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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re AMIRAH H., a Person Coming Under the Juvenile Court Law.	B166658 (Los Angeles County Super. Ct. No. CK47211)
DEPARTMENT OF CHILDREN AND FAMILY SERVICES, LOS ANGELES COUNTY, Plaintiff and Respondent, v. REBECCA T. and CALVIN H., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County. Margaret S. Henry, Judge. Affirmed in part and reversed and remanded in part.

Kimberly A. Knill, under appointment of the Court of Appeal, for Defendant and Appellant Rebecca T.

Anna L. Ollinger, under appointment of the Court of Appeal, for Defendant and Appellant Calvin H.

Lloyd W. Pellman, County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Rebecca T. and Calvin H appeal the juvenile court's order terminating their respective parental rights to their daughter Amirah H. On appeal, Rebecca T. argues the court should not have terminated her parental rights because the Department of Children and Family Services (DCFS) failed to provide her with court ordered visitation between the time reunification services were terminated at the six month status review hearing and the Welfare and Institution Code section 366.26[1] hearing. Below, the juvenile court concluded Rebecca T. did not demonstrate the DCFS was responsible for her lack of visitation during that time period. As set forth more fully herein, sufficient evidence supports the juvenile court's conclusion. Consequently, Rebecca T.'s complaint concerning visitation does not warrant reversal of the order terminating parental rights.

This notwithstanding, both parents also complain the court erred terminating their rights in view of the fact the DCFS neglected to investigate Amirah H.'s possible native American heritage and did not comply with the Indian Child Welfare Act (ICWA), 25 United States Code section 1912. Specifically, the DCFS failed to notify the Bureau of Indian Affairs (BIA) of the dependency proceedings as required by the ICWA. The DCFS concedes it failed to comply with ICWA's notice requirement. Therefore, we reverse and remand.

FACTUAL AND PROCEDURAL HISTORY

When Amirah H. was born to Rebecca T. in December 2001, the baby tested positive for exposure to drugs. Amirah H. was detained and the DCFS filed a juvenile dependency petition pursuant to section 300, subdivisions (b) and (j). In addition to alleging Rebecca T.'s drug abuse during pregnancy, the petition also alleged Amirah H.'s

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

father Calvin H., had a history of drug abuse and criminal convictions and he had failed to protect his unborn daughter.

At the detention hearing, the court inquired into the potential Native American heritage of the baby. Counsel for both parents denied any such heritage. During the hearing the court ordered, among other things, Rebecca T. to have three monitored visits with her daughter per week.

A subsequent jurisdictional and dispositional report indicated Rebecca T. told a dependency investigator her father may have had some Native American heritage. There is no evidence the DCFS ever investigated Rebecca T.'s statement about her father, nor did the DCFS notify the BIA of the case.

Rebecca T. visited Amirah H. sporadically over the next several months and often had difficulty coordinating the visits with Amirah H.'s caretakers.

At the jurisdictional and dispositional hearing in April 2002, the court declared Amirah H. a dependent under section 300. The court ordered six months of reunification services for Rebecca T. including drug treatment and parenting classes. [2] The prior orders for visitation remained in effect.

In May 2002, Rebecca T. was incarcerated for drug possession. She was convicted and in July 2002 subsequently released into a drug diversion program. A report prepared for the six months status review hearing noted Rebecca T. had visited her daughter five times during the prior six month period. Reports also indicated Amirah H. was thriving in her foster home and that her foster parents wanted to adopt her.

In early November 2002, at the six month status review hearing, the court found Rebecca T. was in only partial compliance with the case plan and that DCFS had provided reasonable services to Rebecca T. The court terminated reunification services, but left all other orders, including the order for monitored visitation in effect. The court also

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[2] No reunification services were ordered for Calvin H. pursuant to section 361.5, subdivision (b)(10).

scheduled a section 366.26 hearing for March 2003. Although Rebecca T. did not attend the status review hearing, she was served with notice of her rights to file an extraordinary writ.

