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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Colusa)

In re JESSE C. et al., Persons Coming Under the
Juvenile Court Law.

C069325

COLUSA COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES/CHILD PROTECTIVE
SERVICES,

(Super. Ct. Nos. JU3515,
JU3516)

Plaintiff and Respondent,

v.

R. J.,

Defendant and Appellant.

R. J., de facto parent and maternal grandmother of the minors, appeals from orders of the juvenile court terminating the dependency and placing the minors in guardianship. (Welf. & Inst. Code, § 395 [further undesignated statutory references are to the Welf. & Inst. Code].) Appellant contends the order was made in the absence of expert testimony as required by the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.; ICWA), the court

failed to permit her a contested hearing on placement, the court erred in declaring that her de facto parent status ended when the dependency terminated, and the court erred in refusing to order visitation for her. We affirm.

FACTS

In December 2009 the Colusa County Department of Health and Human Services (Department) filed petitions to detain the two minors, Jesse, age 8, and Andrew, age 5, due to serious neglect of the minors' care by the parents. The minors are enrolled members of the Cachil Dehe Band of Wintun Indians (Wintun), and the family was living on the Wintun reservation. Appellant, who previously had cared for the minors in Colorado, in January 2010 filed a request for de facto parent status, which was denied. The juvenile court sustained the petitions, returned the minors to the parents, and ordered family maintenance services for them.

Following status review reports, which indicated that the parents were only nominally complying with the service plan, in August 2010 the court ordered the two minors detained and placed with the maternal grandfather. The parents voluntarily placed a younger sibling with the maternal grandfather on the same day. The court ordered family reunification services for the parents.

Shortly thereafter, appellant filed a second petition for de facto parent status and also requested placement of the minors. The social worker evaluated appellant's placement request, and received reports that appellant had neglected her teenaged son and his father physically abused him. The social worker further reported that the minors expressed fear of being placed with appellant and did not want visits with or telephone calls from her, although they would consider contact by letter. The social worker concluded that placement with appellant was not in the minors' best interests.

At the hearing, appellant dropped her request for placement and limited the petition to a request for de facto parent status. The court continued the matter to obtain

information, stating that appellant was not currently a de facto parent and that placement in Colorado was not in the minors' best interests.

The minors' counsel filed reports describing their current placement. The reports stated that the minors' stability would be at risk if the maternal grandfather had to accommodate the maternal grandmother in the minors' lives (in light of the "bad blood" between the grandparents). Counsel did not object to de facto parent status. The social worker's report affirmed that the impression the minors did not have a positive bond with appellant remained accurate and stated that forcing visits would be detrimental to the minors. The tribe did not oppose de facto parent status for appellant but noted she was unlikely to have current information about the minors.

Following a contested hearing, the juvenile court granted de facto parent status to appellant, noting that it allowed her only to appear in court, not to have visits with or control over the minors.

A review report filed in February 2011 recommended maintaining the minors' placement with the maternal grandfather, terminating services to the parents, and setting a section 366.26 hearing. The parents did not appear at the review hearing, and the court granted their counsel's request to be relieved. The court then terminated services and set a section 366.26 hearing. Appellant requested visitation and consideration for placement. The court indicated she should file a petition and that she would be considered for placement just as anyone else would be considered, but observed that the minors were currently placed with the maternal grandfather and that the tribe's input would have an impact on the court's consideration of the issue.

Appellant filed a petition seeking visitation in order to preserve her relationship as grandmother to the minors. Appellant's declaration in support of the petition stated she had a relationship with the minors, she would not interfere with the current placement, and she supported reunification.

The minors' counsel filed a report in opposition to the petition, again noting the animosity between appellant and the maternal grandfather and that it was not in the minors' best interests to introduce uncertainty and stress in their lives when they needed stability.

The social worker filed a declaration stating that appellant continued to test the boundaries of the mail contact that had been allowed. She sought to send the minors gifts but wanted to identify them as being from the parents; she wanted to write about the parents and what they were doing; she asked if she could write about the minors' relatives; she contacted the minors' school and disclosed confidential information; and although the parents had chosen not to have contact with the minors, appellant tried to manipulate this truth and thereby set the minors up for disappointment. Appellant recognized she was violating the contact protocols.

