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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

M.S., Petitioner, v. THE SUPERIOR COURT OF SAN JOAQUIN COUNTY, Respondent; SAN JOAQUIN COUNTY HUMAN SERVICES AGENCY et al., Real Parties in Interest.	C064056 (Super. Ct. No. J05235)

M.S. (petitioner), the mother of J.S. (the minor), seeks an extraordinary writ (Cal. Rules of Court, rule 8.452) to vacate orders of the juvenile court denying reunification services and setting a hearing pursuant to Welfare and Institutions Code section 366.26. (Further undesignated statutory references are to the Welfare and Institutions Code.) We shall issue a writ directing respondent to comply with the notice provisions of the

Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.), and deny the petition in all other respects.

FACTS AND PROCEEDINGS

In July 2009, after petitioner was incarcerated for leaving her court-ordered drug treatment program in violation of her probation, San Joaquin County Human Services Agency (the Agency) filed a section 300 petition on behalf of nine-year-old J.S., alleging he came within the provisions of subdivision (b) (failure to protect) and subdivision (g) (no provision for support). At the time of petitioner's arrest, she and the minor were in the home of the maternal grandmother (who is known to abuse substances) and a man named "Assassin." The whereabouts of the minor's father were unknown.

Petitioner has a history of substance abuse and related criminal behavior, has been referred to county treatment programs on 10 separate occasions, has never completed any of her treatment programs, and had left her most recent substance abuse treatment program in violation of her probation. She also has had 18 previous Child Protection Services referrals, has five other children who are being raised by others, and had failed to comply with her 2008 Voluntary Family Maintenance Agreement.

The minor testified at the jurisdiction/disposition hearing. He was 10 years old at the time of the hearing and was living with a foster mother and brother. He explained that, over the years, he had lived with his mother, father, Aunt B.,

grandmother, and stepfather. He had changed schools eight times during his five years of schooling. When asked where he would prefer to live, the minor listed his sister, mother, father, grandmother, aunt, uncle, and "a lot more relatives," as well as the homes of several friends. He did not want to "go to adoption" or long-term foster care. He would rather be with his "family or mom." He enjoyed his visits with his mother and enjoyed talking to her and playing games during the visits. The social worker also noted that the minor was bonded to his mother.

The juvenile court found petitioner had resisted court-ordered treatment as described in section 361.5, subdivision (b)(13). The court stated it did not need an expert to assess the minor's bond with petitioner, as there was "no question" the minor had an attachment and clear connection to his mother. The minor had been remarkably resilient in coping with the ongoing instability, and is an "amazing" child with unique traits. But petitioner had repeatedly failed to make efforts to deal with her substance abuse, despite court orders and the threat of incarceration. Thus, even considering the minor's bond with petitioner, the court did not find it to be in the minor's best interest to order petitioner to participate again. If petitioner made efforts on her own, she could petition the court for a modification of the order. The court adjudged the minor a dependent child of the court and set the matter for a section 366.26 hearing and permanency review.

DISCUSSION

I

Reunification Services

Petitioner contends the juvenile court abused its discretion in denying her reunification services. She admits there was sufficient evidence to find she was resistant to court-ordered treatment under section 361.5, subdivision (b)(13). She argues, however, that regardless of whether there was a valid basis for bypassing reunification services, the juvenile court erred by failing to order such services under section 361.5, subdivision (c). We disagree.

As relevant here, section 361.5, subdivision (c) provides that the court shall not order reunification services for a parent described in section 361.5, subdivision (b)(13), "unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." We review the denial of services under section 361.5, subdivision (c) for abuse of discretion. (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 523.)

"Once it is determined one of the situations outlined in [section 361.5,] subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources." (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478.) "The burden is on the parent to change that assumption and show that reunification would serve the best interests of the child."

(*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.) "The purpose of imposing a 'best interest of the child' standard '"is to maximize a child's opportunity to develop into a stable, well-adjusted adult."' [Citation.] Appropriate factors for the juvenile court to consider when determining whether a child's best interest will be served by pursuing reunification include: (1) the 'parent's current efforts and fitness as well as the parent's history'; (2) '[t]he gravity of the problem that led to the dependency'; (3) '[t]he "strength of relative bonds between" the dependent child and "both parent and caretakers"'; and, '[o]f paramount concern,' (4) 'the child's need for stability and continuity.' [Citation.]" (*In re D.F.* (2009) 172 Cal.App.4th 538, 547, italics omitted.)

Here, petitioner was making no efforts to address her drug addiction. She had failed to take advantage of 10 previous substance abuse referrals and had failed to comply with her most recent court-ordered treatment program, resulting in her incarceration and the removal of the minor. Since her latest release from incarceration, she had not participated in any drug treatment and, in fact, had failed to utilize the recent referral and accept the program opening that had become available just days before the hearing. She has a long history of drug abuse and has been in and out of jail most of her adult life. Although the minor is bonded to petitioner, he is parentified and had lived with numerous family members over the years. Petitioner has been unable to provide a stable residence for the minor, resulting in a transient lifestyle.

