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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

L.G. et al.,

Defendants and Appellants.

E054268

(Super.Ct.No. RIJ120070)

OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part and reversed
in part with directions.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant
and Appellant L.G.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and
Appellant M.M.

Pamela J. Walls, County Counsel, Anna M. Deckert and Carole A. Nunes-Fong, Deputy County Counsel, for Plaintiff and Respondent.

Two children, C.G., and J.G., were declared dependents based on neglect and failure to protect (Welf. & Inst. Code, § 300, subd. (b)),¹ due to their parents' domestic violence, drug use, and transient lifestyle and were placed with a maternal aunt. M.M. (Mother) informed the Department of Public Social Services (DPSS) that her grandfather was an enrolled member of a Cherokee tribe. The parents only minimally participated in reunification services where Mother was sentenced to a term of 16 months and L.G. (Father) only began some components of his plan after Mother was incarcerated. Services were terminated at the six-month review hearing as to both parents, and, after considering the parents' section 388 petitions, filed on the date of the selection and implementation hearing, the court terminated their parental rights. (§ 366.26.) The parents appeal from that judgment.

On appeal, Father asserts the trial court abused its discretion in denying his petition to modify the prior order terminating services (§ 388), requiring reversal of the judgment. Mother asserts the judgment must be reversed because the trial court improperly found that the Indian Child Welfare Act (ICWA) does not apply where the notices to the Cherokee tribes contained incomplete information about Mother's Indian

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

ancestor due to DPSS's failure to obtain necessary information from maternal relatives. We remand for further compliance with ICWA but otherwise affirm.

BACKGROUND

Mother and Father are the parents of C.G., age 5 at the time of detention, and J.G., age 2. On March 20, 2010, Mother was arrested and charged with being under the influence of methamphetamine and in possession of 3.8 grams of the drug, along with possessing a glass pipe used for smoking it. Due to her failure appear, warrants were issued, and Mother was arrested when she turned herself in to her bondsman. Prior to turning herself in, the parents avoided Mother's arrest on the outstanding warrants by moving frequently, living in motel rooms, with friends, and occasionally with relatives, taking the children with them.

The parents eventually left the children with their paternal grandparents, where they stayed until the paternal grandmother was diagnosed with cancer. At that point, the children went to stay with the maternal aunt.

On May 28, 2010, the parents were involved in a domestic dispute that resulted in their eviction from the house where they rented a room. The domestic violence arose when Father observed a baggy of methamphetamine in Mother's purse, after he saw her take possession of it from an unknown male. Father reported that Mother was addicted to methamphetamine and that he had a "license" to use medical marijuana, which he did twice or three times daily.

On July 13, 2010, Mother was arrested on the outstanding warrants. On July 20, 2010, DPSS decided to take the children into temporary custody, and on July 22, 2010, it filed a dependency petition alleging that the parents failed to supervise or protect the children and were unable to provide regular care due to the parents' drug abuse, domestic violence, and transient lifestyle. On July 23, 2010, the court ordered the children detained pending the jurisdictional/dispositional hearing. Mother executed a parental notification of Indian status (Form ICWA-020) indicating she might be a member of, or be eligible for membership in, a Cherokee tribe. The court determined there was reason to believe the children might have Indian ancestry.

On August 5, 2010, DPSS sent ICWA notices to the Bureau of Indian Affairs (BIA), the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians. The notices did not include any information about Mother's grandparents (the children's maternal great-grandparents). DPSS reported that no information was available because Mother had not made contact with the social worker, although the children were living with Mother's sister.² Prior to the jurisdictional hearing, the United Keetoowah Band of Cherokee Indians responded to the notices indicating that, based on the information provided, there was no evidence the children are descendants of an enrolled member of the tribe.

² Unfortunately, the social worker sometimes referred to Mother's sister as the "paternal aunt," while referring to her husband as the "paternal uncle."

On September 16, 2010, the jurisdictional/dispositional hearing was conducted, but neither parent appeared at the hearing. The court made true findings on all allegations of the petition, removed custody of the children from the parents, ordered DPSS to provide reunification services to the parents, and ordered psychological evaluations for both parents. The court also determined that ICWA might apply.

On March 4, 2011, DPSS submitted its six-month status review report, in which it recommended that services be terminated. Mother was incarcerated on criminal charges, serving a 16-month sentence. Regarding reunification services, both parents had only minimally participated. Mother had attended counseling for only one month before she was incarcerated, but she had not participated in parenting classes or other services, including mandatory drug testing and substance abuse treatment, and the social worker could not confirm whether she was taking prescribed psychotropic medications for her mental health diagnoses due to lack of contact with her.

