Filed 8/15/07 In re Asia A. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re ASIA A. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Respondent, v. S.M., Defendant and Appellant.	E041636 (Super.Ct.No. J197627) OPINION

APPEAL from the Superior Court of San Bernardino County. Robert G. Fowler, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Ruth E. Stringer, Acting County Counsel, and Ramona E. Verduzco, Deputy County Counsel, for Plaintiff and Respondent.

Sharon S. Rollo, under appointment by the Court of Appeal, for Minors.

S.M. (Mother) appeals from a judgment concerning three children: Asia and I.A., twins born in December 2003, when Mother was 17 years old; and A.A., born in March 2005, when Mother was 18 years old.[1] Mother appeals from the order terminating her parental rights. She also raises an issue regarding proper notice under the Indian Child Welfare Act (ICWA), Title 25 United States Code section 1901 et seq.[2]

We affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The San Bernardino County's Department of Children's Services (DCS) filed original dependency petitions in October 2004, alleging that Mother had a substance abuse problem and Mother and T.A. (Father) had failed to supervise and protect I.A. and Asia, exposing them to drugs, paraphernalia, and weapons. Both parents were incarcerated. Mother had been arrested after the police found her in possession of loaded guns and methamphetamine. The court ordered the children detained and the parents to receive reunification services.

In the detention report dated November 2004, DCS stated, "The Indian Child

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[1] Mother's birth date is June 1986.

[2] The notice provisions of ICWA are now incorporated into California law at Welfare and Institutions Code sections 224 through 224.3, inclusive, and California Rules of Court, rule 5.664. All statutory references in this opinion are to the Welfare and Institutions Code unless stated otherwise.

Welfare Act does not apply." Mother had a record of a sustained allegation of neglect concerning I.A. and Asia in May 2004. Mother was also the victim of abuse by her own mother, who was a drug user and a convicted felon. Mother had been raised primarily by her older sister and began using drugs and alcohol at age 12. Mother had a 10th grade education. She spent most of an $11,000 personal injury settlement in 20 days in September 2004. Mother was pregnant and due to deliver in March 2005. Mother disputed that having drugs and guns in her house presented a danger to the nine-month-old twins. Mother was somewhat remorseful and tacitly admitted her involvement with drugs. She was expecting to be in jail until March 2005.

Father had a criminal history of seven offenses and was the victim of abuse from his stepfather. His criminal activities began at age 12. When interviewed in jail, he claimed to be "like Jesus Christ and Johovah." He was delusional and incoherent and was scheduled to undergo a psychiatric evaluation.

The twins displayed some developmental delays. DCS determined that they and the unborn child were at risk from the parents.

At the pretrial settlement conference, both parents were present. The court ordered the twins detained and placed with the maternal great-aunt.

In March 2005, DCS filed an original dependency petition concerning AA., born that month. The petition alleged the existence of the open reunification case and Father's failure to support. According to the detention report, when the child was born, the hospital told Mother DCS would assume custody when Mother was discharged. Mother objected, stating she had been released from jail on March 8 and was living with her

grandmother. While incarcerated, she had completed 27 hours of parenting class and participated in a mother-infant support team.

At the detention hearing, the court ordered A.A. detained. Mother and the paternal grandmother mentioned that Father had some Indian ancestry. Mother executed a declaration under penalty of perjury stating "I have no Indian ancestry as far as I know."

In the jurisdiction/disposition report of April 2005, DCS reported the paternal grandmother had said any claim of Indian heritage was an error. In March 2005, Father had been sentenced to state prison for two years eight months. Mother was receiving various reunification services. Mother was demonstrating a positive attitude about improving her circumstances. She had four negative drug tests in March and April 2005.

In April 2005, the court placed A.A. with the paternal grandmother.

On April 21, 2005, Mother enrolled in the dependency drug court program.

DCS reported in May 2005 that the twins were doing well in their placement with the maternal great-aunt. Mother was making progress. DCS recommended another six months of reunification services. At the six-month review hearing, the court authorized the continued services.

DCS reported ICWA might apply in A.A.'s case. Although the paternal grandmother denied any Indian ancestry and Father was incarcerated and not available to provide information, DCS gave notice to the Bureau of Indian Affairs.

At the contested jurisdictional hearing on May 26, 2005, the court terminated reunification services for Father as to I.A. and Asia. Father stated, "I just found out I was a Mohican. I'm the last." When the court asked about Indian relatives, Father

responded, “It’s ancient time.” Then he added, “One of the -- my grandpas, one of my great lords.” He also identified his great-uncle as having Indian ancestry.

