Filed 1/31/16 In re D.E. CA

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re D.E., et al., Persons Coming Under the Juvenile Court Law.	B270072 (Los Angeles County Super. Ct. No. CK78230)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.E., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Reversed and remanded.

Matthew I. Thue, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Brian Mahler, Associate County Counsel, for Plaintiff and Respondent Los Angeles County Department of Children and Family Services.

L.E. (Father) appeals from the dependency court's orders denying his Welfare and Institutions Code[1] section 388 petitions and the section 366.26 order placing minors D.E. (born in December 2011) and K.R. (born in January 2014) in the legal guardianship of their maternal grandmother. Without contesting the merits of these orders, Father contends they should be reversed because the Department of Children and Family Services (DCFS) failed to provide notice under the Indian Child Welfare Act (ICWA). Because the court had reason to know that the children might be members of federally recognized Indian tribes and because no effort was made to notify potentially interested Indian authorities of the dependency proceedings, the court's orders are reversible error, irrespective of the fact that the children's placement complied with the ICWA's placement preferences. Accordingly, we conditionally reverse the orders and remand for compliance with the ICWA notice requirements.

FACTUAL AND PROCEDURAL HISTORY[2]

In February 2012, DCFS filed a section 300 dependency petition on behalf of D.E. that alleged her mother,[3] had a history of physical altercations with others and that her parents used drugs.

Both parents completed ICWA-020 forms before the detention hearing. Father's form indicated that his grandparents were members of an unidentified-federally recognized tribe, and the mother's form specified that her maternal great-grandmother had Cherokee Indian ancestry. D.E.'s mother also separately

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[1] Statutory references are to the Welfare and Institutions Code.

[2] Because the failure to comply with the ICWA is the sole basis for Father's appeal we discuss only the facts pertinent to the ICWA notice.

[3] The mother is not a party to this appeal.

claimed that her maternal great-grandmother had Blackfoot Indian ancestry.

At the detention hearing, the juvenile court found Father to be D.E.'s presumed father[4] and ordered D.E. detained from her parents. The court did not make any ICWA findings; instead, it ordered DCFS to determine whether the ICWA applied.

The jurisdiction/disposition report reflects that D.E.'s mother stated that her claim of Native American ancestry was based on a story her maternal grandmother related about having Indian ancestry "because of her hair," and thus she doubted that she had Indian Ancestry. Similarly, the social worker claimed that Father stated that he was uncertain if he had Indian ancestry in his family. The record does not reflect that DCFS made any further investigation into the parents' Native American ancestry or sent notice of the proceedings to any Indian tribe or authority. Nonetheless, subsequent DCFS reports indicate that the ICWA did not apply to D.E. The court never made an ICWA finding for D.E.

In April 2012, the juvenile court sustained the section 300 petition, declared D.E. to be a dependent, removed her from her parents, and ordered DCFS to provide reunification services

In March 2014, DCFS filed a dependency petition under section 300 on behalf of then two-month-old K.R. based on allegations of domestic violence between the parents and that her sibling D.E. was a dependent of the court. At the detention hearing, the mother stated that a man other than Father could be K.R.'s father. At the hearing the DCFS reported that the ICWA did not apply to K.R.,[5] and the court found that the ICWA did not

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[4] The related detention report indicated the parents were not married, but that Father's name was listed on D.E.'s birth certificate and that the parents were in a dating relationship.

[5] The record does not disclose that DCFS made any inquiry into K.R.'s possible Indian heritage or effort to notify potentially interested Indian authorities.

apply as to K.R. The court detained K.R. And in May 2014, the court sustained the petition as to K.R. and ordered Father to appear for DNA testing. The court subsequently found Father was only K.R.'s alleged father because he did not complete the court-ordered paternity testing. At the September 2014 disposition hearing, the court declared K.R. to be a dependent of the court, removed her from parental custody, declined to order reunification services, and set a section 366.26 hearing.

After evidence presented at D.E.'s review hearings revealed that the parents had not complied with their respective case plans, the court terminated reunification services and set a section 366.26 hearing.[6]

In early 2016, the court held a section 366.26 hearing as to both children, found that the children were not adoptable, and that it was in their best interest to be in a legal guardianship. The court appointed the maternal grandmother as the legal guardian of the children and terminated dependency jurisdiction.

Father timely appealed.

DISCUSSION

Father contends the dependency court committed reversible error by failing to comply with ICWA notice requirements. We agree.

The ICWA promotes the stability and security of Indian tribes and families. (§ 224; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) DCFS and the court "have an affirmative and continuing duty to inquire whether a [dependent] child is or

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[6] In December 2015, Father filed separate petitions pursuant to section 388, in which he requested the juvenile court (1) reinstate reunification services as to D.E. and (2) order him to appear at DNA testing as to K.R.'s paternity. The court summarily denied these petitions.

may be an Indian child."[7] (Cal. Rules of Court, rule 5.481(a).) If DCFS "knows or has reason to know that an Indian child is or may be involved, that . . . entity must make further inquiry as soon as practicable by: [¶] (A) [i]nterviewing . . . 'extended family members' . . . ; [¶] (B) [c]ontacting the Bureau of Indian Affairs . . . ; and [¶] (C) [c]ontacting the tribes." (*Id.*, rule 5.481(a)(4) & (b); 25 U.S.C. § 1912(a); see also § 224.2.). Thereafter, the court must determine whether proper notice was given and whether the ICWA applies. "[T]he record must reflect that the court considered the issue and decided whether ICWA applies." (*In re Asia L.* (2003) 107 Cal.App.4th 498, 506; *In re E.W.* (2009) 170 Cal.App.4th 396, 405.)

