. and J.R. were her aunt and uncle but called them mom and dad.

The probation officer opined that the parents did not abandon minor pursuant to Family Code section 7822, citing mother's five supervised visits with minor between July 2009 and March 2010, and made no recommendation as to section 1516.5.

Probate investigator Robin Pearl filed a report in July 2010. In a June 2010 telephone interview, the parents said they recently "lost" their Sacramento residence and were now living in the town of Orcutt (in Southern California). Mother continued to pay for supervised visits when she could afford it, while father did not visit. Mother had participated in two visits since May 2010. Subsequent attempts to contact the parents were unsuccessful.

D.R. and J.R. wanted to give minor a permanent and stable home. They were willing to allow visitation with the parents after adoption. Minor clearly identified the guardians as her parents, and referred to their baby (her cousin) as her sister. She called mother by her first name and "mommy" interchangeably, and thought father was her brother. She was reluctant to speak about mother, instead wanting to talk about her baby sister and her dog.

The visitation supervisor thought mother presented no danger to minor and appeared to have a relationship with her. She did not believe termination of parental rights was in minor's best interests, but opined that mother was not ready to parent minor.

Pearl analyzed the facts pursuant to the requirements of section 1516.5, and opined that terminating parental rights

would be in minor's best interests. In doing so, she noted that despite sporadic contact with mother, minor had been living consistently and constantly with her guardian since the age of seven months, and had a "clear emotional bond" with D.R. and J.R.--adoption by them would provide minor with stability and permanency. Further, minor had only "a minimal relationship" with mother and no relationship with any half siblings or siblings on mother's side, but had a "baby sister" at her guardian's. Mother and father were unable to provide for minor and minor was "entitled to remain in a safe stable home without the continued possibility of further court action."

Hearing

At a contested hearing on the amended petition, J.R.'s sister B.R. testified that that D.R. and J.R. acted as parents to minor. Minor called D.R. and J.R. "mom" and "dad" and was close with their one-year-old daughter, whom she called "sister." D.R. and J.R. treated both children equally.

J.R. considered both minor and his natural daughter to be his daughters. He wanted to adopt minor because he had raised her as his own daughter and wanted to provide a good future for her. J.R. and D.R. received no financial support from mother and father other than a few checks under \$25 over the last few months.

D.R. testified that mother brought only a couple of bags of clothing and possibly a stroller when she initially brought minor to live with D.R. Except for bringing baby food and diapers to D.R. "a few times at the very beginning," mother and

father did not provide for or care for minor in any way. Mother had visited minor once and called infrequently when she was in New York.

D.R. started getting biweekly checks of between \$15 and \$25 from Sacramento County Department of Child Support Services (DCSS) after the termination petition was filed. The parents also brought a few clothes and video games during the last few visits.

According to probate investigator Pearl, mother admitted leaving her job and moving to Southern California to be with father. Mother and father did not seem to be in a stable situation, as they were unsure what they would do for work or housing. By contrast, D.R.'s home was stable, appropriate, and met minor's needs. D.R. and J.R. appeared bonded and comfortable with minor, who called them "mommy and daddy." Mother intended to move minor to Santa Barbara which would have taken her from the only home she remembered and from the people she identified as her parents.

Father admitted being incarcerated when minor was born and was not released until she was three months old. He then resumed living with mother, who had an open CPS case regarding her other daughter. Father was ordered not to have any contact with the child after he refused to participate in services. Father and mother then began talking about D.R.'s taking minor so CPS would not get involved with her. They started transferring minor's belongings in October 2006, but she did not go to live with D.R. until January 2007.

Father claimed he visited minor from three to five times a week between July 2007 and February 2009. He was thereafter incarcerated in Santa Barbara County for six months and then paroled to Santa Barbara County, where he was allowed to go to Sacramento County for about eight supervised visits.

