IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Welfare of: T.B., A.R., and M.B., Minor Children.	No. 41306-0-II (Consolidated with No. 41313-2-II and No. 41316-7-II) UNPUBLISHED OPINION

Armstrong, P.J. — P.R. appeals Kitsap County orders establishing a dependency for her three children and placing them in the care of others. She argues that there was insufficient evidence to prove that she was incapable of adequately caring for the children. *See* RCW 13.34.030(6)(c). She also contends that the Department of Social and Health Services and the court failed to comply with the requirements of the Indian Child Welfare Act, 25 U.S.C. § 1912 (ICWA). We find adequate evidence to support the dependency but remand for a proper determination of the children's Indian status.

FACTS

P.R.'s children are T.B., born January 14, 1999; A.R., born December 24, 2000; and M.B., born June 6, 2005. The family has had past contact with the Department and law enforcement because of referrals regarding health issues, P.R.'s drug use,[1] and the domestic violence between the parents.[2]

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[1] On December 17, 2002, P.R. pleaded guilty to delivery of cocaine.

[2] P.R. testified at the hearing that the father had broken her jaw before they separated. She also alleged in a May 22, 2009 petition for a protection order that he had abused her and their children both before and after the couple separated. In another incident after the couple's separation, P.R. allegedly had pushed her way past M.B. Sr.'s girlfriend into his house. This incident resulted in a charge of residential burglary against P.R.

In 2009, P.R. and the father, M.B. Sr., separated after a 14-year relationship, and P.R. began to have increasing problems with depression and anxiety. In July 2009, she sought mental health therapy on her own. Her therapist diagnosed adjustment disorder, anxiety, and depression, and began cognitive behavioral therapy sessions with her. In addition, P.R.'s primary care physician prescribed Xanax, a form of benzodiazepine, to alleviate her anxiety and depression and help prevent panic attacks.

On March 19, 2010, P.R. left M.B., then four years old, under the care of her brother and her cousin, who allowed him to wander out into a parking lot next to a busy intersection. Someone notified law enforcement. When the officers were unable to locate P.R., they took M.B. to his father's residence. P.R. contacted M.B. Sr. and requested that he return the child. He agreed to do so within the next few days, but did not. On May 26, P.R. contacted Child Protective Services (CPS). She told them that she was concerned about her son's safety, pointing out that M.B. Sr. was involved in a dependency proceeding pertaining to his child with his current girlfriend and that child had been removed from M.B. Sr.'s custody.

The CPS investigator was aware of allegations that P.R. continued to use illegal drugs, and on March 29, 2010, the Department took M.B. into protective custody. At that time, social workers also asked P.R. to submit to urinalysis. She initially refused, but submitted to the test later that same day. Department social workers took P.R.'s two older children into custody two days later and filed a dependency petition pertaining to all three children.

The juvenile court held a shelter care hearing on April 5, 2010.[3] P.R. challenged the

[3] M.B. Sr. waived the shelter care hearing, and he has also agreed to the dependency.

Department's allegations about drug use, asserting that for the last seven years, she had taken no drugs except for those prescribed by her physician. The court returned the children to P.R. subject to a number of conditions including random urinalysis testing. Thereafter, the Department received the report on P.R.'s March 29 urinalysis, which was positive for cocaine, and the social worker requested a second shelter care hearing. Following that hearing, the juvenile court entered an amended placement order, moving the children into foster care.

Roughly a month later, the children moved from foster care into relative placement with their maternal grandparents. P.R. visited regularly with the children, and the visits appeared to go well. P.R. also submitted to a chemical dependency evaluation. That evaluation indicated a benzodiazepine dependency and moderate cocaine dependence. Based on the evaluator's recommendation, P.R. entered a relapse treatment program. However, her counselor determined that attending the groups was making her anxiety worse[4] and terminated treatment, finding that she needed to address her mental health problems first. P.R. continued to submit to random urinalysis, and except for two early positive results for cocaine, they were all negative for illegal drugs.[5]

P.R.'s attendance at her mental health sessions was sporadic. At the time of the dependency hearing, she had missed more than half of the sessions. Although her panic attacks

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[4] In fact, her physician had doubled the amount of her prescription for Xanax.

[5] With the exception of one result indicating the presence of ethanol, the only positive results pertained to prescribed drugs.

had decreased, the goal of substituting physical coping strategies for medication had not yet been met. As a consequence, P.R. had not returned to chemical dependency treatment.

At the dependency proceeding, the juvenile court heard testimony from two of the social workers involved in the case, P.R.'s chemical dependency treatment provider, her mental health therapist, the court appointed special advocate (CASA), P.R., and her mother. It found that P.R. was generally a good mother, but she needed time to get control of her anxiety and deal with her legal problems. It found the children dependent based on P.R.'s current inability to adequately care for the children.

ANALYSIS

I. Sufficiency of the Evidence

In reviewing a challenge to the sufficiency of evidence in a dependency, we determine whether substantial evidence supports the court's findings of fact and whether the findings support the conclusions of law. *In re Dependency of E.L.F.*, 117 Wn. App. 241, 245, 70 P.3d 163 (2003). Evidence is substantial if viewed in the light most favorable to the party prevailing below. It is sufficient if it allows a rational trier of fact to find the fact in question by a preponderance of the evidence. *In re Dependency of M.S.D.*, 144 Wn. App. 468, 478, 182 P.3d 978 (2008). As a reviewing court, we do not weigh the evidence or the credibility of the witnesses. *E.L.F.*, 117 Wn. App. at 245.

