

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.V., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

N.P.,

Defendant and Appellant.

E056572

(Super.Ct.No. RIJ1100212)

OPINION

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

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

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel,
for Plaintiff and Respondent.

Fifteen-month-old D.V. was injured while in the care of her mother's boyfriend, sustaining a spiral fracture to her left humerus among other injuries. The juvenile court declared D.V. to be a dependent child, offering services to the noncustodial alleged father, but denying services to mother under Welfare and Institutions Code,¹ section 361.5, subdivision (b)(5). Father's services were terminated after six months, and a section 366.26 hearing was set. In the meantime, mother participated in and completed the Family Preservation Court Program, and filed a petition to modify the prior order setting the section 366.26 hearing. The petition was denied because mother continued her relationship with the boyfriend who abused her child, and she never acknowledged her own responsibility for the child's abuse, although she did address substance abuse issues. Mother appealed.

On appeal, mother argues (1) the Riverside County Department of Public Social Services (DPSS) failed to conduct adequate investigation or provide adequate information about mother's Indian ancestry in its notices to the Cherokee tribes; and (2) denial of her section 388 petition was an abuse of discretion. We conditionally reverse the judgment terminating parental rights and order a limited remand for purposes of allowing DPSS to conduct further investigation of the maternal grandfather and great-grandfather's possible Indian ancestry and to provide corrected notice to the Cherokee tribes.

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

BACKGROUND

On February 11, 2011, mother took D.V. to the doctor after noticing that something was wrong with the baby's arm. A few days earlier, mother had left the child in the care of her boyfriend, D.V.'s father, while she went to work. Mother's boyfriend took a shower while the 15-month-old child slept on mother's bed. When he came out of the shower, he saw D.V. lying under a low bookcase that had fallen on top of her. The boyfriend informed mother of the incident, but D.V. seemed to be acting normally, so mother did not seek medical attention, despite the presence of multiple bruises on D.V.'s abdomen, knees, and left scalp, abrasions to her right hand and elbow, and a bleeding cut on her lip. Both mother and her boyfriend acknowledged marijuana use, and mother indicated alcohol use as well.

D.V. seemed normal until February 11, 2011, when she pulled her left arm away and would not let mother touch it. Mother noticed swelling, but went to work. At lunchtime, mother's boyfriend brought D.V. to mother's workplace because the swelling of the arm had worsened. That evening, mother took D.V. to her primary doctor who notified authorities upon seeing multiple bruises all over the baby's body.

While en route and at the hospital, mother was interviewed by a worker for the DPSS. At that time, mother indicated she had no Indian ancestry. Upon transfer to Loma Linda University Medical Center for evaluation, D.V. was found to have suffered a fractured left humerus (diagonal split, offset spiral fracture), numerous bruises all over

her body (including a blackened right eye), bite marks, hair loss, and head swelling. A hospital hold was placed by Child Protective Services (CPS).

A dependency petition was filed on February 16, 2011, alleging nonaccidental physical abuse (§ 300, subd. (a)), neglect (§ 300, subd. (b)), and severe physical abuse to a child under five. (§ 300, subd. (e).) At the detention hearing, the minor was detained and the court ordered the parents to complete the parental notification of Indian status, pursuant to the Indian Child Welfare Act (ICWA), because there was reason to believe the minor is of Indian ancestry. Mother completed the Indian child inquiry form (ICWA-020), indicating possible Cherokee ancestry through her paternal grandfather, who was named on the form.

On March 2, 2011, DPSS sent notices of the pending proceedings to the Cherokee tribes. Regarding mother, father and grandfather, who had Indian ancestry, the only information provided was their names. On March 7, 2011, the United Keetoowah Bank Of Cherokee Indians in Oklahoma responded that “[w]ith the information you supplied us,” there is no evidence that the minor is a descendent of anyone on the Keetoowah Roll. On March 15, 2011, the Cherokee Nation responded that the child could not be traced in their tribal records “based on the above listed information exactly as provided by you.” On March 21, 2011, the court found that DPSS had provided proper notice to the tribes, but did not make any finding that ICWA did not apply.