At the March 2003 section 366.26 hearing, the DCFS reported Rebecca T. had not visited with the minor since the status review hearing. The DCFS also indicated an adoptive home study on Amirah H.'s foster parents had been completed and approved. During the hearing, Rebecca T.'s counsel complained the DCFS had not allowed Rebecca T. to visit since the November status hearing. The court stated Rebecca T. was still entitled to visit and modified the visitation order to reflect Rebecca T.'s entitlement to one monitored visit per week. The court continued the section 366.26 hearing.

The court held a contested section 366.26 hearing in late April 2003. At the hearing Rebecca T. testified she had resumed weekly visits with her daughter since the March hearing. She stated she did not visit the child from November 2002 until March 2003 because she did not believe she had the right to visitation. She claimed that after the six month status review hearing in November 2002, the social worker told her that her parental rights had been terminated and that she was no longer entitled to visit the child. Rebecca T. further testified that she requested the social worker declare in writing that she was no longer allowed visits, but the social worker never provided such a statement. Although she claimed she left a message for her counsel (who attended the November 2002 hearing) Rebecca T. did not follow-up with her attorney to verify the social worker's statements about visitation.

The social worker also testified at the hearing. The social worker denied telling Rebecca T. her parental rights had been terminated or that she could no longer visit the child. She stated Rebecca T. had not been in contact with the DCFS since November 2002 and that she never called for visitation even though it was her responsibility to do so. She further testified that since the minor had been detained in December 2001, Rebecca T. had visited the child less than 15 times. She also opined Rebecca T.'s interest in visiting

the child coincided with her involvement with the court ordered drug diversionary program.

At the conclusion of the hearing the court found that Amirah H. was adoptable and that no statutory exception to termination existed. With respect to Rebecca T.'s complaint about visitation, the court found the social worker's testimony to be more credible than that offered by Rebecca T. The court did not believe Rebecca T. had been denied visits and that if Rebecca T. was confused about the situation or thought her visitation rights had been improperly denied she should have followed-up with her counsel. The court also noted that in any event, there was no evidence that Amirah H. would benefit from the continued relationship with Rebecca T. Consequently, the court terminated parental rights.

Rebecca T. and Calvin H. timely appeal.

DISCUSSION

This appeal raises two issues, whether: (1) the court erred in terminating Rebecca T.'s parental rights in view of her claim DCFS prevented her from visiting Amirah H. between the time reunification services were terminated and the section 366.26 hearing; and (2) the court erred in terminating the parental rights of both Calvin H. and Rebecca T. in light of the DCFS's failure to comply with the ICWA's notice requirements. As set forth below, only the second issue warrants reversal.

1. Rebecca T.'s Visitation Claim

At the section 366.26 hearing the court must select and implement a permanent plan for the dependent child. The court has four alternatives in doing so: (1) termination of parental rights and adoption; (2) identification of adoption as the plan but without

immediate termination of parental rights; (3) appointment of a guardian without termination of parental rights; or (4) long-term foster care. (§ 366.26, subd. (b)(1)-(4); *In re Jessie G.* (1997) 58 Cal.App.4th 1, 3.) Because the express purpose of section 366.26 is to provide stable *permanent homes* for dependent minors, the preferred placement plan among the four alternatives is adoption. (*In re Ronell* (1996) 44 Cal.App.4th 1352, 1368.)

Thus, in selecting a placement plan, the court must determine whether the child will be adopted based upon DCFS's assessment concerning the likelihood of adoption if parental rights are terminated. (§§ 366.26, subd. (c)(1); 366.21, subd. (i).)[3] If the court finds the child is adoptable, the court may order the termination of parental rights unless the court finds the termination would be detrimental to the child under one of the five circumstances listed under section 366.26, subdivision (c)(1)(A) through (E).

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[3] The assessment must include:

"(1) Current search efforts for the absent parent or parents.

