Filed 6/5/18 In re Cornelius J. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re CORNELIUS J., et al., Persons Coming Under the Juvenile Court Law.	B282908 (Los Angeles County Super. Ct. No. CK62362)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. SUSAN J., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. D. Zeke Zeidler, Judge. Affirmed.

Karen B. Stalter, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

Mother Susan J. (Mother) appeals from the order terminating her parental rights as to three of her children, Cornelius J., Ca.J., and C.R. She contends the Department of Children and Family Services (DCFS) failed to comply with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901, et seq.) after she informed the dependency court in 2012 that she might have Eskimo and Cherokee ancestry. She contends the failure to notice the tribes requires a conditional reversal for the purpose of effecting proper notice under ICWA. We find DCFS discharged its inquiry duty, and as a result of that inquiry, no notice pursuant to ICWA was required.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Mother has had five children in the dependency system:

1. Ja.H., born 1995, Father Jeffrey H.
2. Le.J., born 2000, Father Henderson J.
3. Cornelius J., born 2008, Father Cornelius J., Sr.
4. Ca.J., born 2010, Father Cornelius J., Sr.
5. C.R., born 2013, Father Cornelius R.

The current appeal concerns the younger three children, Cornelius, Ca., and C. As Mother asserts error only with respect to ICWA, we limit our factual discussion to that issue.

1. *Proceedings Relating to Ja. and Le.*

Ja. and Le. were the subject of dependency proceedings in 2006 based on allegations Mother attempted to kill herself and the children. The children were removed from Mother's care. During these

proceedings, Mother stated that she had no Indian ancestry on her family side. With respect to the fathers of Ja. and Le., notices were sent to the Bureau of Indian Affairs (BIA) and three Cherokee tribes. In 2007, the dependency court found "no reason to believe that ICWA applies in this case." The case was closed in 2008.

2. *Proceedings Relating to Cornelius and Ca.*

The current proceedings were initiated on November 20, 2012 with the filing of a section 300 petition relating to Cornelius and Ca. alleging that Mother had a substance abuse problem and mental health issues.[1] (Welf. & Inst. Code, § 300, subds. (b), (j).)[2] Mother had been receiving Voluntary Family Maintenance Services, and informed DCFS that her children had Eskimo and Cherokee heritage.

At the November 20, 2012 detention hearing the court observed that two weeks before, the parties had "discussed the Cherokee heritage" but at that time, because the children had not been detained, Indian heritage was not an issue. However, the court made a finding that there was no reason to know ICWA applied, but held the matter in abeyance pending further court order. The two children remained placed with Mother.

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[1] Le. was also the subject of the petition. However, Le. is not the subject of this appeal.

[2] All statutory references herein are to the Welfare and Institutions Code unless otherwise noted.

DCFS reported in its jurisdiction/disposition report that Mother stated she was born in Seattle and was adopted as a small child by a white family. She believed her biological father was black and her biological mother was Chinese. Mother also told DCFS that her biological father was Eskimo. However, Mother had no information about her biological father or any other biological relative.

In December 2012, the children were removed from Mother's care pursuant to a section 385 petition alleging an episode of domestic violence with the children's father Cornelius J., Sr.

In connection with the June 14, 2013 disposition hearing, DCFS requested the court to make an ICWA finding, but the dependency court did not make any additional findings regarding ICWA. Subsequent reports stated that ICWA did not apply.

3. *Proceedings Relating to All Three Children*

On December 17, 2013, DCFS filed a petition pursuant to section 300, subdivisions (a) and (b) with respect to C., age eight months, after Mother engaged in a violent confrontation with her adult daughter Ja. DCFS also filed a section 342 petition with respect to Cornelius and Ca.

In December 2013, Cornelius J., Sr., Cornelius and Ca.'s father, filed an ICWA-020 statement denying Indian Ancestry. Mother's December 2013 ICWA-020 statement with respect to C. stated that Mother had no Indian ancestry. On February 7, 2014, C.'s father Cornelius R. filed an ICWA-020 form denying Indian ancestry. The dependency court found ICWA did not apply to C.

On May 19, 2014, DCFS filed first amended petitions regarding C. (§ 300, subds. (a), (b)) and Cornelius and Ca. (§ 342.)

Mother's reunification services were terminated with respect to Cornelius and Ca. on January 22, 2016, and with respect to C., services were terminated for both Mother and Cornelius R. on February 23, 2016. Reunification was terminated for Cornelius J., Sr. on September 13, 2016. DCFS's adoption progress report of February 6, 2017 noted that "an ICWA order concerning birth mother has not been issued."

DCFS identified an adoptive home for all three children, and in April 2017, the home study was approved.

In connection with the termination of parental rights to the children in April 2017, the court stated at the section 366.26 hearing that "it appears that Judge Trendacosta's ICWA finding for [C.]'s very first hearing when the Mother was here did not make that minute order. The father then showed up at the next hearing, and there was a no-ICWA finding as to the father . . . . The court does not have reason to know or believe [C.] is an Indian child as defined by the Indian child welfare act. [ICWA] does not apply." The court's minute order of that date states that "[p]arents are to keep the Department, their Attorney[s] and the Court aware of any new information relating to possible ICWA status. JV-020, the Parental Notification of Indian Status is signed and filed."

The dependency court freed the children for adoption.

