Children's Law Center of California

"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

Adoption; Selection of Permanent Plan

In re Samantha H. – published 5/26/2020; Second Dist., Div. Eight
Docket No. B300065
Link to case: https://www.courts.ca.gov/opinions/documents/B300065.PDF

WHEN THE STATUTORY REQUIREMENTS ARE MET TO TERMINATE PARENTAL RIGHTS AND ORDER ADOPTION AS THE PERMANENT PLAN, THERE IS NO ADDITIONAL REQUIREMENT FOR THE JUVENILE COURT TO AFFIRMATIVELY ENSURE THAT THE RECORD REFLECTS THAT A WILLING PROSPECTIVE NON-RELATIVE ADOPTIVE PARENT PREVIOUSLY CONSIDERED THE PLAN OF LEGAL GUARDIANSHIP AND THEN REJECTED IT BEFORE PROCEEDING WITH ADOPTION.

A petition was filed on behalf of Samantha H. as a result of mother's drug use. Samantha was placed with the mother of Samantha's godmother, M.W. The petition was sustained, and mother was offered reunification services, which were terminated at the 12-month hearing because she had made no progress. At the section 26 hearing, the court considered, among other reports, two Caregiver Information forms filed by M.W. in which she stated she wanted to adopt Samantha. Mother did not appear at the hearing. Her attorney presented no

evidence but objected on mother's behalf to the court terminating her parental rights. Adoption was the permanent plan selected for Samantha. Mother appealed.

Affirmed. Since the mother never objected to the juvenile court ordering adoption as the permanent plan on the basis that M.W. wasn't properly advised of legal guardianship, the argument is waived on appeal. However, even if the challenge had not been waived it would fail because the juvenile court need not inquire of caregivers whether they have been advised of legal guardianship as a permanent plan option. The two findings the juvenile court has to make in order to free a minor for adoption is that there is clear and convincing evidence that the minor will be adopted and that reunification services have been previously terminated. Here, mother's challenge is not that Samantha should not be adopted, but rather, that the juvenile court erred by not ensuring that the record reflected the prospective adoptive parent was advised, either by the agency or the juvenile court, that legal guardianship was also an option. At the section 26 hearing, the juvenile court considered the Concurrent Planning Assessment by the agency which reported that alternative placement options were discussed with the prospective adoptive parent, and it would have been mother's burden at the trial court to show that M.W.'s decision was uninformed or otherwise coerced. The Legislature's preferred placement plan is adoption. There is no requirement that the juvenile court has to inquire of the prospective non-relative adoptive parent whether or not they previously rejected the plan of legal guardianship. (KH)

ICWA—224.2

In re M.W.—filed 5/7/20; Certified for publication 6/5/20; Third Dist.
Docket No.: C089997
Link to Case: https://www.courts.ca.gov/opinions/documents/C089997.PDF

THE *REASON TO BELIEVE* THE CHILD IS AN INDIAN CHILD PROVISION FOUND IN SECTION 224.2(e) TRIGGERS REQUIREMENTS LESS RIGOROUS THAN THOSE TRIGGERED BY THE *REASON TO KNOW* PROVISION.

Agency filed petition pursuant to section 300, subdivisions (b) and (j) alleging the newborn was at risk due to substance abuse by mother and alleged father M.W., who was eventually excluded from being the child's biological father. The petition was sustained, and mother was denied reunification services. Subsequently, it was learned and confirmed that A.C. was the child's biological father. A.C. reported he had Indian ancestry but was neither a member of, nor seeking membership in a tribe. Paternal aunt reported that she believed they had Native American heritage in the family, but it was not confirmed, and she did not know which tribe. Father filed the parental notification of Indian status form (ICWA-020) writing "may have" on the line asking the name of a band of which he might be a member or eligible for

membership. When the Agency inquired further, paternal grandfather reported possible Navajo and Apache heritage but said his family had not been involved with the reservations for generations. However, he said there were some relatives who used to live on, or were currently living on, reservations in Colorado and other states; paternal grandfather refused to provide any contact information. Later, father said there was possible Cherokee heritage. Per the court's order the social worker contacted the California Department of Social Services (CDSS) Office of Tribal Affairs and the Bureau of Indian Affairs (BIA) and reviewed the BIA's list of designated tribal agents to identify all Navajo, Apache, and Cherokee Tribes and their designated agents. The social worker contacted 12 identified tribes, 10 of which confirmed the child was not an Indian child for purposes of the ICWA, and the two remaining tribes acknowledged contact but had not yet provided a definitive response. Father filed a petition pursuant to section 388 requesting he be found to be the child's presumed father; the court denied the petition. At the section 366.26 hearing the court found there was no reason to know the child was an Indian child within the meaning of ICWA and no further ICWA notice was required. The court terminated parental rights. Father timely appealed.