"(2) A review of the amount of and nature of any contact between the minor and his or her parents since the time of placement.

"(3) An evaluation of the minor's medical, developmental, scholastic, mental, and emotional status and an analysis of whether any of the minor's characteristics would make it difficult to find a person willing to adopt the minor.

"(4) A preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or guardian, particularly the caretaker, to include a social history including screening for criminal records and referrals for child abuse and neglect, the capability to meet the minor's needs, and understanding of the legal and financial rights and possibilities of adoption and guardianship.

"(5) The relationship of the minor to any identified prospective parent or guardian, the duration and character of the relationship, the motivation for seeking adoption or guardianship, and a statement from the minor concerning the placement and the adoption or guardianship, unless the minor's age or physical, emotional, or other condition precludes his or her meaningful response, and if so, a description of that condition." (§ 366.21, subd. (i).)

Here the juvenile court found Amirah H. adoptable and that none of the statutory exceptions to termination of parental rights applied. We review the court's findings for sufficiency of the evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) "On a review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*Ibid.*)

On appeal, Rebecca T. does not contest the juvenile court's determination Amirah H. was adoptable. She contends, however, the court erred in terminating her parental rights because the DCFS prevented her from visiting the child between the six month review hearing (when reunification services were terminated) in November 2002 and March 2003 the section 366.26 hearing.[4] She asserts that because she could not visit the minor during this crucial period of the proceedings, the DCFS effectively denied her an opportunity to show the visitation statutory exception, section 366.26, subdivision (c)(1)(A),[5] to the termination of parental rights and/or the ability to bring a viable section 388 motion.

Below the juvenile court heard testimony from Rebecca T. and the social worker on the issue of whether the DCFS had prevented Rebecca T.'s visitation. This evidence

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[4] On appeal we note DCFS asserts this issue is not appealable because at the six month review hearing the juvenile court determined the DCFS had provided the mother with reasonable services and thus Rebecca T.'s opportunity to challenge that finding expired when she failed to file an extraordinary writ. The DCFS misreads Rebecca T.'s brief. She is not challenging the DCFS's provision of reunification services prior to the six month review hearing. Instead she is assailing the DCFS's alleged failure to allow her court ordered visits with Amirah H. *after* reunification services were terminated at the six month review hearing. Her appeal on this issue is timely and appropriate.

[5] Section 366.26, subdivision (c)(1)(A), provides the court should not order permanent plan of adoption when termination of parental rights would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the [child] and the [child] would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).)

directly conflicted. The juvenile court resolved the conflict in favor of the DCFS, finding the social worker's testimony more credible than Rebecca T.'s version. Rebecca T. has presented nothing to this court to demonstrate that the evidence supporting the court's order is insufficient, unreasonable or incredible. In light of the juvenile court's inherent ability to assess the evidence before it and our limited role on appellate review, we cannot say the juvenile court erred in concluding the DCFS was not responsible for Rebecca T.'s failure to visit Amirah H. Consequently, we conclude Rebecca T.'s complaint about visitation does not warrant a reversal of the court's order terminating her parental rights.

2. ICWA Claim

In their briefs, both parents argue the DCFS's failure to comply with the ICWA mandates reversal of the order terminating their parental rights. They assert the record fails to reflect the DCFS made any effort to investigate the possible Indian status of Amirah H. and failed to notify the proper parties, namely the BIA, of the pending dependency proceedings. On appeal, DCFS concedes this error and has notified this court that it does not oppose reversal of the juvenile court's order on this basis. With these matters in mind, we examine the merits.

Title 25 United States Code section 1912, subdivision (a) provides:

> "In any voluntary 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, Indian child shall notify . . . the Indian child's tribe . . . of the pending proceedings and of their right of intervention. If the identity or location of . . . the tribe cannot be determined, such notice shall be given to the Secretary [of the BIA] . . . who shall have fifteen days after receipt to provide the requisite notice to 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 . . . tribe or the Secretary. . . ." (25 U.S.C. § 1912, subd. (a).)