Subsequently, DCS contacted the paternal grandmother about Father’s claim of being Mohegan or Mohican. She denied it and said Father was crazy, suffered hallucinations, and should be on medication.

The court declared A.A. was a dependent of the court and found Father should not receive reunification services. Mother was ordered to have reunification services and visitation. The court also found ICWA did not apply and DCS had complied with its notice provisions.

As of November 2005, Mother had completed many reunification classes and enrolled in job training. Unfortunately, she had one positive drug test in August 2005. The court ordered another six months of services and unsupervised visitation until May 17, 2006.

On December 6, 2005, the Mohegan Tribe of Connecticut disclaimed any interest in A.A.

In January 2006, DSC recommended Mother receive another six months of reunification services for A.A. Mother had been employed but suffered a work-related injury. Mother had moved back and forth from her grandmother’s house. Nevertheless, DCS described Mother’s progress as remarkable. The court ordered another six months of services for A.A.

On February 11, 2006, Mother was arrested for driving under the influence. In May 2006, DCS recommended reunification services be terminated for Asia and I.A.

Mother was unemployed and still living with her grandmother. After more than 18 months, she had not been able to maintain her progress toward reunification. Her participation diminished after October 2005. Father was incarcerated at a state mental hospital. Adoption by the maternal great-aunt was recommended for the twins. DCS also recommended termination of services and adoption by the paternal grandmother for A.A.

The court conducted the 18-month review hearing for the twins and the 12-month review hearing for A.A. together in June 2006. DCS reported it had given ICWA notice concerning A.A. to the Bureau of Indian Affairs and three Indian tribes and not received any positive responses. The paternal grandmother had agreed to make further inquiries but was not successful. The court found Father was the presumed Father of all three children. At the time of the hearing, Mother was unemployed and did not have suitable housing. The court terminated all reunification services and set a section 366.26 hearing for all three daughters.

DCS executed declarations of due diligence about ICWA notice for A.A., stating there was no confirmation of membership in an Indian tribe.

Mother appeals.[3]

In October 2006, based on DCS reports and recommendations, the court found the children were likely to be adopted, terminated the parents' rights, and ordered a permanent plan of adoption.

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[3] Father is not a party to the appeal.

II

ICWA

Although ICWA notice requirements were satisfied as to A.A., Mother argues that the order terminating her parental rights concerning I.A. and Asia must be reversed because DCS and the court failed to comply expressly with ICWA notice requirements as to the twins.

DCS asserts Mother has waived this issue. California courts -- including this court -- have recognized that a parent can raise an ICWA notice issue for the first time on appeal. (E.g., *In re S.B.* (2005) 130 Cal.App.4th 1148, 1159-1160; *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231-232; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 706; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 257-258; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267-1268; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 738- 739; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 471-472.) This is because "'[t]he notice requirements serve the interests of the Indian tribes "irrespective of the position of the parents" and cannot be waived by the parent. [Citation.]' [Citation.]" (*Suzanna L., supra,* at pp. 231- 232, quoting *Samuel P., supra,*, at p. 1267, quoting *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) But even if Mother did not waive the issue, we would hold against her.

Congress enacted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique

values of Indian culture, . . ." (25 U.S.C. § 1902.) Under ICWA, an Indian child is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" (25 U.S.C. § 1903(4); Cal. Rules of Court, rule 5.664(a)(1), formerly rule 1439(a)(1).)

"[T]he tribe determines whether the child is an Indian child and its determination is conclusive." (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174; Cal. Rules of Court, rule 5.664(g)(1), formerly rule 1439(g)(1).) Any affected tribe has the right to intervene at any time in state dependency proceedings. But "'the tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending.'" (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 253.) For this reason, "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 parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . ." (25 U.S.C. § 1912(a).)

Both the juvenile court and DCS have an affirmative duty to inquire whether a dependent child is or may be an Indian child. (Cal. Rules of Court, rule 5.664(d), formerly rule 1439(d).) The notice requirement is triggered when there is any suggestion that a child has Indian ancestry. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; *Dwayne P. v. Superior Court, supra,* 103 Cal.App. 4th at p. 255.)

Here, there was such a "suggestion." Father claimed to be the last of the Mohicans or possibly a member of some other tribe, like a "Creole."[4] DCS then made a diligent effort to inquire and give proper notice in A.A.'s case. (*In re C.D.* (2003) 110 Cal.App.4th 214, 225.) But no positive response was generated from the Bureau of Indian Affairs or any of the tribes contacted.