On March 28, 2011, the court conducted the jurisdictional and dispositional hearing, finding the allegations of the petition true and sustaining it. The minor was

declared a dependent and removed from the custody of her parents. Reunification services were offered to the father, but the court denied services to mother based on a finding under section 361.5, subdivision (b)(5), relating to the finding that the minor came within section 300, subdivision (e) due to the conduct of the parent. Regarding ICWA, the court found that ICWA may apply.

Notwithstanding the fact that services to mother were denied, mother promptly engaged in services with Family Preservation Court and actively participated in programs. She visited regularly, but showed up with bruises on her body and did not come prepared with diapers or snacks. Father, for whom services were ordered, failed to participate in any program. He was inconsistent with visits, frequently showing up late and unprepared. At times, father attended visits with his parents (the paternal grandparents), and argued with the grandfather during the visit.

At the six-month review hearing conducted on October 3, 2011, father's reunification services were terminated and a section 366.26 hearing was scheduled to select and implement a proposed permanent plan of adoption for the minor. The court also found that ICWA did not apply. The report submitted for the hearing by DPSS revealed that the minor was reported to have nightmares after visits with the parents. Mother participated in services and had copies of certificates and letters attesting to her participation. Her situation was not stable, however.

In August 2011, the mother moved in with her mother, the maternal grandmother, for a short time, precluding consideration of the grandmother's home as a relative

placement.² Subsequently, on November 5, 2011, the maternal grandmother was arrested for prostitution and methamphetamine use, putting an end to any consideration of placement of the minor in her home. After moving out of the maternal grandmother's home, mother moved into the home of her boyfriend's mother, and continued to have contact with him. Additionally, the boyfriend transported mother to and from visits with the minor.

Mother contacted her relatives in November 2011 when she realized she might not be able to reunify with the minor, and they assisted her in getting into a sober living home. Mother consistently visited the minor, but showed up at visits with bruises on her body. Mother did not come to visits prepared with toys, games or snacks. After visits, the minor had nightmares. At a visit on July 21, 2011, the minor slapped her mother's face in anger.

While the mother actively participated in Family Preservation Court, the social worker had serious concerns about her judgment, because mother had not taken responsibility for her own actions, was not willing to accept that her boyfriend had injured her daughter, and she continued her relationship with the boyfriend even after the child was removed.

² A maternal aunt of the mother requested relative placement, so a referral to the Relative Assessment Unit was made on November 7, 2011. Subsequently, the maternal great-aunt filed a section 388 petition seeking placement of the minor, which was denied. The maternal great-aunt's appeal from that order is considered separately in case No. E055688.

On January 31, 2012, mother filed a petition to modify the prior order, pursuant to section 388, seeking return of her daughter or, at a minimum, an order for reunification services. On February 9, 2012, at the scheduled hearing, mother withdrew the petition. On April 2, 2012, mother renewed her request to change the prior court order (§ 388). The petition alleged mother had completed the one-year Family Preservation Court program, including a 16-week domestic violence program and a drug treatment program. Mother submitted to regular testing for drugs, and all tests were negative. Additionally, the petition alleged mother had consistently visited the minor and the child was bonded to her.

On April 27, 2012, the court heard the section 388 petition. The court found there was no change in circumstances, nor was modification of the prior order in the minor's best interests. It therefore denied the petition. On June 8, 2012, the court conducted the selection and implementation hearing pursuant to section 366.26. The mother did not present any affirmative evidence, but argued that the court should consider establishing a legal guardianship, rather than terminating parental rights. The court found the minor was adoptable and terminated parental rights. Mother timely appealed.

DISCUSSION

1. The Notices to the Tribes Contained Inadequate Information About the Minor's Relatives With Possible Indian Ancestry.

Mother argues that the trial court erred in finding that ICWA did not apply because the notices to the tribes provided by DPSS included inadequate information

about maternal relatives, despite the access to and availability of relatives. DPSS responds that mother has not shown prejudice and that the information contained in the notices was as complete as possible. We agree with mother.

