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

Adoption of A. A., a Minor.

C080932

MICHELLE H.,

(Super. Ct. No. 15AD00091)

Plaintiff and Respondent,

v.

ERIN A.,

Objector and Appellant.

Erin A., mother of the minor, appeals from the judgment terminating her parental rights and freeing the minor for a stepparent adoption. (Fam. Code,¹ § 7800 et seq.) Erin A. contends there was no substantial evidence to support the court's finding that she

¹ Further undesignated statutory references are to this code.

had the intent to abandon the minor within the meaning of section 7822 and the court failed to make any inquiry of her Indian ancestry as required by the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) We affirm.

FACTS

In May 2015, Michelle H., wife of T. H., the natural father of the minor A. A., filed a request for a stepparent adoption of A. A. Michelle H. concurrently filed a petition to terminate the parental rights of Erin A., the mother of the minor A. A. Michelle H. also provided an ICWA-020 form, indicating the father had no Indian ancestry and the required Indian child inquiry attachment which stated A. A. had no known Indian ancestry.

The petition alleged the minor was six years old and had been in her father's custody since 2012. The custody orders provided for supervised visitation between Erin A. and A. A. The petition further alleged that Erin A. left the minor in father's sole custody from January 9, 2014 to May 2015 without provision for support and without visiting or communicating in any other way with the minor since January 9, 2014, with the intent to abandon the minor. The petition further alleged that Erin A. and the father were required by the custody order to keep each other apprised of their current contact information. Erin A. moved from Sacramento County to El Dorado County in February 2014 but did not notify the father. In November 2014, the father e-mailed Erin A. to give her his new address. The petition was served on Erin A. on July 28, 2015.

The probate court investigator's report, filed in August 2015, stated father submitted to DNA testing to confirm his paternity and he was granted full custody of A. A. in a family law case. Father told the investigator Erin A.'s last visit was January 2014. When father moved in October 2014, he sent Erin A. an e-mail giving her the new contact information. She responded to the e-mail and explained that she wanted to see A. A. but was unable to do so. Father declined to permit telephone visits because he wanted Erin A. to have supervised visits as ordered by the court. Father said Erin A.

made no further attempt to contact him or the minor. Father told the investigator Erin A. was not ordered to pay child support and had paid no support on her own.

Michelle H. told the investigator she had been involved in A. A.'s life for several years and wanted to adopt her. A. A. told the investigator she wanted to be adopted and live with the father and Michelle H., not with Erin A. It was not clear whether A. A. understood the investigator's explanation of termination of parental rights but it was clear the minor was closely bonded to Michelle H.

The investigator interviewed Erin A. who said she intended to appear in court and object to termination of her parental rights. She agreed that her last contact with the minor was in January 2014 and that she had e-mail contact with father in November of 2014. At that time, she was unable to arrange for visitation and asked to have telephone contact with A. A., which father did not allow. Erin A. said she lost custody of A. A. due to the behavior of her then-husband and the domestic violence in the relationship and that her divorce from him was final in May of 2015. She explained that she was finally getting stable and was ready to restart visits with a court-approved agency when she was served with the petition. Erin A. acknowledged she had never paid child support for the minor. She said her ex-husband took control of all finances and would not allow her access to her money. Erin A. had custody of two of her other children, was working full time, and had lived in Sacramento since April of 2015 with her current boyfriend and her children.

The report stated that the natural parents agreed that Erin A. had not had physical contact with A. A. since January 2014 and that Erin A. had not provided financial support for A. A. after father was awarded custody. The report also noted Erin A.'s attempt to have telephone contact with the minor in November 2014 and her inability to financially support the minor due to her ex-husband's control of her money. It was unclear to the investigator if the one-year period for abandonment had been met and thus the investigator made no recommendation on the petition.

On September 1, 2015, the petition came on for hearing and was set for trial. Erin A. was present and the court appointed counsel for her; however, the court made no ICWA inquiry and did not direct her to complete an ICWA-020 form.

Trial commenced October 30, 2015. Father testified he was awarded sole custody of A. A. in November 2012 due to deplorable living conditions in Erin A.'s home and her ex-husband's methamphetamine use. Erin A. had agency-supervised visitation at Wynspring which decreased over time until her last visit was January 9, 2014. When Erin A. missed visits, A. A. was very sad and withdrawn and thought her mother had forgotten her. Father testified that Erin A. never sent any cards or gifts and did not provide financial support for A. A. He acknowledged there was no child support order that she do so. Father further testified that in November 2014, he e-mailed Erin A. to update his contact information. Erin A. responded saying she had moved to Placerville but it was difficult to get to Sacramento and she wanted him to let her speak to the minor by telephone. Father felt he could not allow telephone contact because he had been told to follow the court orders strictly and the court orders only allowed for supervised visitation. Father recognized the order did not exclude phone calls and there was a provision in the order for the parties to agree to modify the order but he did not feel he could modify the order without presenting a stipulation to the court.

