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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re T.B. et al., Persons Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, **Plaintiff and Respondent,** **v.** **KATHLEEN W.,** **Defendant and Appellant.**	**A115616** **(Alameda County Super. Ct. Nos. J187561 & J187562)**

Kathleen W. appeals an order denying her Welfare and Institutions Code section 388 petition seeking return of her children, T.B. and J.B.[1] We reverse and remand for the limited purpose of ensuring compliance with the notice requirements of the Indian Child Welfare Act of 1978 ("ICWA"), title 25 United States Code section 1901 et seq.

BACKGROUND

On June 23, 2003, the Alameda County Social Services Agency (CFS) filed a petition alleging that T.B., born in January 1991, and J.B., born in September 1999, were

[1] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

minors within the jurisdiction of the juvenile court under Welfare and Institutions Code section 300, subdivisions (a), (b), and (g). The petition alleged that the minors' father had physically abused T.B. and that the parents had failed to protect the minors in various respects. For example, the petition alleged that Kathleen W. ("Mother") has a history of drug and alcohol abuse, and serious mental illness, that she failed to obtain appropriate medical care for infected bug bites suffered by T.B., that the parents failed to appropriately respond to multiple suicide attempts by T.B., that the three-year-old was found home alone at 10:30 p.m., and that the parents engaged in acts of domestic violence in front of the minors. The court ordered the minors detained and placed them in protective custody.

In July 2003, CFS filed a jurisdiction/disposition report, and Mother submitted to the petition on the basis of the report. The juvenile court found the petition to be true.

In December 2003, the CFS filed a six-month status review report. The report noted that Mother was in partial compliance with her case plan. "The mother's progress is quite good in that she is enrolled and participating in inpatient substance abuse treatment and has been very diligent on her visitation." The CFS June 2004 twelve-month status review report stated that Mother had continued making progress, but also noted that she had briefly discontinued use of psychiatric medications and that she had used alcohol. The CFS November 2004 eighteen-month status review report recommended termination of family reunification services and recommended that the minors be permanently planned into long term foster care. The report noted that Mother had been faithful about visitation, but she had continued to use alcohol and was not yet on a stable psychiatric medication regime. The juvenile court terminated family reunification services and selected placement with the foster parents as the permanent plan for the minors.

An April 2005 post-permanent plan review report recommended that the minors return to Mother's home and receive family maintenance services. According to the report, Mother had obtained stable housing in a residential treatment program and had made substantial progress towards alleviating the causes that necessitated removal of the

minors. In late April, the juvenile court continued the minors as dependents of the court and returned them to Mother's home.

In September 2005, the minors were placed with Mother's agreement in 30-day respite care with the previous foster parents, due to Mother's "inability to manage full time care of her children." Mother admitted to a social worker that she consumed alcohol in July 2005 and twice in September 2005 and that she also took a "street Valium" in September.

In October 2005, CFS filed a supplemental petition under section 387 to continue the placement in foster care rather than return the minors to Mother's home. The petition alleged that Mother relapsed in September, that she failed to keep her subsequent agreement to drug test three times a week, and that she failed to graduate from her residential treatment program. The juvenile court ordered the minors detained.

The CFS jurisdiction/disposition report on the section 387 petition reported that Mother left a troubling voice mail message for her social worker on the day of the detention hearing. She threatened to stab the minors' father if he was at the hearing because he was stalking her. The report further stated, "The Mother has had erratic behavior and it is the opinion of the undersigned that the Mother is either drinking, is not taking her medication, or both." The report opined that Mother's "desires for her children are real," but "the Mother appears to become overwhelmed with the reality of 'real parenting.'" The juvenile court found true the allegations of the section 387 petition.

According to the CFS January 2006 disposition report, Mother admitted that she was not taking her medications; she also was not drug testing or participating in a treatment program or therapy. A paternal aunt reported to CFS that she was going to get a restraining order against Mother because Mother was leaving her threatening phone messages. The juvenile court found that Mother's progress was minimal and ordered her to maintain her medication use and AA attendance.

An April 2006 CFS report stated that visits between Mother and the minors had been going well and that Mother indicated that she was staying on top of her psychiatric medication and AA meetings. The juvenile court continued its placement order.

