Filed 5/3/12 In re Samuel S. CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re SAMUEL S. et al., Persons Coming Under the Juvenile Court Law.	2d Juv. No. B235993 (Super. Ct. No. J-1317463, J-131464) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD PROTECTIVE SERVICES, Plaintiff and Respondent, v. CELENA G., Defendant and Appellant.	

Celena G. (mother) appeals from the juvenile court's order terminating parental rights to her sons, Samuel S. and Jon T. (Welf. & Inst. Code, § 366.26.)[1] Her sole contention is that the court erred because it failed to ensure compliance with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) before terminating her parental rights. We conclude that any error in the court's findings concerning compliance with the ICWA has been cured, and therefore, affirm.

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

BACKGROUND

On December 15, 2009, the County of Santa Barbara Department of Social Services, Child Welfare Services (CWS) filed petitions on behalf of then three-year-old Samuel and 17-month-old Jon, alleging failure to protect and support. (§ 300, subds. (b) & (g).) The children have different fathers. Neither father is a party to this appeal. The petitions alleged that the children may be eligible for tribal membership based on their mother's Navajo heritage.

The December 17, 2009, detention report stated that mother claimed that Samuel and Jon had Native American ancestry, because her paternal great-grandmother was a full-blooded Navajo Indian. She thought there might be Native American heritage in Samuel's father's family. Jon's father also believed he had Native American heritage. During the December 21, 2009 detention hearing, mother informed the juvenile court that her paternal grandmother was Navajo, and she completed a form stating that she might have Navajo heritage. The court deferred any ICWA finding until it could learn more about the parents' Indian heritage. The January 21, 2010, Jurisdiction/Disposition Report erroneously stated that she denied any Native American heritage.

During jurisdiction proceedings on January 21, 2010, the juvenile court sustained the petition. CWS thereafter continued filing regular reports regarding the progress of Samuel, Jon, their mother, and their fathers. It made inquiries among the extended families of Samuel's father and Jon's father regarding their possible Native American ancestry.

During the July 15, 2010 six-month status review hearing, the juvenile court found that ICWA did not apply to Jon. The children remained dependent children. CWS continued to monitor their progress, and that of their parents, and filed reports with the court.

In the June 30, 2011, section 366.26 report, CWS recommended that the juvenile court find that ICWA did not apply to Samuel, terminate parental rights, and

select adoption as the permanent plan for Samuel and Jon. During the permanency planning hearing on June 30, both fathers appeared and rested on the CWS reports. The court found that the ICWA did not apply to Samuel.

During a trial confirmation hearing on July 21, 2011, mother's counsel appeared on her behalf and rested on the CWS reports. The court terminated the parental rights of mother, as well as those of both fathers, and selected adoption as the permanent plan for the children.

After this appeal was filed, CWS made further inquiry regarding mother's claimed Native American ancestry. It contacted her in December 2011, to seek additional information regarding her possible Native American ancestry. On December 21, 2011, mother completed an ICWA family information form and claimed Navajo and Yaqui heritage.[2]

Later in December 2011, CWS sent notices to the BIA, the Secretary of the Interior, the Navajo Nation, the Pascua Yaqui Tribe, and the Colorado River Tribal Council. The notices included information regarding mother and the children's maternal grandparents and great-grandparents. The CWS January 26, 2012, Addendum Report advised the juvenile court that the Colorado River Tribal Council and the Pascua Yaqui Tribe responded that Samuel and Jon were not Indian children, and the Navajo Nation responded that it could not verify that the children were eligible for enrollment within the Navajo Indian Tribe.

On January 26, 2012, CWS filed its addendum report, with responses from the BIA and the three noticed tribes, with the juvenile court. On January 26, 2012, the court considered and admitted the CWS addendum report and found that the ICWA did not apply to the children.

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[2] On March 21, 2012, we granted respondent's motion to augment the record with several post judgment exhibits relating to its further ICWA investigation.

DISCUSSION

Mother contends that the juvenile court erred because it failed to ensure compliance with the ICWA before terminating her parental rights, and that we should reverse the order terminating her parental rights. We agree that the court erred in finding that ICWA did not apply to Samuel and Jon before it terminated mother's parental rights. However, we conclude that the error was cured when the court considered postjudgment evidence and found that the ICWA did not apply to Samuel and Jon, and affirm.

"Congress enacted the ICWA in 1978 to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' (25 U.S.C. § 1902.) It allows a tribe to intervene in state court dependency proceedings (25 U.S.C. § 1911(c)), because the 'ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource.' [Citation.]" (*In re Louis S.* (2004) 117 Cal.App.4th 622, 628.)