The ICWA provides that where the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and their right of intervention. (*In re A.B.* (2008) 164 Cal.App.4th 832, 838, citing *In re Daniel M.* (2003) 110 Cal.App.4th 703, 707.)

Section 224.3, subdivision (a), provides that the court, county welfare department, and the probation department had an affirmative and continuing duty to inquire whether a child, for whom a petition under section 300 has been filed, is or may be an Indian child. (*In re A.B., supra*, 164 Cal.App.4th at p. 838.) A parent's failure to object at the juvenile court to inadequate ICWA notice does not preclude appellate review. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 261.)

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 status of the child need not be certain or conclusive to trigger the ICWA's notice requirements. (*In re D.T.* (2003) 113 Cal.App.4th 1449, 1454; *In re Desiree F.* (2000) 83

Cal.App.4th 460, 471.) Thus, the suggestion that a child “might” be an Indian Child is sufficient to trigger the notice obligation. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406, 1408.) Mother informed the court at the detention hearing that she may have Indian heritage, which was sufficient to trigger DPSS’s obligation to investigate or inquire further.

The primary purpose for giving notice to a tribe is to enable it to determine whether the child is an Indian child. (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576; *In re D.T.*, *supra*, 113 Cal.App.4th at p. 1455.) The ICWA notice requirements are strictly construed. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174.) A notice with incomplete or incorrect information prevents a tribe from conducting a meaningful search to determine a child’s eligibility for membership. (*In re Cheyanne F.*, at p. 576.) Thus, it is essential to provide the Indian tribe with all the available information about the child’s ancestors, particularly those who may have Indian heritage. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703; *In re Louis S.* (2004) 117 Cal.App.4th 622, 631.)

Here, mother provided the names of her father and grandfather, the two relatives believed to have Indian ancestry. However, the notice to the tribes included only their names—no dates of birth, places of birth, or other relevant information to assist the tribe in making its determination whether D.V. is eligible to be an Indian child. There is no indication in the record that DPSS ever inquired about this missing information of mother or anyone else. Yet this information was readily available, as the maternal relatives were in contact with DPSS during the pendency of the proceedings, and attended hearings.

The maternal great-aunt, sister of mother's father, was actively involved in the dependency, seeking relative placement of the child with her, and was in continuous contact with the social worker. She could have provided some or all the missing information herself. By failing to obtain the necessary information from readily available maternal relatives, DPSS breached its continuing duty of inquiry, and thus provided inadequate notice to the tribes.

The failure to provide proper notice is prejudicial error requiring reversal and remand. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) We reverse and remand with directions to comply with inquiry and notice provisions of the ICWA. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 188.)

2. The Trial Court Did Not Abuse Its Discretion In Denying Mother's Section 388 Petition.

Mother argues that the trial court abused its discretion in denying her section 388 petition. She points to the facts that she fully completed the Family Preservation Court program, had moved into a sober living home, visited consistently and maintained a bond with the minor, as evidence of changed circumstances and best interests of the minor. 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.)

In the present case, mother did complete a year-long Family Preservation Court program, and appears to have overcome her substance abuse issues. However, as the court indicated in its ruling, the cause that led to the dependency was severe physical abuse, and mother's continued association with her boyfriend, the alleged abuser, showed no changed circumstances. Mother's continued relationship with the boyfriend, coupled with her lack of acknowledgment of her own responsibility in not seeking medical

treatment for the spiral fracture promptly, also demonstrated that the proposed change in court order would not be in the minor's best interests.

The trial court's denial of the section 388 petition was reasonable.

DISPOSITION

The juvenile court's order terminating parental rights and referring the minors for adoptive placement is conditionally reversed. The matter is remanded to the juvenile court with directions to proceed in compliance with the notice provisions of the ICWA and section 224.2, in accordance with the views expressed in this opinion. If, after proper notice to the Cherokee tribes, the court finds that the minors are Indian children, the juvenile court shall proceed in accordance with the ICWA and section 224 et seq. If, however, the juvenile court finds that the minors are not Indian children, the court shall reinstate the order terminating parental rights.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

RICHLI
J.

KING
J.