Filed 9/24/03 In re David L. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re DAVID L., a Person Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. BONNIE S., Defendant and Appellant.	C042781 (Super. Ct. No. JD216956)

Bonnie S. (appellant), the mother of David L. (the minor), appeals from juvenile court orders establishing a guardianship. (Welf. & Inst. Code, § 366.26; further section references are to this code unless otherwise specified.) She contends that there is no evidence the Department of Health and Human Services (DHHS) complied with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.), and that the juvenile

court improperly delegated to the guardian the court's authority over visitation.

We shall remand this matter to the juvenile court for the limited purpose of determining whether DHHS complied with the notice provisions of ICWA and whether ICWA applies to the minor.

FACTS

The three-year-old minor was removed from parental custody in June 2001, due to his parents' persistent substance abuse and domestic violence. At the detention hearing, appellant indicated she might have some Cherokee Indian heritage through her father. The juvenile court ordered "the Department of Health and Human Services . . . to comply with ICWA requirements. Social Worker to make further inquiries and[,] if appropriate, ICWA notice shall be provided." The minor was placed in the home of his paternal grandparents.

The court denied appellant services, and the minor's father failed to complete his reunification plan. An adoption assessment accompanying the twelve-month review report recommended a permanent plan of guardianship with the paternal grandparents, contingent upon monthly visits for appellant, supervised by a third party due to problems between appellant and the paternal grandparents.

The reports contained no information on further inquiry into appellant's status as a member of any Cherokee tribe or any notices sent to any tribe in compliance with ICWA. And the court made no finding as to appellant's Indian status.

The assessment for the section 366.26 hearing stated that the minor had visited the maternal grandparents and maternal aunt

every other weekend and that the maternal relatives supervised appellant's visits when the minor was in their care. DHHS continued to recommend a permanent plan of guardianship with the paternal grandparents. The case plan attached to the assessment included supervised monthly visits for appellant; but the order recommended by DHHS merely would allow visitation "as arranged with the guardian and subject to any reasonable conditions, including supervision, as the guardian considers necessary, unless such visits would be detrimental to the child."

At the section 366.26 hearing, appellant objected to the plan of guardianship and, asserting that unilateral discretion over visitation should not be given to the guardian, she asked for a more specific visitation order than proposed by DHHS. The court questioned the proposed guardians and the maternal grandmother about the current visitation arrangements. The maternal grandmother stated that she supervised appellant's visits twice a month at her home. The court asked: "If I made an order for the parents that it be -- that the guardians are in control of visits but it's got to be at least a minimum of one time a month, would everybody be in agreement with that?" Both grandmothers agreed to this visitation order, and no one else objected. Accordingly, the court ordered "Visitation between the child and parents shall be: Parents shall have contact with the child as arranged and directed through the Guardians, under any conditions deemed appropriate by the Guardians, unless the Guardians deem the visitation to be detrimental to the child. Visitation shall be at a minimum of one time per month. If the Guardians deem visitation detrimental,

they shall notify the parents of the reasons for their decision." No one made any further objection to the visitation order.

DISCUSSION

I

The juvenile court selected guardianship as the permanent plan and terminated the dependency. When guardianship is the plan, the court is required to make a visitation order. (*In re Randalynne G.* (2002) 97 Cal.App.4th 1156, 1163; but see *In re Jasmine P.* (2001) 91 Cal.App.4th 617.)[1] Appellant contends the order in this case improperly delegated discretion over visitation to the guardians. We disagree.

Appellant argues the visitation order permits the guardians to determine "when and if" any visits should occur. However, as appellant recognizes, the juvenile court set a minimum of monthly visitation, to be arranged with the guardians and subject to reasonable conditions, including supervision, as the guardians consider necessary. This order does not vest the guardians with the discretion to determine whether visitation should occur. Rather, it allows for the guardians and the appellant to work out the details of appellant's visitation, including such factors as when and where these visits will take place. Consequently, the order is consistent with the decision of *In re Moriah T.* (1994) 23 Cal.App.4th 1367, in which this court held that delegation to

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[1] Issues relating to visitation when guardianship is selected as the permanent plan are pending review in the Supreme Court. (*In re S.B.* (2002) 103 Cal.App.4th 739, review granted 1/22/03 (S112260).)

the social worker of the ministerial tasks of determining the time, place, and manner of visitation, subject to review by the juvenile court, is not an unauthorized delegation of the court's authority over visitation. (*Id.* at p. 1374; *In re Randalynne G., supra,* 97 Cal.App.4th at pp. 1165-1166 [permitting guardian to determine whether *any* visits would occur is improper].)