DISCUSSION

"ICWA itself does not expressly impose any duty to inquire as to American Indian ancestry." (*In re H.B.* (2008) 161 Cal.App.4th 115, 120.) California law, however, imposes an additional "affirmative and continuing" duty on the juvenile court and the child protective agency "to inquire whether a child . . . is or may be an Indian child." (§ 224.3, subd. (a); *In re Michael V.* (2016) 3 Cal.App.5th 225, 233 (*Michael V.*).) "This affirmative duty to inquire is triggered whenever the child protective agency or its social worker 'knows or has reason to know that an Indian child is or may be involved.' (Cal. Rules of Court, rule 5.481(a)(4).)" (*Michael V.*, *supra,* at p. 233.)[3] For purposes of ICWA, an "Indian child" is a child who is either a member of an Indian tribe or 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, subd. (4); § 224.1, subd. (a).)

Once provided with information that a child may be an "Indian child," the social worker must make further inquiry regarding the possible Indian status of the child, and do so as soon as practicable by interviewing the parents, Indian custodian, and extended family members. (§ 224.3, subd. (c); *Michael V., supra,* 3 Cal.App.5th at p. 235.) However, "the obligation is only one of inquiry and not an absolute duty to ascertain or refute Native American ancestry." (*In re*

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[3] The burden of determining whether a child is an Indian child does not rest entirely, or even primarily, on the child or the child's family. (*Michael V., supra*, 3 Cal.App.4th at p. 233.) The continuing duty under ICWA is not suspended while a parent disclaims Indian status. (*Ibid.*)

Antoinette S. (2002) 104 Cal.App.4th 1401, 1413.) Importantly, "[t]he relevant question is not whether the evidence . . . supports a finding that the minor[ ] [is an] Indian child[ ]; it is whether the evidence triggers the notice requirement of ICWA so that the tribes themselves may make that determination." (*In re D.C.* (2015) 243 Cal.App.4th 41, 63; *In re Isaiah W.* (2016) 1 Cal.5th 1, 15.)

Accordingly, if an ICWA inquiry leads the social services agency or juvenile court to know or have reason to know an Indian child is involved, ICWA requires the social services agency to notify the tribe of the pending proceedings and its right of intervention. (25 U.S.C. § 1912, subd. (a); §§ 224.3, subd. (d), 224.2, subd. (a)(5); Cal. Rules of Court, rule 5.481(b).) The social services agency must send notice to "all tribes of which a child may be a member or eligible for membership." (§ 224.2, subd. (a)(3).) If the identity or location of the tribe cannot be determined, the same notice must be directed to the Bureau of Indian Affairs (BIA). (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739–740, fn. 4.)

The duty to inquire under California Rule of Court, rule 5.481 "is triggered by a lesser standard of certainty regarding the minor's Indian child status . . . than is the duty to send formal notice to the Indian tribes." (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200; accord, *Michael V., supra*, 3 Cal.App.5th at p. 235.) The failure to comply with ICWA "renders the dependency proceedings, including an adoption following the termination of parental rights, vulnerable to collateral

attack if the dependent child is, in fact, an Indian child." (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 653.)

We review the trial court's findings whether ICWA applies to the proceedings for substantial evidence. (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.)

Here, DCFS made an adequate inquiry given the information Mother provided. In the prior proceedings for Ja. and Le., Mother told DCFS that she had no Indian ancestry on her side, but in the proceedings for the three younger children, stated she had Indian ancestry. These contradictory statements were sufficient to trigger DCFS's continuing duty to inquire. (*Michael V., supra,* 3 Cal.App.5th at pp. 230–231.) However, despite this information, there was no one for DCFS to interview to substantiate Mother's claims because Mother was adopted and could provide no further information regarding her biological parents. (Cf. *id.* at pp. 235–236 [DCFS made no effort to locate and interview maternal grandmother with direct link to tribe].) Furthermore, the information before the court here was too vague and uncertain to trigger the ICWA notice requirements to the BIA or any Indian tribes. As a result, Mother's bare assertions, without more to substantiate them, were insufficient to trigger the notice requirements of ICWA. (See, e.g., *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467 [mother's inability to identify tribe or nation and failure to provide any contact information to substantiate her unsupported belief insufficient to invoke ICWA; family lore alone is insufficient to give court reason to know a child is an Indian child]; *In re O.K.* (2003) 106 Cal.App.4th 152,

157 [grandmother's statement that child "'may have Indian in him,'" without more, insufficient to invoke ICWA notice requirements]; see also *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520 ["more than a bare suggestion that a child might be an Indian child" is required to trigger ICWA notice requirements].)

Mother relies on *In re L.S.* (2014) 230 Cal.App.4th 1183, where after failing to claim Indian heritage in a prior dependency proceeding, the mother claimed and then denied "Blackfoot" heritage, and alternatively stated that she had Cherokee heritage or that she had no Indian heritage. (*Id.* at pp. 1196–1197.) The dependency court "never clarified the facts regarding claims of Indian heritage" and "never ruled on whether . . . ICWA applied." (*In re L.S., supra,* 230 Cal.App.4th at p. 1197.) The Court of Appeal concluded that the agency "may have performed its duty of inquiry," but "failed in its duty to document it and to provide clear information to the court so the court could rule on the question . . . whether . . . ICWA applied." (*Id.* at p. 1198.)

In re L.S., supra, 230 Cal.App.4th 1183 is distinguishable. The ICWA deficiency in *In re L.S.* related to the sufficiency of the trial court's findings on whether ICWA applied; indeed, the court never clarified the facts or made a ruling. (*Id.* at p. 1197.) Here, on the other hand, the dependency court made findings that ICWA did not apply after reviewing the information DCFS supplied to it.

DISPOSITION

The order of the Superior Court is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.