Father did not contact DPSS or participate in any services until after Mother was incarcerated, when he began individual counseling sessions on January 25, 2011; he attended three sessions. His enrollment in parenting classes was only confirmed on February 14, 2011; he had not participated in any other services. The parents maintained a tumultuous relationship, as evidenced by Mother's appearance at one visit with a black eye and their transient lifestyle prior to Mother's incarceration. The children were doing well in the home of Mother's sister and were bonded to their aunt and uncle.

The six-month review hearing was conducted on April 4, 2011. By this time, DPSS had received responses from the Indian tribes indicating that, based on the information provided, the children were not eligible for membership in the Cherokee tribes. Thus, the court determined that ICWA did not apply. The court also found that the parents had not regularly participated in reunification services and terminated those services, since the sibling group included a child under the age of three.

On August 10, 2011, the court conducted a combined hearing pursuant to sections 366.3 (postpermanency hearing review) and 366.26 (selection and implementation hearing). On that date, the parents submitted their respective petitions for modification of the prior order (§ 388) seeking reinstatement of reunification services. The court denied both petitions after finding that neither petition demonstrated changed circumstances or that a modification would promote the best interests of the children. Proceeding with the selection and implementation hearing, the court determined that the children were likely to be adopted and that termination of parental rights would not be detrimental. The court then terminated parental rights to both children.

The parents appealed from the judgment.

DISCUSSION

Father's Appeal

On appeal, Father argues that the juvenile court erroneously denied his petition for modification of a prior order pursuant to section 388 and that the error requires that the

judgment terminating parental rights must be vacated. We disagree.

A juvenile court order may be changed, modified, or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-317.) The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) “Generally, the petitioner must show by a preponderance of the evidence that the child’s welfare requires the modification sought.” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)

In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial court should consider “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.” (*In re Kimberly F., supra*, 56 Cal.App.4th at p. 532.)

The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. (*In re Stephanie M., supra*, 7 Cal.4th at p. 318; *In re S.J.* (2008) 167 Cal.App.4th 953,

959-960 [Fourth Dist., Div. Two].)

Here, the changed circumstances alleged in Father's petition were that Father had "completed anger management and parenting classes. He continues in mental health treatment." However, the attachments to the petition included only certificates for completing a 16-session anger management program and parenting classes. There was no indication Father was in mental health treatment or that he had participated in any other court-ordered treatment program. Father's mental health assessment, performed on October 5, 2010, recommended four therapy sessions per month and two collateral sessions per quarter, but there is no indication Father actually attended any therapy sessions.

Similarly, there is no indication Father participated in any domestic violence program or that he complied with drug treatment or mandatory testing. There is also no indication that he has any stable housing or employment. Further, Father did nothing on his plan until after Mother was incarcerated, some five months after the court took jurisdiction. Given the limited time periods where a child under the age of three is involved, as well as the role that domestic violence and transiency played in this family, the fact that Father attended anger management and parenting classes at the eleventh hour does not demonstrate changed circumstances. (See *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.)

The court properly exercised its discretion when it denied Father's modification petition.

Mother's Appeal

Mother argues that the judgment must be reversed because DPSS did not include adequate information in the notices that were sent to the Indian tribes and breached its continuing duty to inquire about the children's Indian status. We agree.

Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." (25 U.S.C. § 1902.) The State of California recognizes that it has an interest in protecting Indian children and has declared its commitment to protecting the essential tribal relations and best interest of an Indian child by promoting practices in accordance with ICWA. (Welf. & Inst. Code, § 224.) Because ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage, the party seeking foster care placement of, or termination of parental rights to, an Indian child is required to notify the Indian tribe, by registered mail with return receipt requested, of the pending proceedings and the right to intervene. (25 U.S.C. § 1912, subd. (a).)

Under California law, the court, the county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all dependency proceedings. (§ 224.3, subd. (a); *In re A.B.* (2008) 164 Cal.App.4th 832, 838.) "If the court, social worker, or probation officer knows or

has reason to know that an Indian child is involved, the social worker or probation officer is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the necessary information” (§ 224.3, subd. (c).)