In September 2006, Mother filed petitions under section 388 for return of the minors. On September 26, the juvenile court conducted a contested hearing on the petition. The court found that Mother had not met her burden of proof and denied the petition.

DISCUSSION

I. *Mother's Section 388 Petition*

Mother contends the juvenile court erred in denying her section 388 petition seeking return of the minors to her care.

Section 388 provides that "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition . . . shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction." (§ 388, subd. (a).) A parent who files a section 388 petition bears the burden of showing by a preponderance of the evidence that circumstances have changed and that the proposed modification is in the child's best interests. (§ 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) We review the denial of a section 388 petition for abuse of discretion. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)

The section 388 petition alleged that Mother had remained clean and sober for 11 months (i.e., since September of 2005), attended AA and NA Twelve Step meetings every week, and taken her psychiatric medication for over 11 months. She also alleged that the minors wanted to return to her care. Mother submitted a declaration supporting the allegations in the section 388 petition, and testified consistent with the allegations at the September 2006 hearing. Mother also submitted supportive letters from the manager

of her apartment building, and former social worker, verification of attendance at AA meetings, three excuse slips from her doctor's office, and several certificates from treatment programs pre-dating her September 2005 relapse.

On cross-examination at the hearing on the section 388 petition, Mother admitted that she had not taken any drug tests or seen any counselors in the past year. She also admitted that she had not presented any proof that she had been taking her psychiatric medication, other than her testimony that she had been seeing her doctor once a month and taking the prescribed medication. The three excuse slips submitted into evidence were from January, February, and April 2006, and did not provide any information other than the fact of an appointment.

The minors' father testified that he was opposed to the minors being returned to the Mother's home because she had a new boyfriend living there who had been arrested from the home.

The CFS social worker testified that in her opinion it would not be in the minors' best interest to immediately return to Mother. She opined, "More time is needed to assess Mom's involvement in the services that she indicated that she participates in. I would also need to do a home assessment, and I would, I would really think that a therapist should be involved in some family therapy to assist with the transition, to prepare the children for return."

After the presentation of the evidence, the trial court stated "Right now as it stands the worker has testified that she doesn't believe that the court should return the children today. And if the court were to simply look at the totality of the evidence I agree there are too many unknowns that have not be[en] verified." Mother consented to CFS speaking to her doctor about her treatment, but the doctor was not available that day. CFS declined to request a continuance of the hearing because it was Mother's burden to prove she had been taking her medication.

The trial court denied the petition, reasoning "I think the issue is whether or not the evidence is sufficient. And of course the court can believe even a single witness in that regard, and so if the court believes that the Mother was credible, arguably the court

could act on her testimony and grant the 388 motion. And it's not that the Mother is not credible, she testified, and I listened to her, it appears that she is credible. However, her testimony raises other questions because there were issues in the past regarding whether she was taking the medication, regarding whether she was seeing a psychiatrist for her medications, and she has testified that she has done that. [¶] There's nothing that I heard that rebuts that necessarily, but there's nothing that really confirms that either. [¶] And then on top of that there are questions and concerns that were raised as a result of, of the father's testimony. I don't know who the man is that stayed with the Mother. [¶] . . . [¶] But in any event, it seems as though the home needs to be assessed. [¶] . . . [¶] Without everything being checked out, I'm not inclined to just return the children today." The court also stated that some family therapy is necessary and asked CFS to facilitate that and also to assess Mother's home.

The juvenile court did not abuse its discretion. In light of the history of the case, particularly the fact that the minors had been returned once before without success and Mother's past serious mental instability, the court was understandably cautious about returning the minors. At the time of the hearing, the minors' need for permanence and stability was the primary consideration. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) The court's desire for some confirmation of Mother's testimony and clarification of the situation in her home was prudent, not "'"arbitrary, capricious, or patently absurd,"'" as required for us to conclude the court abused its discretion. (*Id.*, at p. 318.) Mother cites no authority on appeal supporting her argument that the juvenile court erred by requiring Mother to provide some confirmation of the alleged changed circumstances.[2]

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[2] Contrary to Mother's contentions on appeal, it was her obligation to prove the existence of the changed circumstances to the juvenile court's satisfaction, and not the obligation of the CFS to confirm the changed circumstances before the hearing on the section 388 petition. Where appropriate, a juvenile court may continue a hearing to allow CFS to perform an investigation, but Mother's counsel did not request a continuance. And Mother does not argue on appeal that the juvenile court should have continued the hearing.