This notice requirement applies even if the Indian status of the child is uncertain. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.) Moreover, the parents cannot waive the notice. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 735-736.) When 25 United States Code section 1912, subdivision (a) is violated, a parent, the child, or tribe may petition the court to invalidate the termination proceeding. (See 25 U.S.C. § 1914.)

Here, Rebecca T.'s statement to the DCFS investigator Amirah H.'s maternal grandfather may have had Indian heritage triggered the department's notice obligations under ICWA. DCFS's failure to comply with 25 United States Code section 1912, subdivision (a) warrants reversal of the order terminating Calvin H. and Rebecca T.'s parental rights. (*In re Marinna J., supra,* 90 Cal.App.4th at p. 739; see 25 U.S.C. § 1914.)

On remand the juvenile court must direct DCFS to comply with the ICWA notice provisions. If, after proper inquiry and notice, no response from the BIA or a tribe is received indicating that Amirah H. is an Indian child, all previous findings and orders shall be reinstated. However, if the BIA or a tribe determines that Amirah H. is an Indian child as defined by the ICWA, the question remains whether all prior orders and findings made in violation of the requirements of the ICWA must be vacated.

A finding a child is an Indian child under the ICWA automatically triggers certain procedural requirements and safeguards. (See 25 U.S.C. § 1912, subds. (b)-(f).) For example, no foster care placement of an Indian child may be ordered "in absence of a determination, supported *by clear and convincing evidence*, including testimony of a qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912, subd. (e); emphasis added.) Similarly, no termination of parental rights of an Indian child may be ordered "in absence of a determination, supported by evidence *beyond a reasonable doubt*, including testimony of qualified expert witnesses, that the continued custody of the child by a parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912, subd. (f); emphasis added.) If the court concludes Amirah H. is an Indian child under the ICWA, she is entitled to all of the benefits of the ICWA's provisions from the inception of the case, even if her tribe does

not otherwise object or intervene on her behalf. To the extent *In re Desiree F.* (2002) 83 Cal. App. 4th 460, 475 is read to require reversal of *only* those prior orders to which the tribe objects, we disagree. The right to seek the invalidation of any order which fails to comply with the ICWA belongs to the Indian child and her parents as much as it does to the tribe. (25 U.S.C., § 1914 ["*Any Indian child* who is the subject of any action for foster care placement or termination of parental rights under State law, *any parent* or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act [25 USCS §§ 1911, 1912, and 1913]."]; emphasis added.) Here, by letter brief the parents have made clear they are seeking, under 25 United States Code section 1914, to invalidate all juvenile court actions in violation of the ICWA. In view of the foregoing, we conclude that the failure to comply with the ICWA requires the court vacate all of the prior orders after the detention hearing.

DISPOSITION

The detention and dispositional orders, orders from the subsequent status review hearings and the order of the juvenile court terminating Calvin H. and Rebecca T.'s parental rights to Amirah H. are reversed. On remand, the juvenile dependency court is directed to order the respondent DCFS to comply with ICWA notice provisions. If, after proper inquiry and notice, no response from the BIA or a tribe is received indicating the minor is an Indian child, or the responses received indicate the minor is not an Indian child, within the meaning of ICWA, then the juvenile court shall reinstate all prior orders including the order terminating parental rights. (E.g., *In re Marinna J., supra,* 90 Cal.App.4th at p. 740.) If, on the other hand, the BIA or a tribe determines the minor is an

Indian child under ICWA, the juvenile court shall conduct the detention, disposition and all subsequent hearings in conformity with the provisions of the ICWA California Rules of Court 1439.

In all other respects, the order terminating parental rights is affirmed.

CERTIFIED FOR PUBLICATION

WOODS, J.

We concur:

JOHNSON, Acting P.J.

ZELON, J.