In light of these circumstances, we conclude the juvenile court did not abuse its discretion by declining to order reunification services for petitioner.

II

Bonding Study

Petitioner contends the juvenile court abused its discretion in refusing to order a bonding study; we reject her contention.

The juvenile court's discretion to order a bonding study arises from Evidence Code section 730 which provides, in relevant part: "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court . . . ." Thus, the reason for appointment of an expert is that the expertise is, or may be, required to resolve issues in the case.

In a hearing to terminate parental rights in a dependency proceeding, the primary issue often is whether the parents can establish that the child would benefit from a continuing relationship with them and that termination of parental rights would therefore be detrimental to the child. (§ 366.26, subd. (c)(1)(B)(i).) In attempting to establish or eliminate this exception to the preference for adoption, the parties or the court may require a bonding study to assist in determining

whether such a parent-child bond that would potentially create a question of detriment to the child exists.

In this case, upon denial of reunification services and the setting of the section 366.26 hearing, petitioner requested a bonding study. She claimed it was necessary for the court to get "a clear picture of the bond between [petitioner and the minor]." The juvenile court denied the request, stating that it was already aware, based on the record and the minor's testimony, that the minor had what the court considered more than just a bond, but had an "attachment" to petitioner, so it did not need the bonding study. Since the purpose of ordering a bonding study is to have an expert determine and then testify to the attachment, if any, between the parent and child, and the court already had the necessary information, it was not an abuse of discretion for the court to deny the request for a bonding study.

III

ICWA

Petitioner contends the juvenile court and the Agency failed to comply with the notice provisions of ICWA. We agree.

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, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the

pending proceeding and the right to intervene must be sent to the tribe. (25 U.S.C. § 1912; see also Welf. & Inst. Code, § 224.2; Cal. Rules of Court, rule 5.481(b).) The Indian status of a child need not be certain or conclusive to trigger ICWA's notice requirements. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.) Failure to comply with the notice provisions and determine whether ICWA applies is prejudicial error. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424; *Desiree F.*, *supra*, at p. 472.)

Here, the Agency failed to fulfill its responsibilities under ICWA. At the July 31, 2009 hearing, petitioner indicated the minor might have Indian ancestry. On August 12, 2009, the Agency filed a Parental Notification of Indian Status form, signed by petitioner, stating petitioner may have Cherokee ancestry. Thereafter, it appears the Agency took no steps whatsoever to obtain further tribal or ancestry information, nor did the Agency make any attempt to provide notice to the tribes with the information it had available to it. Instead, the Agency merely reported in its October 8, 2009, jurisdiction/disposition report that "[i]t has been difficult to obtain ICWA information from the mother due to her incarceration. The undersigned will obtain more information for the mother at the next Court hearing . . . ."

The record, however, reflects that the same social worker who prepared the report had been transporting the minor to visit petitioner in jail. The social worker could have requested additional information from petitioner during any of these

visits. Moreover, petitioner was released from custody in November 2009 and participated in weekly visits with the minor with the social worker present. Yet, the record contains no addendum or other document indicating any attempts to comply with ICWA. Additionally, throughout these proceedings, the social worker knew how to contact the maternal grandmother, and even provided her address in the jurisdiction/disposition report.

Furthermore, even if the social worker had been unable to obtain any additional information from petitioner or the maternal grandmother upon request, the Agency had enough information to require notice be sent. The record contains: (1) the minor's name and date of birth, (2) the mother's name and date of birth, (3) the maternal grandmother's name and date of birth,[1] and (4) the deceased paternal grandfather's name.

Despite having notice that the minor may have Cherokee ancestry, the Agency made no attempt to obtain the necessary information prior to the disposition hearing or send notice to the tribes. Thus, further proceedings are required.

DISPOSITION

The petition for extraordinary writ is granted as to the claim of failure to provide notice in compliance with ICWA and

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[1] The maternal grandmother's date of birth is contained in the July 27, 2009, Stockton Police Department's incident report which resulted in the detention of the minor, and was attached to the social worker's report as exhibit C.

denied as to the remaining issues. Let a peremptory writ of mandate issue directing respondent juvenile court to vacate its orders denying petitioner reunification services and scheduling a section 366.26 hearing, and order the Agency to provide notice in accordance with ICWA. If, following such notice, a tribe determines that the minor is an Indian child, or if other information is presented showing the minor is an Indian child as defined by ICWA, the juvenile court shall conduct a new dispositional hearing in conformity with all the provisions of ICWA. If, however, the tribes determine that the minor is not an Indian child, or if no response is received indicating the minor is an Indian child, the juvenile court shall reinstate the vacated orders.

Petitioner's request for stay is denied. In order to prevent the frustration of the relief granted, the decision of this court shall be final forthwith. (Cal. Rules of Court, rule 8.490(b)(3).)

HULL, Acting P. J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.