Filed 9/18/12 In re D.M. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re D.M., Jr., et al., Persons Coming Under the Juvenile Court Law.	B239632 (Los Angeles County Super. Ct. No. CK65341)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. D.M., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Timothy Saito, Judge. Remanded with directions.

Frank H. Free, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Melinda White-Svec, Deputy County Counsel, for Plaintiff and Respondent.

Father D.M. (Father) appeals from the juvenile court's order terminating his parental rights to his son D. and daughter L. pursuant to Welfare and Institutions Code section 366.26.[1] The children's mother (Mother) is not a party to this appeal. Father's sole contention is that the court failed to make an adequate inquiry into whether the Indian Child Welfare Act (ICWA) applies to him. We conclude that the court erred, and that because Father has made an offer of proof of Indian heritage on appeal, the error requires limited remand to make proper inquiry and comply with the notice of provisions of ICWA if Indian heritage is indicated.

BACKGROUND

Because the sole issue relates to the adequacy of the court's ICWA inquiry, we only briefly summarize the proceedings leading to termination of parental rights.

In October 2006 the Los Angeles Department of Children (DCFS) filed a section 300 petition regarding D. and L. alleging, among other things. that Mother and Father had a history of domestic violence that put the children at risk. The children were detained, and in January 2007 the court sustained the petition as amended, finding that the children were at risk: (1) under section 300, subdivision (b)(1), based Mother and Father's history of domestic violence, including an incident in which Father shot live ammunition into a home in which the children were present; and (2) under section 300, subdivision (b)(2), based on Mother exposing the children to violent altercations with a male companion.

The court placed the children with Mother and, as relevant to Father, ordered reunification services, domestic violence counseling, parent education and monitored visits. The case remained pending for more than five years.

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[1] All undesignated section references are to the Welfare and Institutions Code.

In August 2007, following Mother's inconsistent residency and her allowing Father unmonitored visits with the children, the court sustained a section 387 petition alleging that for a month Mother failed to make the children available to DCFS for visits. The court terminated placement with Mother. Father continued to receive reunification services until they were terminated in May 2008. Although his visitation was consistent, he failed to comply with the case plan. Thereafter, through April 2009 Father had at best sporadic visits with the children.

As of November 2008, Father was incarcerated in Nevada. By September 2009 he was out of custody, but because of his Nevada parole, he had difficulty maintaining regular visitation with the children. Although Father later had more regular visits, by December 2010 he was again incarcerated and his visits ceased until March 2011, when he was released. Thereafter, again his visits were sporadic.

In August 2011 Father filed a section 388 petition seeking to reinstate reunification services and have unmonitored visits with the children. He reported that he was enrolled in parenting and anger management classes and was employed and had a suitable home in Las Vegas. Ultimately, the hearing on Father's petition and the section 366.26 hearing were held in proceedings in November and December 2011 and January 2012. Father was present with counsel (Mother was absent), called witnesses, and testified. The court denied Father's petition and terminated his and Mother's parental rights, finding (among other things) that inconsistent visitation and lack of visits led to the conclusion that the benefit to the children of maintaining a parent-child relationship with Father and Mother did not outweigh the benefit of adoption. Father timely filed a notice of appeal from the orders denying his section 388 petition and terminating his parental rights.

DISCUSSION

Father contends that the juvenile court failed to adequately inquire into his possible Indian heritage under ICWA, in that the court did not obtain the required ICWA-020 form from him (though it did from Mother, who denied Indian heritage), and did not make any oral inquiry of him in court. DCFS does not dispute that the court erred, but argues that the error is not prejudicial. Reluctantly, despite the delay that will be caused in final resolution of the case, we cannot say the court's error is harmless.

ICWA provides that when a state court "knows or has reason to know that an Indian child is involved" in a juvenile dependency proceeding, the court must give the child's tribe notice of the pending proceedings and its right to intervene. (25 U.S.C. § 1912(a); *In re S.B.* (2005) 130 Cal.App.4th 1148, 1157.) California law imposes a higher burden. Section 224.3, subdivision (a) imposes "an affirmative and continuing duty to inquire" whether a child involved in a dependency proceeding "may be an Indian child." California Rules of Court, rule 5.481(a) also imposes "an affirmative and continuing duty [on the court and other officials] to inquire whether a child is or may be an Indian child." In addition, rule 5.481(a)(2) requires the court "[a]t the first appearance by a parent" to order the parent to complete Form ICWA-020. On this form, the parent must declare under penalty of perjury whether the child or the parent has Indian ancestry and whether the child or the parent is a member of an Indian tribe or could be eligible for membership in an Indian tribe.