Mother testified that minor lived with her for six months after her birth. Her daughter C.C. was three when minor was born, and had an active CPS case because mother used drugs. Although there was an ongoing no contact order for father, mother saw father daily and CPS removed C.C. as a result. Mother let D.R. take minor because she was afraid CPS would take her. She became depressed over losing minor and moved to New York in March 2007, where she stayed for about a year and a half. Mother called minor during this time, and visited her when she returned for a few days. She visited minor several times a week after she returned from New York. Mother paid for these supervised visits, and had trouble affording them; she also had trouble finding a suitable visitation supervisor, which also caused her to miss visits.

Mother admitted she never provided financial support for minor, but gave D.R. clothing, food, and diapers. Her wages were recently garnished for support. She denied having a drug problem. She was a manager for J.C. Penny in Santa Maria. She moved to Santa Barbara County because living with father's family would give her more stability.

According to mother, minor called her "mommy" while she called D.R. "[t]ia" or "mom." She did not know the name of

minor's pediatrician, where she went to school, or whether she had any health problems. She believed that returning minor to her custody was in minor's best interests and she was confident that she could raise minor.

Statement of Decision

In its lengthy statement of decision, the probate court made numerous findings regarding the case. As to mother, it concluded, among other things, that she had repeatedly chosen drug abuse and father over her children and that living with mother and father would not be in minor's best interests. After finding no clear and convincing evidence that mother intended to *abandon* minor as required by Family Code section 7822, the court turned to section 1516.5 and the investigation and testimony of probate investigator Pearl. Noting that Pearl had opined that "it would be in the best interest" of minor to terminate parental rights, the court went on to analyze the considerations of section 1516.5 *seriatim*.

Although the court found that Pearl's application of the "best interests" standard was "legally incorrect," it agreed that it should "consider all factors related to the best interest of the child" when analyzing whether minor would benefit from the adoption. It then found "clear and convincing evidence" that minor would benefit from adoption by D.R. Further opining that its finding of benefit created a rebuttable presumption of unfitness, the court found that mother and father had failed to rebut the presumption and also that it would be

detrimental to minor to *not* free her for adoption.⁴ The court granted D.R.'s section 1516.5 petition and terminated parental rights.

DISCUSSION

I

ICWA Notice

Mother first contends the Agency and the probate court did not comply with the notice provisions of the ICWA. Notice under the ICWA is triggered if the court "knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a); Cal. Rules of Court, rule 5.481(b).) The ICWA applies to petitions to terminate parental rights pursuant to section 1516.5. (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1385 (*Noreen G.*); § 1516.5, subd. (d).)

D.R. filed a form ICWA-010(A) wherein she indicated that an "Indian child inquiry" had been made and that the "child's grandparents may have Indian ancestry, tribe unknown, never member of a tribe." The form was attached to the adoption petition, which stated that minor had no Indian ancestry. The record contains no other mention of minor's alleged Indian ancestry.⁵

⁴ As we discuss *post*, the court was incorrect regarding the applicable standard.

⁵ Mother's March 22, 2012, motion to consider additional evidence and to augment the record with her declaration is denied. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 400 [in case terminating parental rights, appellate courts will not receive

Mother argues that this limited information from the ICWA-010(A) was sufficient to trigger the ICWA notice provisions. We disagree. A statement that the grandparents "may" have Indian ancestry, with the tribe unknown and no evidence of membership, is too vague and insubstantial to trigger notice under the ICWA. (See *In re J.D.* (2010) 189 Cal.App.4th 118, 125 [paternal grandmother indicating possible Indian ancestry related by her grandmother, tribe unknown, notice not required]; *In re O.K.* (2003) 106 Cal.App.4th 152, 154, 157 [grandmother says child may have Indian heritage, no known tribe "too vague and speculative to give the juvenile court any reason to believe the minors might be Indian children"]; *In re Levi U.* (2000) 78 Cal.App.4th 191, 194, 198 [paternal grandmother's statement that might have Indian ancestry on her mother's side, tribe unknown, her mother was deceased and born on a reservation was "no basis whatever for continuing to assume the minor must be an Indian child within the meaning of the [ICWA]".].)