Here, Father argues, DCFS concedes, and we agree that DCFS and the court had reason to know that D.E. and K.R. might be Indian children; that DCFS made no effort to fully investigate the claims of their Indian heritage; and the court failed to make appropriate findings and orders to ensure compliance with the ICWA. Nonetheless, DCFS argues that this court should not disturb the court's orders because the failure to provide notice did not prejudice Father: The error was harmless because the children's placement with the maternal grandmother under a legal guardianship constituted the preferential placement under the ICWA, and thus, there is no possibility the result would be different if the children were determined to be Indian children, subject to the ICWA.

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[7] An "Indian child" is a child 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 §§ 224-224.1; Cal. Rules of Court, rule 5.481(a)(5).) An "Indian tribe" under ICWA is "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians." (25 U.S.C. § 1903(8).)

DCFS is correct that the children's guardianship with their maternal grandmother complied with the ICWA's placement preferences. (See 25 U.S.C. § 1915(a); § 361.31, subds. (a) & (b); see also 25 U.S.C. § 1915(b).) We cannot, however, conclude that the failure to comply with the ICWA was harmless because the error compromised other requirements, rights, and benefits provided under ICWA to the children and the tribes. For example, if after receiving notice, a tribe determines that a dependent minor is an Indian child, the tribe has a right to intervene and have the dependency case transferred to a tribal court. (25 U.S.C. § 1911(b) & (c); § 224.4; Cal. Rules of Court, rules 5.482(d) & 5.483.) The tribe may also move to invalidate prior orders issued in the absence of compliance with the ICWA. (25 U.S.C. § 1914; § 224, subd. (e); Cal. Rules of Court, rule 5.486(a).) And when an out-of-home placement is being considered, the tribe may override the statutory placement preferences through tribal resolution. (25 U.S.C. § 1915(c); § 361.31, subd. (d); Cal. Rules of Court, rule 5.484(b).) Here because the tribes did not receive notice of the proceedings, they were denied the opportunity to exercise these rights.

In addition, the ICWA sets higher evidentiary standards than state law for the removal of children. (See 25 U.S.C. § 1912(d)-(f).) An order removing an Indian child from parental custody must be supported by: (1) a showing that the party seeking removal made "active efforts" to prevent the breakup of the Indian family; and (2) evidence, including testimony from a qualified expert witness, establishing that it would be detrimental to leave the dependent minor in parental custody. (25 U.S.C. § 1912(d) & (e); § 361.7; Cal. Rules of Court, rule 5.484(a).) In this case, there is no reason to believe that the court applied the higher ICWA standards in removing these children from parental custody. Thus, irrespective of the children's placement, the lack of notice deprived the tribes and the children of additional benefits and rights under the ICWA.

Therefore, we are not convinced that the failure to comply with ICWA notice requirements is harmless.[8] (See *In re B.R.* (2009) 176 Cal.App.4th 773, 785, citing *In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1424 ["Courts have consistently held failure to provide the required notice requires remand unless the tribe has participated in the proceedings or expressly indicated they have no interest in the proceedings."].)

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[8] DCFS points out that Father lacks standing to challenge the ICWA notice error as it relates to K.R. because of his status as her "alleged" father. (*In re Daniel M.* (2003) 110 Cal.App.4th 703, 708.) But the right to notice under the ICWA protects the rights of Indian tribes, not just parents. And to protect tribal rights, a dependency court has an ongoing duty to provide notice of the dependency proceedings if it has reason to believe a minor is an Indian child. (§ 224.2, subd. (b); 25 U.S.C. § 1912(a); *In re Daniel M., supra,* 110 Cal.App.4th at p. 707.) It follows therefore that an alleged parent's lack of standing under the ICWA does not release the court from its obligations under the ICWA.

DISPOSITION

The order denying the section 388 petitions and the section 366.26 order placing D.E. and K.R. in the legal guardianship of their maternal grandmother are conditionally reversed, and the matter is remanded for compliance with the ICWA. The court is directed to order DCFS to make a more thorough inquiry regarding Indian ancestry of D.E. and K.R. and to provide proper notice to any appropriate tribes, the Bureau of Indian Affairs, and the Secretary of the Interior, under the ICWA, and to submit such notices to the court. The juvenile court shall thereafter make findings concerning the adequacy of DCFS's compliance with the ICWA notice provisions and the applicability of the ICWA to this case. If no tribe indicates that D.E. or K.R. is an Indian child, then the juvenile court may reinstate its prior orders. If a tribe indicates D.E. or K.R. is an Indian child, the juvenile court is ordered to proceed in accordance with ICWA with respect to the child identified as an Indian child.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

JOHNSON, J.

LUI, J.