The court denied the petition and confirmed the existing order for mail contact but indicated that appellant could renew the visitation issue at the next hearing by filing papers to update the information.

Prior to the section 366.26 hearing, the minors' counsel filed declarations that stated it was in the minors' best interests to remain in the maternal grandfather's home under guardianship and that guardianship would not adversely affect the minors' tribal membership.

The social worker's report for the section 366.26 hearing also recommended guardianship as the appropriate permanent plan for the minors. The social worker had minimal contact with the father, who had moved to Colusa and was homeless. The mother was in counseling with a tribal elder and wanted the minors placed with her in a rehabilitation facility. The social worker refused to support the request, and the mother made no further contact. The report stated appellant continued to disclose confidential information to third parties and tried to schedule horse camp for one of the minors over Thanksgiving, although she lacked the authority to do so. The choice of legal

guardianship by the maternal grandfather was supported by the tribe, the social worker, the adoptions worker, and counsel. A report by the California Department of Social Services was attached to the social worker's report and also recommended guardianship. The Wintun Tribe, the Department, and the minors' counsel stipulated to using a written expert opinion in lieu of testimony by the Indian expert. A copy of the Indian expert's opinion was attached to the social worker's report.

Neither parent was present at the section 366.26 hearing. Appellant objected to the stipulation to use a written opinion in lieu of testimony of the ICWA expert and asked the court to continue the hearing, set it for trial, and have the expert available for cross-examination. The Department and the Wintun Tribe agreed that an expert opinion was not required because guardianship was the recommended plan. Appellant wanted to present evidence and cross-examine the expert on the question of whether she should have been evaluated for placement.

The court took judicial notice of all prior findings and orders, stated that reunification services had been terminated, and adopted the recommended findings and orders. The court also made various ICWA findings based on the written opinion of the Indian expert, found the minors were not likely to be adopted, and found that legal guardianship was in the minors' best interests. The court appointed the maternal grandfather as guardian of the minors and terminated the dependency, noting that appellant's de facto parent status was also terminated.

Appellant requested a visitation order, which the court declined to issue, instead leaving visitation decisions to the minors' newly appointed guardian since the social worker would no longer be involved.

DISCUSSION

I

Appellant argues there was no Indian expert testimony prior to selection of a permanent plan for the minors as required by the ICWA and state law.

The ICWA, state law, and the California Rules of Court require the court to hear testimony from a qualified expert before placing an Indian child in foster care or terminating parental rights. (25 U.S.C. 1912(e), (f); Welf. & Inst. Code, § 224.6, subd. (b); Cal. Rules of Court, rule 5.484(a)(1).) The requirement can be waived pursuant to a written stipulation by the parent, Indian custodian, or tribe. (§ 224.6, subd. (e); Cal. Rules of Court, rule 5.484(a)(2).)

Appellant, as a de facto parent, lacks standing to raise the application of the substantive provisions of the ICWA because they do not affect her rights in the litigation and she cannot assert the rights of the parents. (*In re Kieshia E.* (1993) 6 Cal.4th 68, 77-78; *In re Crystal J.* (2001) 92 Cal.App.4th 186, 191; *In re Daniel D.* (1994) 24 Cal.App.4th 1823, 1836.) Moreover, as pointed out by the Department and the tribe, the provision was inapplicable to the proceeding because the minors were not being placed in foster care and parental rights were not being terminated. Thus, any failure to comply with the provisions of the statute or rule did not affect the proceedings in any way. Appellant has not shown any error occurred.

II

Appellant asserts that the court erred in failing to accord her a contested hearing on placement.

As a de facto parent, appellant has no right to placement of the minors. (*In re Crystal J.*, *supra*, 92 Cal.App.4th at p. 191.) Appellant's claim arises from statutory provisions for considering relatives of the minors for placement.

When a child is removed from the physical custody of the parents at the disposition hearing, preferential consideration shall be given to a relative request for placement of the child. (§ 361.3, subd. (a).) The Department and court must consider numerous factors in assessing the relationship between the relative and the child, the appropriateness of the placement, and the best interests of the child. (§ 361.3, subd. (a)(1)-(8).) During the reunification period, the relative placement preference

applies whether or not a new placement is required or being considered. (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 795.) Appellant was considered for placement and rejected during this time.