A court's failure to inquire about Indian heritage is subject to harmless error analysis. A limited reversal for compliance is not required if it is not reasonably probable that a different result would have been reached in the absence of the error. (*In re A.B.* (2008) 164 Cal.App.4th 832, 838; *In re H.B.* (2008) 161 Cal.App.4th

115, 120; cf. *In re J.N.* (2006) 138 Cal.App.4th 450, 461.) But it has been held that where the record fails to show Indian heritage, yet on appeal a parent makes an offer of proof that he or she has Indian heritage, the juvenile court's error in not complying with its duty of inquiry is prejudicial and requires a limited remand. (*In re Noreen G.* (2010)181 Cal.App.4th 1359, 1389-1390 ["Given the offer of proof and assertions by [mother] of her Indian heritage, . . . without reversal of the judgment, we must make a limited remand with directions to the trial court to effectuate proper inquiry and comply with the notice provisions of the ICWA if Indian heritage is indicated"]; see *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431 [no miscarriage of justice shown by lack of ICWA inquiry in the absence of parent's showing "in . . . briefing or otherwise" some "offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA"].)

Here, the record does not show that the court had Father complete the ICWA-020 or that the court orally inquired of him whether he had Indian ancestry. As DCFS points out in its harmless error argument, the following facts are true. First, in a Jurisdiction/Disposition Report dated September 4, 2007, under the heading "INDIAN CHILD WELFARE ACT STATUS," DCFS reported that on August 29, 2007 the social worker "interviewed the father in regards to American Indian ancestry. . . . [T]he father stated that there was no Indian heritage in his family." Second, Father did not challenge the accuracy of this report or the court's finding in its December 4, 2006 minute order that ICWA did not apply to Father. Third, Father was present with counsel at the December 5, 2006 proceeding at which the court questioned Mother about whether she had Indian heritage. Mother explained that she had thought that her grandmother was of American Indian heritage, but then the grandmother told her that she was not, but rather was of West

Indian and French heritage. The court made the finding that ICWA did not apply to Mother. Despite being present for this discussion concerning Mother, neither Father nor his counsel spoke up to assert that Father had American Indian heritage or to raise any issue about inquiry of Father about his heritage. Fourth, from August 29, 2007 forward through the termination of parental rights in January 2012, the DCFS reports consistently stated that ICWA did not apply. At no time in the lower court did Father challenge that assertion.

However, in connection with his reply brief on appeal, Father filed a motion to take additional evidence pursuant to Code of Civil Procedure section 909. The additional evidence is an unsworn letter dated June 19, 2012 that Father wrote to appellate counsel in which he states that his paternal great grandmother is "100% Cherokee Indian" and that his brother "lives on the reservation in Oklahoma." While we will not grant Father's motion to take additional evidence, the offer of proof made in his letter requires that we make a limited remand.

"Code of Civil Procedure section 909 allows appellate courts to 'accept evidence in dependency cases "to expedite just and final resolution for the benefit of the children involved."' (*In re Carrie M.* (2001) 90 Cal.App.4th 530, 535.) That right, however, should be exercised sparingly. (*Zeth S.* [2003] 31 Cal.4th [396,] 405.) '"Absent exceptional circumstances, no such findings [based on the receipt of evidence outside the record on appeal pursuant to section 909] should be made. [Citation.]"' (*Id*. at p. 408, fn. 5.)" (*In re A.B., supra,* 164 Cal.App.4th at p. 843.)

Here, no exceptional circumstances are presented so as to justify making Father's letter part of the record on appeal. It is for the trial court, not this court, to make appropriate inquiry, and making Father's letter a formal part of the record on appeal would serve no purpose, especially considering that it raises a conflict in the

evidence – the DCFS report of September 4, 2007 states that Father claimed no Indian heritage, but now Father claims such heritage. (See *In re Noreen G., supra,* 181 Cal.App.4th at p. 1388 [appellate court declined to take additional evidence regarding Indian heritage where parent and DCFS proffered conflicting evidence].) However, although we deny the motion to take additional evidence on appeal, "[g]iven the offer of proof and assertions by [Father] of [his] Indian heritage, . . . without reversal of the judgment we must make a limited remand with directions to the trial court to effectuate proper inquiry and comply with the notice provisions of the ICWA if Indian heritage is indicated." (*Id.* at p. 1389-1390; cf. *In re H.B., supra*, 161 Cal.App.4th at p. 122 ["Absent any affirmative representation of Indian ancestry, either in the dependency court or on appeal, [parent's] statement to the social worker denying such ancestry and her failure to indicate any of her children may have Indian ancestry throughout the Department's lengthy involvement with this family fully support the conclusion any error by the juvenile court was harmless"].) Given the delay already incurred in this case, we reach this conclusion reluctantly, for it is difficult to see how such delay will benefit the children. However, given Father's assertion of Indian heritage on appeal, we are compelled to grant a limited remand.

DISPOSITION

We deny Father's motion to take additional evidence on appeal. We decline to reverse the judgment that terminated parental rights. Instead, we order a limited remand with directions to the trial court to effectuate proper inquiry, and to comply with the notice provisions of the ICWA if Indian heritage is indicated. If, after proper inquiry and notice a tribe determines the minors are Indian children, the parents may petition the court to invalidate the termination of parental rights upon a showing that such action violated the provisions of ICWA. If the minors are not found to be Indian children, the judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.