Michelle H. testified she was asking to terminate Erin A.'s parental rights and to adopt A. A. She stated the minor was upset by the supervised visits and had stabilized over time with no visits. Michelle H. testified that about a year ago, the minor, referring to Erin A., told Michelle H. that "the lady I used to visit" had passed away. Michelle H. responded that was not the case and asked A. A. where she got that idea. A. A. said she had not seen her in "a hundred years." Michelle H. testified that A. A. wanted to be adopted and the delay had destabilized her.

Erin A. testified that she married her ex-husband, M. K., in June 2012. M. K. was controlling and abusive, taking her money and deciding how it would be spent. In 2012

he was using methamphetamine and the relationship was bad. Erin A. admitted that she filed a declaration in A. A.'s custody case in which she stated that M. K. was never abusive and was a kind, gentle man. Erin A. said she visited the minor until January 2014 when the grant funding to pay for visitation supervision ran out. She was aware that the grant would be reinstated in April 2014 on a first come, first serve basis but did not contact Wynspring about restarting visitation. In February 2014, Erin A. and M. K. moved from Sacramento to El Dorado County where they lived in a motel. Erin A. left M. K. in April 2014 and moved to her sister's home in Placerville. Erin A. and M. K. were not completely separated at that time and continued to try to work things out until October 2014, when she again separated from him. She had several vehicles during this time, some of which were undriveable for short periods of time. Erin A. said that, although her funds were within her control after April 2014, she did not have complete control of her money until after this second separation. She filed for divorce in November 2014. In April of 2015 she returned to Sacramento.

Erin A. testified she worked as a taxi driver from June 2014 to September 2014 and earned over \$4,600 before she quit. From October 2014 to February 2015 she worked at Blue Ribbon Staffing and Snowline Hospice. In April 2015, she began her current employment working with developmentally delayed adults through Choices Transitional Services and In Home Support Services. She received a total of \$2,000 per month from both organizations. Over the last year, Erin A. had a roommate/boyfriend who contributed to expenses and with whom she had a joint bank account. His name was on their lease and on the title of the van she bought in 2015. In July or August of 2015, Erin A. received a personal injury settlement for herself and the children who lived with her and used the money to start over. Erin A.'s bank statements from June and July of 2015 showed that she had enough income to get her nails done and support her smoking habit during that time.

Erin A. testified that since January 2014, she had not sent any cards or gifts to A. A. In November 2014, when father declined her request for telephone contact with A. A., she did not respond to him, although she disagreed with him. She did not attempt to file a motion to modify visitation after the November 2014 contact with father. She did not complete a coparenting program which was a condition of the 2012 custody order. She did not contact Wynspring to reinstate visitation until July 2015. Erin A. did not feel the lack of contact with A. A. since January 2014 had been all that hard on A. A. since the minor had a stable home with father and Michelle H.

Erin A.'s sister V. T., who lived in Placerville, testified Erin A. and M. K. lived with her in February 2014 then Erin A. moved back with her in April 2014 and stayed with her until June 2014. V. T. testified that Erin A. then became homeless and lived in a shelter for a time.

Following the parties' arguments, the court took the matter under submission and issued its ruling on November 4, 2015. The court stated that the issue to be resolved was whether Erin A. had the requisite intent to abandon A. A. The court said it was undisputed that Erin A.'s last contact with A. A. was January 9, 2014, and the termination petition was served on Erin A. on July 28, 2015. There was also no dispute that she provided no financial support for A. A. Erin A. was ordered to do coparenting and did not. She testified visits stopped because grant funding ceased but also said that by April, funding was restored. The court found that, even though Erin A. was struggling financially, she was not so destitute that she could not pay visitation fees of \$20 per visit. The court also concluded from the financial records that Erin A. had the ability to transport herself to and from visits. However, visits just did not happen for well over a year. As to Erin A.'s request for telephone contact, the court, having heard the testimony, did not have the impression father was trying to frustrate or limit Erin A.'s contact with A. A. and found Erin A. had made only a token effort to renew contact with A. A. The court found, by clear and convincing evidence, that Erin A. did possess the requisite

intent to abandon A. A. during the relevant time period. The court granted the request to terminate parental rights. The court never made a finding regarding whether the ICWA applied.