After reunification efforts have terminated but before parental rights are terminated, the relative placement preference still applies and is governed by section 361.3, subdivision (d). (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032.) Section 361.3, subdivision (d) states that “whenever a new placement of the child must be made, consideration for placement shall again be given as described in this section to relatives who have not been found to be unsuitable and who will fulfill the child’s . . . permanent plan requirements. In addition to the factors described in subdivision (a), the county social worker shall consider whether the relative has established and maintained a relationship with the child.” In this case no new placement was required and thus no new evaluation was required.

The purpose of the section 366.26 hearing is to select a permanent plan for the minor. Placement is not at issue at the hearing unless the matter is raised by a party. Appellant was previously denied placement, and it was her burden to demonstrate that placement of the minors was now in their best interests. However, appellant did not file a petition to modify the current placement orders, nor did she provide information demonstrating changes from the last assessment. The question of placement was not before the court and no hearing, contested or otherwise, was required. The court did not err in failing to set a contested hearing so that appellant could present evidence on placement.

III

Appellant argues the court erred in declaring her de facto parent status terminated when the dependency terminated.

De facto parent status arises from the existence of the dependency proceeding and is permitted only in those cases where the court has concluded that the individual seeking

de facto parent status has a close relationship with the child based on assuming a parental role and may have information that is in the child's best interests for the court to receive. (*In re Patricia L.* (1992) 9 Cal.App.4th 61, 66-67.) However, de facto parent status is not permanent. Changed circumstances may result in loss of the status, and it necessarily terminates when the dependency from which it springs is terminated. (*Id.* at p. 67; *In re Leticia S.* (2001) 92 Cal.App.4th 378, 383, fn. 5.)¹

Accordingly, it was not necessary for the court to articulate the termination of the de facto parent status when it terminated the dependency upon appointing a guardian. That it did so does not give rise to any error.

IV

Appellant contends it was error for the court to refuse to consider ordering visitation for her.

As a de facto parent, appellant has no right to visitation. (*In re Kieshia E., supra*, 6 Cal.4th at p. 82.) Further, there is no statutory right to visitation for grandparents when the court selects guardianship as a permanent plan. (Welf. & Inst. Code, § 366.26, subd. (c)(4)(C).) However, an order for visitation may be granted at the discretion of the court to any person having an interest in the welfare of the child. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1123-1124; *Guardianship of Martha M.* (1988) 204 Cal.App.3d 909, 911-912; Fam. Code, § 3100, subd. (a).) In considering a visitation

¹ To the extent that appellant relies on *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1196, that case is factually distinguishable. In *Joel H.*, the dependency was terminated upon return to the parent and the department sought dismissal of the appeal. (*Id.* at p. 1192.) The court was concerned that, given the probability the minor would again be removed from the parents and the de facto parent might need to be available for placement, the question of the sufficiency of the evidence to support the current removal from the de facto parent should be addressed. The considerations that led the *Joel H.* court to conclude the appeal was not rendered moot by a subsequent return to the parent and dismissal of the case are not present here, and *Joel H.* is not controlling on the question of termination of the de facto parent status.

order, the court must determine whether visitation is in the minor's best interests. (Fam. Code, §§ 3103, 3104.)

At the time of the section 366.26 hearing, appellant had established a pattern of attempting to interfere with the maternal grandfather's exercise of custody and control of the minors and of disclosing confidential information about them to third parties. Neither behavior furthered the minors' interest in a stable and secure home. Appellant's contact with the minors during the dependency was limited to letter contact through the social worker. Because the appointment of a guardian and termination of the dependency would necessarily mean that no independent party would oversee and intervene to protect the minors from appellant's conduct, that function devolved upon the maternal grandfather, who was in the best position to determine the nature and amount of contact with appellant that would not be detrimental to the minors' well-being. The juvenile court did not abuse its discretion in declining to make an order for visitation rather than vesting decisions about contact between appellant and the minors in the guardian.

DISPOSITION

The orders of the juvenile court are affirmed.

RAYE, P. J.

We concur:

HULL, J.

ROBIE, J.