On these facts, no notice under the ICWA was required.⁶

and consider postjudgment evidence which was never before the trial court absent "rare and compelling" circumstances].)

⁶ Mother also suggests that D.R. and the court with its investigators should have made further inquiry of the parents. As the record provided to us indicates that adequate inquiry was indeed made, we do not address mother's speculative argument to the contrary.

II

Improper Standard

Mother next correctly contends that the probate court applied the wrong standard of proof to the section 1516.5 petition. As we explain, the error was harmless.

Applying our *depublished* decision in *Guardianship of Ann S.* (2006) 138 Cal.App.4th 644, the probate court first found by clear and convincing evidence that minor would benefit from adoption, and then found a rebuttable presumption of parental unfitness. This was the wrong standard--our decision was *depublished* when the Supreme Court granted review and cannot be relied on as precedent. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1121 (*Ann. S.*); § 1516.5, subd. (a).) The standard is now correctly articulated as follows: "Section 1516.5 authorizes the termination of parental rights after two years of probate guardianship, if adoption by the guardian is in the child's best interest." (*Ann S., supra*, 45 Cal.4th at p. 1124; § 1516.5, subd. (a).) In *Ann S.*, our Supreme Court held that parental unfitness was not a prerequisite to the termination of parental rights at a section 1516.5 hearing. (*Ann S., supra*, at pp. 1133-1134.) Therefore, parental rights could be terminated pursuant to section 1516.5 based *solely* on the child's best interests. (*Id.* at p. 1136.)

Here, the probate court's erroneous approach afforded mother an opportunity to prevent the termination of parental rights by rebutting the presumption of unfitness. Although she was unable to do so, it was an opportunity she would not have

received had the probate court applied the proper standard from the outset. As noted *ante* and discussed immediately *post*, the probate court thoroughly analyzed the applicable statute, section 1516.5, and addressed the best interests of minor in its statement of decision, despite its failure to apply the correct standard. Since mother was in no way prejudiced by the application of the incorrect standard, the error was harmless.

III

Substantial Evidence

Mother contends the probate court's finding that termination of parental rights was in minor's best interests is not supported by substantial evidence. We disagree.

"Our review of the evidence is constrained. 'Although a trial court must make such findings based on clear and convincing evidence ([Fam. Code,] § 7821), this standard of proof "is for the guidance of the trial court only; on review, our function is limited to a determination whether substantial evidence exists to support the conclusions reached by the trial court in utilizing the appropriate standard.'" [Citation.] Under the substantial evidence standard of review, "[a]ll conflicts in the evidence must be resolved in favor of the respondents and all legitimate and reasonable inferences must be indulged in to uphold the judgment.'" [Citation.]' [Citations.] 'It was the trial court's duty to determine whether' the petitioners met their 'burden of proof; it is our duty to determine whether there is substantial evidence to

support the trial court's findings that it did.' [Citation.]" (Noreen G., *supra*, 181 Cal.App.4th at p. 1382.)

In determining whether minor would benefit from being adopted by the guardian, the probate court is instructed to consider all relevant factors, including, but not limited to, the relationship between the child and the guardians and the guardians' family, the natural parents, and any siblings. (§ 1516.5, subd. (a)(3).)

D.R. had been minor's primary caregiver since approximately September, 2006--for all but her first seven months of life. Minor was closely bonded to D.R. and J.R., and clearly considered their role in her life to be "parental." The guardians provided almost all material support for her--the support provided by mother and father barely even qualifies as *de minimus*--and provided her with a stable, supportive, and loving home. She had a sibling relationship with her cousin.

Minor called mother her "other mommy" or by her first name, while she thought father was her brother. Mother's contact with minor was sporadic for the vast majority of her life, and father's even more so. Minor had no relationship with mother's other children, her half siblings.

