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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MILEY S., a Person Coming Under  
the Juvenile Court Law.

IMPERIAL COUNTY DEPARTMENT  
OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

KRYSTAL S.,

Defendant and Appellant.

D061307

(Super. Ct. No. JJP02237)

APPEAL from orders of the Superior Court of Imperial County, Christine V. Pate, Judge. (Retired judge of the San Diego Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Krystal S. appeals orders terminating her parental rights to her daughter, Miley S. She contends the juvenile court's finding that Miley is not an Indian child under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) was not supported by

substantial evidence because Miley's alleged father, B.G., was never asked whether he has Indian heritage. We hold there is no merit to her contention and affirm the orders.

#### FACTUAL AND PROCEDURAL BACKGROUND

On September 14, 2009, one-year-old Miley was taken into protective custody after Gabriella G., who is B.G.'s sister, took her to the Imperial County Department of Social Services (the Department) offices. Gabriella had been providing care for Miley since August 3 when Krystal left Miley with her. Krystal had been arrested at the United States/Mexican border for child desertion and being under the influence of drugs on August 8.

The Department petitioned on Miley's behalf under section 300, subdivisions (b) and (g),<sup>1</sup> alleging Krystal had left her with Gabriella without any provision for her support. Krystal indicated she had no Indian ancestry. The court ordered Miley detained. Gabriella applied for licensing and placement, as did Miley's maternal great-aunt. On September 25, the court ordered Miley detained with Gabriella.

At the jurisdictional hearing on October 14, 2009, neither Krystal nor B.G. was present. The court found the allegations of an amended petition to be true and found the provisions of ICWA did not apply.

The social worker reported B.G. was wanted for violating parole, and family members said he was hiding from law enforcement in Mexico. At the dispositional hearing in November 2009, the court removed Miley from parental custody and ordered

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code unless otherwise specified.

reunification services and supervised visits for Krystal. It ordered B.G., as an alleged father, would not receive services. The court ordered Miley placed with Gabriella.

In early 2010, Krystal tested negative for drug use and had regular weekly visits with Miley. At the six-month review hearing in May, the court continued services. In June, however, Krystal was arrested for attempting to smuggle drugs into the United States, and in November she was sentenced to prison.

At the 12-month review hearing on November 1, 2010, the court terminated Krystal's services and set a section 366.26 hearing. On November 5, B.G. contacted the Department and said he wanted to reunify with Miley.

At the permanency review hearing on May 2, 2011, B.G. appeared in court for the first time and the court appointed counsel for him. B.G.'s counsel said B.G. told her he had had a paternity test through child support services which indicated he is Miley's biological father. The court granted a continuance. At B.G.'s request, he had one supervised visit with Miley. On May 16, the court held the continued hearing, but B.G. did not appear and his counsel offered no evidence to support B.G.'s claim of paternity. The court set the matter for further review in six months. In November, Krystal petitioned under section 388, requesting her services be reinstated.

The court combined Krystal's section 388 petition with the section 366.26 hearing on December 28, 2011. B.G. did not attend, and Krystal testified from prison by telephone. After considering the evidence and argument by counsel, the court denied Krystal's section 388 petition, terminated parental rights and set the matter for adoption.

## DISCUSSION

Krystal contends the juvenile court's finding that Miley is not an Indian child under ICWA was not supported by substantial evidence because B.G. was never asked whether he had Indian heritage. She argues ICWA inquiry and notice were required because during the course of Miley's dependency, B.G. was treated as a biological father and as a presumed father. Krystal points to Miley being placed with B.G.'s sister, Gabriella, at the detention hearing; the court continuing the placement at the dispositional hearing; and the Department's argument at disposition that Gabriella should be Miley's caregiver because she is Miley's "paternal aunt" and "an extended family member[] who is important to the child . . . ." She claims Gabriella cannot be considered a nonrelative extended family member because Miley lived with her much longer than the maximum 15 days that a child may be placed with a nonrelated extended family member under sections 319, subdivision (f)(1) and 362.7.

A biological tie to a tribe through a biological parent or parents must be shown in order to trigger ICWA requirements. (25 U.S.C. § 1903(9); *In re E.G.* (2009) 170 Cal.App.4th 1530, 1533.) Until biological parentage is established by an alleged father's biological connection, the minor cannot claim Indian heritage through the alleged father. (*In re E.G.*, at p. 1532.) "The ICWA defines 'parent' as 'any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child . . . .' [Citation.] The ICWA expressly excludes from the definition of 'parent' an 'unwed father where paternity has not been acknowledged or established.' " (*In re Daniel M.* (2003) 110 Cal.App.4th 703, 708.) "An alleged father who has not acknowledged or established

he is a parent within the meaning of title 25 United States Code section 1903(9) lacks standing to challenge a violation of the ICWA notice provisions." (*Id.* at p. 709.) An alleged father may establish or acknowledge paternity by voluntarily signing a declaration of paternity at the time of the child's birth or through scientific testing. (*Id.* at pp. 708-709.)

Krystal's contention that the social worker and the court were required to inquire whether B.G. had Indian heritage lacks merit. No evidence was ever presented to show B.G. is Miley's biological father. Krystal had named him as the father, but he had not been involved in Miley's life, and it was reported he was hiding from law enforcement authorities in Mexico. He appeared in court only one time and, at that hearing, he said he had taken a paternity test through child support services that indicated he is Miley's biological father. The court appointed counsel for him to investigate and to report to the court, but B.G. never presented any evidence of the results of a genetic test to show he is Miley's biological father. His assertion to his attorney that a genetic test showed they shared a biological connection without proof is insufficient to raise his status from alleged father to biological father.

The fact the court ordered Miley placed with Gabriella and that Miley remained with Gabriella from the time Krystal left her there also did not elevate B.G.'s status. Although the social worker referred in reports to Gabriella as B.G.'s sister and as the paternal aunt, counsel for the Department noted that even though reports referred to her as a paternal aunt, B.G.'s status had never been elevated and he is legally an alleged father. Counsel stated that Gabriella being labeled a paternal aunt or extended family

member was irrelevant to B.G.'s status. The recommendation to place Miley with Gabriella was based not on a biological connection, but primarily on Miley's preexisting relationship with her. Also, Gabriella promptly applied to be licensed as a foster parent. The record does not show any biological evidence was ever presented in the juvenile court to show B.G. is Miley's biological father to trigger ICWA inquiry and notice requirements.

Krystal's argument the court's appointment of counsel for B.G. constructively raised his status from alleged father to biological father or presumed father is unfounded. The court's appointment of counsel for the purpose of aiding in establishing whether or not B.G. is the biological father comports with the court's duty under California Rules of Court, rule 5.635(h) to determine whether an alleged father is a biological father or a presumed father. It did not elevate his position from that of alleged father. On this record, Krystal has not shown that ICWA inquiry or notice was required.

#### DISPOSITION

The orders are affirmed.

O'ROURKE, J.

WE CONCUR:

McDONALD, Acting P. J.

McINTYRE, J.