II. *ICWA*

Mother contends that CFS failed to comply with the notice requirements of the ICWA.

In 1978, Congress enacted the ICWA, which allows an Indian tribe to intervene in dependency proceedings 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 ICWA sets forth specific notice requirements: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify … . . the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) If the tribe's identity cannot be determined, notice must be given to the Bureau of Indian Affairs (BIA). (25 U.S.C. § 1912(a); *In re Edward H.* (2002) 100 Cal.App.4th 1, 4.)

The ICWA notice requirements are strictly construed, and the notices must contain enough information to be meaningful. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.) "The notice must include: if known, (1) the Indian child's name, birthplace, and birth date; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child's parents, grandparents, great grandparents, and other identifying information; and (4) a copy of the dependency petition. [Citation.] To enable the juvenile court to review whether sufficient information was supplied, [CFS] must file with the court the ICWA notice, return receipts and responses received from the BIA and tribes." (*Ibid.*) [3]

The ICWA confers on tribes the right to intervene at any point during state court dependency proceedings. (25 U.S.C. § 1911(c); *Dwayne P. v. Superior Court* (2002) 103

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[3] The Third District Court of Appeal held that the notices did not need to be filed with the court under the law in effect in 2006. (*In re Levi U.* (2000) 78 Cal.App.4th 191; *In re L. B.* (2003) 110 Cal.App.4th 1420.) We agree with the weight of authority to the contrary. (See *In re Karla C.* (2003) 113 Cal.App.4th 166, 175-178 [discussing cases]; see also *In re Asia L.* (2003) 107 Cal.App.4th 498, 507-509.) Under current law, notices must be filed with the court. (§ 224.2, subd. (c).)

Cal.App.4th 247, 253.) The tribe's right to intervene is meaningless if the tribe has no notice that the action is pending; notice ensures the tribe will be afforded the opportunity to assert its rights irrespective of the position of the parents or state agency. (*Dwayne P., supra,* at p. 253.) Because the obligation to provide notice continues until proper notice is given, an error in not giving notice is of a continuing nature and may be challenged at any time during the dependency proceedings. (*Id.* at p. 261.)

Mother informed CFS in June 2003 that she believed her maternal grandmother was part Cherokee, and she provided her grandmother's name and stated that she lived in Berkeley, California. CFS was unable to locate the grandmother in the white pages. CFS sent notice of the July 2003 jurisdictional hearing to the BIA and the Cherokee Nation of Oklahoma Tribe. Copies of the notices were not filed with the court; only proofs of service with certified mail receipts were filed. In May 2004, the CFS sent notice to the Cherokee Tribe of North Carolina, but the record does not contain a copy of the notice or proof of service.

Because the CFS failed to provide the juvenile court copies of the notices sent to the BIA and the two Cherokee tribes, we cannot determine whether the notices were adequate. Accordingly, we reverse the juvenile court's order and remand for the limited purpose of ensuring compliance with the ICWA. CFS must file with the court the ICWA notices sent, return receipts, and any responses received. CFS must also provide notice to all Cherokee tribes not yet properly notified, in compliance with current law requiring notification of "all tribes of which the child may be a member or eligible for membership." (§ 224.2, subd. (a)(3); Cal. Rules of Court, rule 5.664(f).)

DISPOSITION

The order denying Mother's section 388 petition is reversed and the matter is remanded to the juvenile court with directions to order CFS to comply with the notice provisions of the ICWA. After finding that proper notice has been provided and after either receiving determinations of tribal membership or eligibility for membership or waiting the required time period, the court shall make findings whether the minors are

Indian children. If the minors are Indian children, the court shall proceed in conformity with all provisions of the ICWA. If the minors are found not to be Indian children, the court shall reinstate the order denying Mother's section 388 petition.

GEMELLO, J.

We concur.

SIMONS, Acting P.J.

NEEDHAM, J.