"After years of guardianship, the child has a fully developed interest in a stable, continuing, and permanent placement with a fully committed caregiver. [Citations.] The guardian, after fulfilling a parental role for an extended period, has also developed substantial interests that the law recognizes. [Citations.]" (*Ann S.*, *supra*, 45 Cal.4th at

p. 1136, fn. omitted.) It is apparent from this record that minor continues to benefit greatly from her relationship with her guardian, and there is no evidence she would be harmed by terminating parental rights. Substantial evidence supports the probate court's finding that termination of parental rights and adoption was in minor's best interests.

IV

Mother's Petition to Terminate Guardianship

Mother's final claim is that her due process rights were violated when her petition to terminate guardianship was "dropped" due to the filing of the section 1516.5 petition.

A. The Petition

Mother's petition is not in our record and the details surrounding its filing and disposition are sketchy, as we have described *ante*. The petition's first reference in the record is in the March 17, 2009, memo to the probate court by probate investigator Bonnie Huffman. Huffman reported mother's petition had been filed and recommended that it not be entertained due to a pending petition for adoption and Huffman's misunderstanding of a now-defunct local rule.

At the contested hearing on the section 1516.5 petition, mother testified that she did not know how to serve the petition to terminate guardianship on D.R.⁷ Mother also addressed *her* petition in her opposition to the section 1516.5 petition, where

⁷ Mother was not represented by counsel until September 29, 2009.

she argued that the section 1516.5 petition was untimely because it was filed less than two years after the probate court issued letters appointing D.R. as the guardian.⁸ In support of her contention, mother asserted "the natural parents did not leave their child in guardianship limbo," because she returned from New York well before her child had been with D.R. the requisite two years and "filed a petition to terminate the guardianship," which "was then dropped by the court because of Petitioner's subsequent petition for adoption, at issue in this proceeding." Mother asked the probate court to proceed on her "long-overdue [p]etition to terminate the guardianship" if it denied the guardian's petition for adoption/to terminate parental rights. During the argument on the section 1516.5 petition, mother's counsel described mother's petition as evidence of her intent to "retrieve her child."

Mother contends the probate court prevented her from terminating the guardianship before the section 1516.5 petition was filed. She argues that "[o]nly by the fact that her Petition was stayed, was the guardian able to meet the two-year requirement" under section 1516.5. Not allowing her to show she was a capable parent before the two years had run was, according to mother, a due process violation.

⁸ A guardian must have physical and legal custody of the child for two years before filing a section 1516.5 petition to terminate parental rights. (*Ann. S., supra*, 45 Cal.4th at p. 1131, fn. 13.)

B. Analysis

Mother did not raise her due process argument in the probate court. The failure to raise an issue below generally forfeits the matter on appeal unless the matter is a pure question of law. (*Noreen G.*, *supra*, 181 Cal.App.4th at p. 1373, fn. 8; *In re P.C.* (2006) 137 Cal.App.4th 279, 287; *In re Erik P.* (2002) 104 Cal.App.4th 395, 402-403.) The petition to terminate guardianship was cited by mother only as evidence that she did not abandon the child to guardianship. Even though the probate court later corrected the probate investigator's erroneous advice to mother, mother did not raise a due process claim or re-file her petition at that time. Mother's failure to raise the due process issue or to file a new petition forfeits her contention on appeal.

Even were we to consider her claim, mother would not prevail because the record shows no prejudice to her from the petition's "dropping." Nothing in the Probate Code or the local rules prevented mother from filing a petition to terminate guardianship (§ 1601) at *any point* during the pendency of the section 1516.5 petition. The erroneous advice by investigator Huffman, later corrected on the record by the court, did not deny mother any process to which she was entitled, and therefore did not violate her due process rights.⁹

⁹ We add that on this record, for reasons we describe *ante*, it is clear that mother would not have prevailed on her petition even had it been entertained. Mother has made no effort to show any prejudice from the "dropping" of her petition and we see none.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

HOCH, J.