DISCUSSION

I

Substantial Evidence Of Intent To Abandon

Erin A. contends substantial evidence does not support the trial court's finding that she had the intent to abandon A. A. Erin A. argues the court's determination that she had the ability to pay for supervised visits and the ability to transport herself to and from visits was not supported by the evidence.

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. (*In re Jason L.*, at p. 1214.) The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Termination of parental rights for the purposes of subsequent adoption in a family law setting is governed by part 4 of the Family Code commencing with section 7800. The circumstances which support a declaration freeing a child from custody and control of a parent include clear and convincing evidence of abandonment. (§§ 7820, 7821, 7822.) Abandonment may be shown where "[o]ne parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, with the intent on the part of

the parent to abandon the child.” (§ 7822, subd. (a)(3).) “The failure to provide . . . support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent . . . h[as] made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent” (§ 7822, subd. (b).)

The petition to terminate parental rights; the probate investigator’s report, which included statements by father, Michelle H. and Erin A.; and testimony by those individuals established that Erin A. had not communicated with A. A. for over a year and had not provided any support for the minor during that time. This evidence established the presumption that Erin A. intended to abandon A. A. The issue at trial was whether Erin A. could present sufficient evidence to rebut the presumption of intent to abandon. Erin A.’s rebuttal evidence attempted to show that she was financially unable to provide support to, or to communicate with, A. A.

A

Communication

Erin A. testified that she stopped attending visits at Wynspring because grant funding ran out. However, she also testified that she was aware that funding would resume in three or four months on a “first come, first serve” basis but did not contact Wynspring until July 2015, some 18 months after her last visit. Erin A. further testified that her ex-husband was controlling and did not allow her access to her money so she was unable to go to visits. However, she also testified that, by April 2014, they had separated and she was living with her sister and that after April 2014 she had some control over her own finances, although she continued to have contact with her ex-husband and did not have full control of her income until after her second separation when she filed for divorce. She testified she began working in July 2014 and remained employed in some fashion up to the time of trial. She was able to maintain her vehicles for transportation and had access to her e-mail account. Resolving the conflicts adversely to Erin A., the evidence supports the court’s finding that at least after July 2014, when she was

employed and had a vehicle, Erin A. had the financial ability to resume some level of visitation with A. A.

The parties focus on Erin A.'s lack of visitation, but the statute requires only communication. Thus, even assuming that visitation was too financially burdensome for Erin A., particularly during the first months of 2014, when she had no income or control over her income, it is inconceivable that Erin A. was unable to secure a postcard or a stamp, a sheet of paper and an envelope in order to communicate with A. A. Further, Erin A. made no attempt to use her e-mail account to contact father and attach a note to be delivered to A. A. in a supervised setting. She did not even seek telephone contact until November 2014 after father had first e-mailed her. When he declined to allow phone calls, on the grounds that he believed he had to follow the court order or get into trouble, Erin A. did not attempt to secure a modification of the court order.

When Erin A. stopped visiting, she did not think the lack of contact would be hard on A. A. because A. A. was in a stable home with Michelle H. and father. Contrary to Erin A.'s assumption, A. A. was sad and withdrawn when Erin A. missed visits because she thought Erin A. had forgotten her and, after many months without any communication at all, came to believe Erin A. had passed away. The evidence showed Erin A. was indifferent to A. A. and believed the relationship could be placed on hold until she got around to reviving it. The law does not give parents unlimited time to ignore their children without facing the consequence of termination of parental rights. Erin A. did not establish she was unable to communicate with A. A., only that she chose not to.

B

Support

Erin A. also argues that her financial circumstances prevented her from providing so much as a toy to A. A. for more than a year. The evidence established that in 2014 she indeed had little income and had to provide for the children who were living with her.

Nonetheless, by 2015 she had an income tax return, steady employment and financial assistance from her current boyfriend/roommate. She could have provided some modicum of financial assistance for A. A. and did not.

However, even assuming Erin A. had no ability to provide any support for A. A. during the relevant period, she has not rebutted the presumption of intent to abandon. “Financial inability may excuse the failure to send any funds for support of the children [citation], but the failure to communicate for the requisite statutory period of time is adequate ground under the statute to adjudicate an abandonment by the non-communicating parent.” (*Adoption of Oukes* (1971) 14 Cal.App.3d 459, 467.)

Erin A. did not show she was unable to communicate with A. A. for more than a year and did not rebut the presumption of intent to abandon her. Thus, substantial evidence supported the trial court’s finding that Erin A. intended to abandon A. A.

II

Compliance With The Indian Child Welfare Act

Erin A. argues the court failed to comply with the provisions of the ICWA because the court neither inquired about her Indian heritage nor ordered her to complete an ICWA-020 form at her first appearance in the proceeding.