Under RCW 13.34.030(6)(c), a dependent child is one who "[h]as no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development."

P.R. argues that the Department presented inadequate evidence to prove either that (1) she is incapable of adequately caring for the children, or (2) they were at risk of harm in her care.[6]

We find no merit in this argument. The record supports the juvenile court's findings that P.R. has significant mental health problems that impact her ability to function and safely parent her children. When P.R. sought counseling, she told the therapist that her anxiety was increasing because of several stressors in her life, including the termination of her relationship with the children's father, the difficulties of being a single parent of three young children, and difficulties concentrating in the academic setting. Police reports document violent behavior by both P.R. and M.B. Sr., and P.R. was facing criminal charges for one incident. Clearly, there were times when P.R. reacted inappropriately to stress. P.R.'s mental health counselor testified that her cognitive abilities are impaired by her anxiety/depression, specifically, her concentration, memory, and ability to focus on tasks. Further, according to the chemical dependency expert, the benzodiazepine drug she was using to help relieve her depression and anxiety could, itself, affect decision-making.

The record also supports the trial court's findings with respect to P.R.'s chemical dependency issues. She had used cocaine at least twice near the time of the children's removal from her home. She said those relapses were the result of stress. Thereafter, she appears to have relied upon the benzodiazepine drugs prescribed, but those drugs, too, are addictive, and they did not seem to be alleviating her anxiety, even after the prescribed amount was increased. It is

[6] In this context, she assigns error to findings 2.1-2.5 of the dependency order, as well as conclusion 3.4.

reasonable to believe that until she is able to deal with stress and anxiety without drugs, she is at risk of relapse to substance abuse.

Finally, the court's findings are sufficient to support the conclusion that a dependency is warranted under RCW 13.34.030(6)(c). A dependency based on that provision does not turn on parental "unfitness" in the usual sense. *In re Dependency of Schermer*, 161 Wn.2d 927, 944, 169 P.3d 452 (2007). It allows the State to intervene when circumstances affect a parent's ability to respond to the children's needs. *See Schermer*, 161 Wn.2d at 944. Evidence that P.R. interacted well with her children during visitation, and that her children exhibited no extraordinary behavioral problems bodes well for return of the children, but it does not negate the current need for intervention. The dependency ensures the children's safety while it provides P.R. the opportunity to find solutions to her problems.

II. Compliance with ICWA

Department social workers testified that P.R. believed there was some Native American heritage in her background, but the Department had not confirmed or excluded that possibility. The court nonetheless found that there was no reason to know that the children are Indian children as defined in 25 U.S.C. § 1903(4).

The ICWA applies to any involuntary child custody proceeding involving an Indian child.[7] It requires the State to notify the parents and the Indian child's tribe, by registered mail with

[7] The ICWA defines an "Indian Child" as a minor who "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); *see also In re Adoption of M*, 66 Wn. App. 475, 478, 832 P.2d 518 (1992).

return receipt, of the pending proceedings and the tribe's right to intervene. 25 U.S.C. § 1912(a). The Indian status of the child need not be certain. *In re Kahlen W.*, 233 Cal. App. 3d 1414, 1421-22; 285 Cal. Rptr. 507, 511 (1991). Notice is required whenever the court knows or has reason to believe the child is Indian. *In re Kahlen W.*, 233 Cal. App. 3d at 1421-22. The Bureau of Indian Affairs has published guidelines for state courts under 44 Fed. Reg. 67, 584-95. Based on those guidelines, a court has reason to believe a child is Indian if it is so informed by any party to the case, an Indian tribe, Indian organization, or public or private agency. 44 Fed. Reg. 67, 586; *see also In re Interest of H.D.*, 729 P.2d 1234 (Kan. Ct. App. 1986); *In re Dependency of Colnar*, 52 Wn. App. 37, 40, 757 P.2d 534, 536 (1988). When the court receives such information, no further proceedings can be held until at least 10 days after receipt by the tribe or Secretary of the Interior of the notice required by 25 U.S.C.§ 1912(a). *In re Colnar*, 52 Wn. App. at 39; *see also In re Dependency of T.L.G.*, 126 Wn. App. 181, 192 n.26, 108 P.3d 156 (2005).

The Department informs the court that it has ruled out five of the six tribes suggested as possibilities. However, none of that documentation is in the record, and it was apparently not presented to the juvenile court. In any case, as the investigation is not complete, the juvenile court's finding was premature. The Department concedes this error. We reject P.R.'s contention that it requires reversal. The proper procedure is remand for further proceedings. *See In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 242, 237 P.3d 944 (2010).

We affirm the dependency and disposition orders. We remand the case to the juvenile court for the following actions. The Department shall complete its investigation. If the results are

negative as to the children's Indian status, the Department shall present the documentation to the trial court and make it part of the record. In that case, the dependency and disposition orders will stand. On the other hand, if there is a tribe that desires to become involved, the juvenile court shall reconsider the dependency and disposition with the tribe's input and in light of the ICWA requirements.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Van Deren, J.

Johanson, J.