Affirmed. On January 1, 2019, California made substantial revisions to section 224.2, including adding requirements where there is a *reason to believe* a child is an Indian child. The newly revised California laws apply to father, who made his first appearance on March 27, 2019. From that point forward, the only ICWA information father provided was that he may have Indian ancestry but was neither a member of a tribe nor could he identify a tribe. The paternal aunt reported possible but unconfirmed Indian heritage and stated she did not think any member of her family was a member of a tribe. Based on the initial inquiry by the court and the Agency, there was at best a *reason to believe* the child may be an Indian child, triggering section 224.2, subdivision (e), which required the court and the Agency to make further inquiry as soon as practicable. With the limited information the inquiry produced, the Agency contacted the CDSS and the BIA, identified 12-federally recognized tribes, and contacted the 12 tribes; therefore, complying with the newly revised requirements of section 224.2, subdivision (e). (NS)

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WIC 388

In re J.M.—filed 5/29/20; Cert. for Publ. 6/17/20; Second Dist., Div. One
Docket Nos. B298473, B301428
Link to case: https://www.courts.ca.gov/opinions/documents/B298473.PDF

THE JUVENILE COURT ABUSED ITS DISCRETION WHEN IT DENIED MOTHER'S 388 PETITION FOR RETURN OF THE CHILD AFTER SHE COMPLETED HER CASEPLAN AND ALSO ADDRESSED EVERY OTHER CONCERN RAISED BY THE AGENCY AND THE COURT

J.M. was detained in March 2017, at age 2 months, from mother due to a domestic violence incident with J.M.'s father. The petition alleged domestic violence and mother failing to seek mental health treatment, but only the domestic violence allegation was sustained. J.M. was removed, and mother had monitored visits with discretion to liberalize. Mother visited consistently and was loving and appropriate during visits and then had three successful unmonitored visits. She participated in ordered services and obtained new housing in a converted garage. The court granted a 29-day visit, but then rescinded it because mother failed to move to safer, permitted housing, had stopped her classes, and the CSW suspected father had been in her home. The court ordered no contact with father and an additional six months of reunification. At the next review hearing, mother's services were terminated. Although mother completed her original caseplan, she had violated the no-contact order between her and father two days after it was made. Mother also failed to comply with an order to obtain a mental health evaluation, and she was still living in an unpermitted garage. After termination of services, mother continued to visit J.M. for six hours a week and was serving in a parental role during visits. J.M. developed a closer bond with mother and was also bonded to caregivers. J.M. was diagnosed with autism and received 19 hours of services per week. In January 2019, three months after services were terminated, mother filed a section 388 petition seeking return of J.M., or additional services with overnight visits, and to vacate the section 366.26 hearing. Mother had obtained DCFS-approved housing, had unmonitored visits with J.M., had no contact with father in a year, and addressed all of the agency's concerns. During the May 2019 trial, the CSW testified that she had no concerns with mother's ability to care for J.M. even given his special needs, mother testified she had a full-time job and could work from home, and the agency acknowledged that DMH said she did not need mental health treatment. The court denied mother's 388 because mother had lied in the past, and the court was concerned she would not be able to provide for J.M.'s special needs while also working full-time. Mother and minor appealed. In August 2019 mother filed a second 388 petition, which was denied after a hearing. The court then terminated mother's parental rights. Mother appealed again.
Reversed with directions. Mother offered substantial evidence of a change in circumstances since her reunification services were terminated—she had resolved

the domestic violence concerns from the original petition, had not been in contact with father for over a year, had completed all her domestic violence training, and had address numerous other concerns from the agency and the court that were unrelated to the sustained petition allegations. The evidence of her stable housing, success in individual therapy, parenting, and anger management classes, and lack of need for mental health services was uncontroverted. The court must analyze the case under the factors listed in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532, considering 1) the seriousness of the problem leading to dependency and any continuation of it, 2) the strength of bond between child and parent and between child and caregivers, and 3) the reason why the change was not made sooner. (*Ibid.*) Although the initial allegations were serious, J.M. was never physically harmed, and mother had addressed all domestic violence issues. That mother made mistakes early in the case does not mean it was not in J.M.'s best interest to be raised by his biological mother and extended family. In fact, the purpose of section 388 is to provide a means for a parent to show she has learned from and corrected past mistakes. The court's concerns regarding her lack of (unidentified) training and permitted housing, and her potential child-care needs, would not, alone, have allowed the court to take initial jurisdiction over J.M. The juvenile court did not have discretion to "write off mother as a parent entirely, or to force her to prove an above average level of parental ability in order to meet her burden of establishing" it was in J.M.'s best interest to have a chance of being raised by her. (SH)