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, actions resulting in termination of parental rights. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) The court and the individual seeking termination of parental rights have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (§ 177, subd.(b); Cal. Rules of Court, rule 5.481(a).) As a part of this duty, the party seeking a “declaration freeing a child from the custody or control of one or both parents, termination of parental rights, or adoption must [ask the parent about the child’s Indian ancestry] and must complete the *Indian Child Inquiry Attachment* (form ICWA-010(A))

and attach it to the petition” (Cal. Rules of Court, rule 5.481(a)(1).) Additionally, the court has a duty “[a]t the first appearance by a parent . . . in any . . . proceeding to terminate parental rights, proceeding to declare a child free of the custody and control of one or both parents, or an adoption proceeding; [to] order the parent . . . to complete *Parental Notification of Indian Status* (form ICWA-020).” (Cal. Rules of Court, rule 5.481(a)(2).)

As a part of the documents supporting the petition for termination of parental rights, Michelle H. provided the required ICWA-010(A) inquiry attachment which stated “the child has no known Indian ancestry.” It is undisputed that, when Erin A. first appeared in the proceeding, the court did not inquire about her Indian heritage, if any, and did not order her to complete an ICWA-020 form. The court’s failure to comply with the rule was error. Nonetheless, failure to strictly comply with a statutory duty does not require reversal in the absence of prejudice. (*People v. Cooley* (1993) 14 Cal.App.4th 1394, 1399 [jury advisement]; *In re Melinda J.* (1991) 234 Cal.App.3d 1413 [timely mailing of notice to last known address].)

Relying on the line of cases which hold that failure to inquire about Indian ancestry is not harmless error because it requires the court to speculate about the parent’s response (see *In re J.N.* (2006) 138 Cal.App.4th 450, 461), Erin A. argues the court’s failure to inquire is reversible error. We disagree.

The court in *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, discussed the holding in *J.N.* and declined to follow it. (*In re Rebecca R.*, at p. 1431). The *Rebecca R.* court observed that the “sole reason an appellate court is put into a position of ‘speculation’ on the matter is the parent’s failure or refusal to tell us.” (*Ibid.*) The court pointed out that “there can be no prejudice unless, *if* he had been asked, father *would have* indicated that the child did (or may) have such ancestry.” (*Ibid.*) The court stated that nothing currently prevented the father from making an offer of proof or other affirmative representation that “had he been asked, he would have been able to proffer some Indian

connection.”² (*Ibid.*) “In the absence of such a representation, the matter amounts to nothing more than trifling with the courts. [Citation.] The knowledge of any Indian connection is a matter wholly within the appealing parent’s knowledge and disclosure is a matter entirely within the parent’s present control. The ICWA is not a ‘get out of jail free’ card dealt to parents of non-Indian children, allowing them to avoid a termination order by withholding secret knowledge, keeping an extra ace up their sleeves. Parents cannot spring the matter for the first time on appeal without at least showing their hands. . . . [¶] The burden on an appealing parent to make an affirmative representation of Indian heritage is de minimis. In the absence of such a representation, there can be no prejudice and no miscarriage of justice requiring reversal.” (*Ibid.*) We are persuaded by the reasoning in *Rebecca R.* and decline to follow *In re J.N.* insofar as it requires the reviewing court to assume prejudice.

Erin A. has not, either in her opening brief nor in her reply brief, made any affirmative representation that she has Indian heritage, relying solely on the court’s failure to comply with the statute for reversal without showing she is prejudiced. Because she has failed to demonstrate prejudice from the court’s inaction, she has not established that reversal is required. For the same reasons as set forth above, mother cannot rely on possible prejudice to an Indian tribe because no tribe or Indian heritage has been claimed or suggested and no tribal interest has yet arisen.

In her reply brief, Erin A. relies on this court’s decision in *In re Marinna J.* (2001) 90 Cal.App.4th 731, for the proposition that she need not show prejudice. That case is distinguishable because it dealt with the agency’s failure to send notice where Indian

² The *Rebecca R.* court and those decisions which follow it, suggest that such an affirmative representation could be made in an offer of proof in the brief. To the extent that such a representation is outside the record on appeal, it could also be made in a petition for writ of habeas corpus.

heritage had been claimed and tribal affiliation identified. Inquiry had already occurred, the ICWA notice provisions had been triggered and the prejudice was apparent from the record and arose from the agency's failure to comply with the notice requirements of ICWA, not from speculation. Here, the documents supporting the petition indicate that no Indian heritage is known and the prejudice to appellant, if any, is speculative.

DISPOSITION

The orders of the juvenile court are affirmed.

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Mauro, J.