"The notice requirements of the ICWA are intended to ensure the tribe will have the opportunity to assert its rights to intervene in juvenile dependency proceedings irrespective of the position of the parents or state agency. [Citation.] The ICWA provides that when the court knows or has reason to know an Indian child is involved, the agency must notify the child's tribe, or if the tribe is unknown, the BIA, as agent for the Secretary of the Interior. (25 U.S.C. § 1912(a).) The notice must include all known names of the child's biological parents, maternal and paternal grandparents and great-grandparents. [Citation.]" (*In re X.V.* (2005) 132 Cal.App.4th 794, 802.)

"The Indian tribe determines whether the child is an Indian child. [Citation.] 'A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive.' [Citation.]" (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 865.)

Mother argues that we should not consider the postjudgment evidence presented by respondent in its motion to augment the appeal because we could only do so by acting as a trier of fact on an issue that was not "not litigated in the juvenile . . . court." We disagree.

The juvenile court has already considered the postjudgment evidence that responded submitted with its motion to augment the record. The court relied on that evidence and found that that ICWA did not apply to Samuel or Jon. We review that evidence for the limited purpose of determining whether it supports the court's finding that the ICWA does not apply to these children. It does support that finding.

Relying on *In re Glorianna K.* (2005) 125 Cal.App.4th 1443 and *In re Zeth S.* (2003) 31 Cal.4th 396, mother argues that reviewing courts ordinarily do not consider postjudgment evidence to review the correctness of a judgment as of the time of its rendition, but limits itself to the ""record of matters which were before the trial court for its consideration." [Citation.]" (*Glorianna K.*, at p. 1451.) The *Glorianna K.* court declined to take additional evidence because the proffered documents were incomplete and the tribes' responses were equivocal. Here, in contrast, the augmented record shows that in December 2011, CWS fulfilled its duty of inquiry concerning mother's Indian ancestry, and the tribes' responses were unequivocal. (See also, *Alicia B. v. Superior Court*, *supra*, 116 Cal.App.4th at pp. 866-867.)

In re Zeth S., *supra*, 31 Cal.4th 396 is also distinguishable. In *Zeth S.* our Supreme Court concluded that, in the absence of exceptional circumstances, a reviewing court may not "receive and consider postjudgment evidence that was never before the juvenile court, and rely on such evidence outside the record on appeal to *reverse* the judgment [terminating parental rights.]" (*Id.* at p. 399, italics added.) In this case the postjudgment evidence was before the juvenile court. Moreover, we rely on such evidence to affirm the judgment terminating parental rights, not to reverse it.

We also reject mother's argument that the judgment must be reversed because neither she nor her attorney were present at the hearings held on January 19, and January 26, 2012. She concedes that they received notice of the January 19 proceeding, but stresses that the record does not indicate that she or her attorney were provided notice of the January 26 proceedings, during which the juvenile court found that the ICWA did not apply to her children. She argues that "neither mother nor her counsel were able to verify for accuracy the [ICWA] notices respondent issued, much less the information therein included about mother's family and Indian ancestry." Mother does not, however, state that the ICWA notices were inaccurate.

Although the court erred by failing to give mother and her attorney notice, that error does not warrant the further delay a reversal would entail. It would not serve the interests of the tribe or the children were this court to do so. The tribes have already determined that the children are not eligible for tribal membership. Their determinations are conclusive. (*Alicia B. v. Superior Court, supra*, 116 Cal.App.4th at p. 865.) A trial court cannot force a tribe to enroll a child. (*In re Jose C.* (2007) 155 Cal.App.4th 844.) "Parents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship, without any showing whatsoever that the interests protected by the ICWA are implicated in any way." (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431.)

We nevertheless urge respondent not to rely on such late notices as a substitute for early and complete compliance with the ICWA's notice provisions. Obviously, the better practice is for respondent to provide the tribes, at the earliest opportunity, with complete information concerning the background of a possible Indian child. (See, e.g., *In re Francisco W.* (2006) 139 Cal.App.4th 695, 702-703; *In re Louis S.* (2004) 117 Cal.App.4th 622, 631.) Here, however, respondent belatedly provided information to the Navajo tribe, and also provided information to the Yaqui and Colorado River tribes, and allowed them to determine conclusively that the children are

not eligible for tribal membership. (See *In re Francisco W.*, at p. 702.) The purpose of notice under the ICWA has been served and the trial court's postjudgment finding that the ICWA does not apply was correct. Any error in the trial court's earlier finding has been cured. (*In re Alexis H*. (2005) 132 Cal.App.4th 11, 15-16; *In re Brooke C*. (2005) 127 Cal.App.4th 377, 384-385.)

DISPOSITION

The judgment (order terminating parental rights) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Arthur A. Garcia, Judge
Superior Court County of Santa Barbara

Andre F. F. Toscano, under appointment by the Court of Appeal, for Defendant and Appellant.

Dennis A. Marshall, County Counsel, and Sarah A. McElhinney, Deputy County Counsel, for Plaintiff and Respondent.