The reasoning of *In re Moriah T., supra,* also applies in the case of guardianship (although the guardians are private parties) since the court continues to provide oversight of the ward's circumstances even when the dependency is terminated. (§§ 366.3, subd. (a), 366.4.) The court's order in this case determined not only whether, but how frequently, visits should occur. The court delegated only ministerial matters surrounding the specifics of each visit to the guardians, subject to the court's ability to oversee the issue of visitation if it is unjustly denied or if the guardians become convinced that further visitation would be detrimental to the minor. (*In re Moriah T., supra,* 23 Cal.App.4th at p. 1377; but see *In re Randalynne G., supra,* 97 Cal.App.4th at pp. 1166-1167.)

The order also states that visits will occur, "unless the Guardians deem the visitation to be detrimental to the child." Construing this language in light of the entire visitation order, we interpret it to mean detriment to the child must be determined on a visit-by-visit basis, i.e., the guardians do not have the discretion to determine that all visitation is detrimental to the minor, only that a particular visit is detrimental. The guardians are further constrained to inform the minor's parents of the basis

for that determination, thus allowing for prompt judicial review. This part of the order is similar to the order in *In re Moriah T.*, which allowed visitation "'consistent with the well-being of the minor[s].'" (*In re Moriah T.*, *supra*, 23 Cal.App.4th at p. 1375.)

In sum, the juvenile court did not grant the guardians the legal authority to terminate visitation altogether. It only gave the guardians the authority to end a particular visit, or deny a visit, if they determined the particular visit was detrimental to the child. This order is consistent with the unique requirements of the juvenile court. "Visitation arrangements demand flexibility to maintain and improve the ties between a parent . . . and child while, at the same time, protect the child's well-being. Moreover, compelling a juvenile court judicial officer to specify such detail in a visitation order creates the risk that the order actually may work to the detriment of the child whom the court must protect . . . ." (*In re Moriah T.*, *supra*, 23 Cal.App.4th at p. 1376.) There was no improper delegation of visitation to the guardians.

II

Appellant contends, and DHHS concedes, that the record fails to disclose whether notice required by ICWA was ever given or whether there was any determination by the juvenile court that ICWA applied.

ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1912.) The juvenile court and DHHS have an affirmative duty to inquire at the outset of

the proceedings whether a child who is subject to the proceedings is or may be an Indian child. (Cal. Rules of Court, rule 1439(d).) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the Bureau of Indian Affairs (BIA) if the tribal affiliation is not known. (25 U.S.C. § 1912; Cal. Rules of Court, rule 1439(f).)

Appellant asserted Cherokee heritage through her father. The record is devoid of evidence either of further inquiry which would dispel the possibility that the minor was an Indian child or of proper notice to the tribe and/or the BIA of the pending proceeding.[2] There also is no indication the court ever made a determination whether the case came within the provisions of ICWA.

Failure to comply with the notice provisions and determine whether ICWA applies is prejudicial error. (*In re Kahlen W.* (1991) 233 Cal.App.3d. 1414, 1424; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472.) Thus, we must reverse the orders of guardianship and remand for further proceedings regarding compliance with ICWA.

DISPOSITION

The orders selecting guardianship as the permanent plan are reversed, and the matter is remanded for the limited purpose of

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[2] Respondent invites us to apply the presumption that the social worker performed her official duty with respect to the ICWA inquiry and notice. (Evid. Code, § 664.) We cannot do so because there is no indication in the record that the social worker took any action on this issue after the detention hearing.

determining whether DHHS complied with the notice provisions of ICWA and whether ICWA applies in this case.

If, after proper inquiry, the juvenile court determines that the tribe or BIA was properly noticed and there either was no response or the tribe or BIA determined that the minor is not an Indian child, the court shall reinstate the orders. If notice was not given, the juvenile court shall order DHHS to comply promptly with the notice provisions of ICWA and, if there is no response or if the tribe or BIA determines the minor is not an Indian child, the court shall reinstate the orders. However, if the tribe or BIA determines the minor is an Indian child or if information is presented to the juvenile court that affirmatively indicates the minor is an Indian child as defined by ICWA and the court determines ICWA applies to this case, the juvenile court shall conduct a new section 366.26 hearing in conformance with all the provisions of ICWA.

SCOTLAND, P.J.

We concur:

BLEASE, J.

DAVIS, J.