Thus, the social worker has a duty to inquire about and obtain all information about a child’s family history in order to assist the tribe in determining if the child is an Indian child. (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1116.) The fact the identity of the tribe is unknown does not discharge DPSS from the requirement of giving notice. The Indian tribe determines whether the child is an Indian child (*In re Robert A.* (2007) 147 Cal.App.4th 982, 988), so only a suggestion of Indian ancestry is needed to trigger the notice requirement (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406, 1408).

The ICWA notice must “contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child’s eligibility for membership.” (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576 [Fourth Dist., Div. Two]; see also *In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) Where notices contain incomplete or incorrect information, a tribe cannot conduct a meaningful search to determine a child’s Indian heritage. (See *In re Louis S.* (2004) 117 Cal.App.4th 622, 631, citing *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705.)

Here, Mother informed the social worker and the court that her grandfather (the children's great-grandfather) was a member of the Cherokee nation, and she had previously provided this information to DPSS in 2009 when general neglect allegations were investigated. However, the original notices sent to the BIA and the Cherokee tribes contained no information about Mother's biological grandparents (the children's maternal great-grandparents) because the "information was unavailable."

Yet, the same notice indicated that Mother's father lived in Riverside. Further, the children were placed with Mother's sister, with whom the social worker met face to face at regular intervals when checking the children's status. There is no indication that the social worker ever inquired about Indian ancestry with Mother's parents, siblings, or half siblings, all of whom are listed in the original ICWA notice.

DPSS argues that any error is harmless because Mother appeared at the detention hearing and failed to provide any specific information about her Indian ancestry. It acknowledges the correctness of Mother's argument that it should have interviewed her relatives for information about Indian ancestry, but argues that even if it had done so, "it would have resulted in a determination that the ICWA did not apply to these children." DPSS's conclusion is based on the fact the prospective adoptive mother identified herself as Caucasian in the adoption assessment. The Mother's failure to provide the social worker with specific information does not render the error harmless, because the responsibility for compliance with ICWA "falls squarely and affirmatively" on the court

and DPSS. (*Justin L. v. Superior Court* (2008) 165 Cal.App.4th 1406, 1410.) The aunt's statement that she was Caucasian did not relieve DPSS of its duty of further inquiry, because the aunt's determination of Indian ancestry is not controlling under ICWA. (*In re Damian C.* (2009) 178 Cal.App.4th 192, 199 ["the question of membership in the tribe rests with the tribe itself"]; *In re Robert A., supra*, 147 Cal.App.4th at p. 988.)

The finding that ICWA did not apply under such circumstances was improper given the inadequate information in the notices. "Deficiencies in an ICWA notice are generally prejudicial, but may be deemed harmless under some circumstances." (*In re Cheyanne F., supra*, 164 Cal.App.4th at p. 577.) Improper notice may be deemed harmless where the tribe actually participated in the proceedings (*In re Miracle M.* (2008) 160 Cal.App.4th 834, 847) or where a notice listed only one of two possibly Indian children, who had the same parents (*In re E.W.* (2009) 170 Cal.App.4th 396, 400-402 [Fourth Dist., Div. Two]).

However, in this case we cannot find the error to be harmless because the omitted information prevented the tribes from having a meaningful opportunity to search the tribal registry. (*In re S.M., supra*, 118 Cal.App.4th at p. 1116-1117 [omission of information about child's grandmother and great-grandmother prevent tribes from conducting meaningful search]; *In re Louis S., supra*, 117 Cal.App.4th at p. 631 [notice is meaningless if insufficient information is presented to a tribe asked to determine if a child is an Indian child].)

DISPOSITION

The order terminating parental rights is conditionally reversed, and a limited remand is hereby ordered, as follows:

The court is directed to order DPSS to obtain complete information about maternal relatives and to provide corrected ICWA notices to the relevant tribes. Once the juvenile court finds that there has been substantial compliance with the notice requirements of ICWA, it shall make a finding with respect to whether the children are Indian children. If at any time within 60 days after notice has been given there is a determinative response that the children are not Indian children, the juvenile court shall find in accordance with the response. If there is no such response, the juvenile court shall find that the children are not Indian children. If the juvenile court finds that the children are not Indian children, it shall reinstate the original order terminating parental rights. If the juvenile court finds that the children are Indian children, it shall set a new section 366.26 hearing and it shall conduct all further proceedings in compliance with ICWA and all related federal and state law.

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RAMIREZ
P.J.

We concur:

KING
J.

CODRINGTON
J.