On appeal, Mother contends she has standing to raise the ICWA issue. (25 U.S.C. § 1914.) She also contends each child must be the subject of separate notice. But the cases she cites all involve children who are half siblings, rather than children who have the same two biological parents. (*In re Desiree F., supra,* 83 Cal.App.4th 470; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 108; *In re Samuel P., supra,* 99 Cal.App.4th at p. 1262.) When children have different parents, a tribe may treat them differently in

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[4] "Creole" is not the name of an Indian tribe. Instead, it refers to **"1.** A person of European descent born in the West Indies or Spanish America. **2a.** A person descended from or culturally related to the original French settlers of the southern United States, especially Louisiana. **b.** The French dialect spoken by these people. **3.** A person descended from or culturally related to the Spanish and Portuguese settlers of the Gulf States. **4.** often **creole** A person of mixed Black and European ancestry who speaks a creolized language, especially one based on French or Spanish. **5.** A Black slave born in the Americas as opposed to one brought from Africa. **6. creole** A creolized language. **7.**

[footnote continued on next page]

terms of membership but when children have identical heritage, there is no reason for a tribe to do so. In fact, the second and third letters, dated January and June 2006, from the Mohegan tribe stated there was no record of Mother, Father, the paternal grandmother, or any family members related to A.A. -- or by extension her siblings -- being connected to the tribe.

In oral argument, minor's counsel cited to the recent case of *In re Robert A.* (2007) 147 Cal.App.4th 982, which involved halfsiblings with the same biological father but who were the subject of separate dependency proceedings. (*Id.* at p. 989.) At the appellate level, the agency made a motion to augment the record to show that ICWA notice had been given for Robert's halfsiblings and therefore should suffice for him. The appellate court denied the motion to augment. Its further comment about whether such notice could ever be adequate was dicta. (*Id.* at p. 990.) In the present case, full siblings were the subject of joint dependency proceedings in which the trial court was advised ICWA notice had been given as to A.A. The same notice would have been given regarding the twins with the same negative response.

The record demonstrates multiple and ongoing heroic efforts by DCS to give ICWA notice based on scanty information from Father and the paternal grandmother. Although there may have technically been an error in not giving notice in the twins' case too, any error had to be harmless because all three children had the same parents. No

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[footnote continued from previous page]
Haitian Creole." (American Heritage Dict. (4th ed. 2000) <http://www.bartleby.com/61/99/C0739900.html> [as of Jul. 20, 2007].)

different results could reasonably or possibly have occurred concerning the twins. (*In re Samuel P., supra*, 99 Cal.App.4th at pp. 1259, 1265; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413-1414.)

III

TERMINATION OF PARENTAL RIGHTS

The issue involving the termination of parental rights applies to all three children. Mother argues the juvenile court should have applied the so-called "benefit exception" to the termination of parental rights found at section 366.26, subdivision (c)(1)(A): "The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

Mother did not raise this issue below, resulting in its waiver on appeal. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Christopher B.* (1996) 43 Cal.App.4th 551, 558; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412.) Instead, Mother argued for a guardianship for I.A. and Asia. But, again, even absent waiver, we would hold against Mother.

Adoption is the preferred plan except in the extraordinary case or exceptional circumstances. (*In re Celine R.* (2003) 31 Cal.4th 45, 53; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) Adoption is preferred to guardianship or long-term foster care. (*In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1188.) The parent has the burden of showing the benefit exception applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343.) Whether the standard of review is the substantial evidence test or the abuse of discretion standard, the evidence in the present case fully supports the trial court's

determination the benefit exception does not apply. (*In re Autumn H.* (1994) 27 Cal.App.4th 567; *In re Jasmine D.*, *supra*, at p. 1351.)

Although the record may demonstrate Mother was faithful in maintaining regular visitation, nothing supports the contention that these very young children would benefit more from a continuing relationship with Mother than they would from having stable, permanent adoptive homes with their maternal great-aunt and their paternal grandmother. Substantial evidence supports the trial court's orders finding the children adoptable, terminating parental rights, and ordering a permanent plan of adoption.

III

DISPOSITION

The orders terminating parental rights and placing all three children for adoption are affirmed.

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s/Richli
J.

We concur:

s/McKinster
Acting P. J.

s/Miller
J.