Filed 7/30/12 In re M.M. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re M.M., a Person Coming Under the Juvenile Court Law.	B238957 (Los Angeles County Super. Ct. No. CK80910)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. E.M., Defendant and Appellant.	

Appeal from an order of the Superior Court of Los Angeles County. Valerie Lynn Skeba, Juvenile Court Referee. Affirmed.

Gerard McCusker, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Frank J. DaVanzo, Deputy County Counsel, for Plaintiff and Respondent.

* * * * * *

Defendant and appellant E.M. (father) appeals the order terminating his parental rights to his daughter M.M. Father's sole contention on appeal is that reversal is mandated because the juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) Finding no merit to father's appeal, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

We briefly summarize the dependency proceedings.

M.M. came to the attention of the Los Angeles County Department of Children and Family Services on January 21, 2010, from a call to the child abuse hotline. A social worker went to the home of K.J. (mother) the next day. (Mother is not a party to this appeal.) The social worker spoke with mother who admitted she had slapped M.M., then six months old, three times on the leg. Mother also admitted to problems with mental illness since 1989, a diagnosis of a schizoid disorder in 2005, and that she had not been taking her prescribed medications. Mother showed signs of disorganized thinking, made rambling comments about "demons" and the like, but did have some moments of apparent lucidity. Mother identified father by name as the father of M.M., but said she did not know where he was and was not in contact with him. Father and mother were never married, and father was not listed on M.M.'s birth certificate, but M.M. was given father's surname. The Department detained M.M. that day and placed her in foster care.

The Department filed a petition pursuant to Welfare and Institutions Code section 300, subdivisions (a), (b) and (g). The Department alleged mother used inappropriate physical discipline with M.M., suffered from schizoid affective disorder and had stopped taking her prescribed medications, placing the infant at risk of harm. The Department named father as an alleged father, whereabouts unknown, who failed to provide for M.M. The petition alleged mother denied any Indian ancestry but that contact with the father had not been established to determine any claimed Indian heritage through M.M.'s paternal lineage.

The Department gave notice of the detention hearing to all required persons, including father at his last known address. A day before the hearing, a social worker was

able to reach father on the telephone. Father stated he had not seen M.M. since she was a couple of weeks old and that he was not sure whether he was her father.

At the January 27, 2010 detention hearing, mother was present and was appointed counsel. The juvenile court inquired about any possible Indian heritage and mother denied any such heritage. Father also appeared and was appointed counsel. Father stated he believed he had Seminole ancestry. Through counsel, father represented that his ancestry could best be investigated through his paternal grandmother who resided in Tampa Bay, Florida, and that he would provide the necessary information to the Department.

The juvenile court ordered custody of M.M. to remain with the Department. The court ordered a psychological evaluation for mother, as well as various services. The court found father to be an alleged father and, at father's request, ordered father to appear for a paternity test. Based on father's assertion of possible Seminole heritage, the court also ordered the Department to conduct an investigation and serve the requisite ICWA notices to the Bureau of Indian Affairs (BIA) and the relevant tribes. Both mother and father were granted transportation funds to comply with the court's orders and were granted monitored visitation with M.M.

The Department contacted a number of mother's family members, including her parents and a brother and his ex-wife. The Department obtained information relevant to mother's relatives' ability to monitor visits with M.M., and to determine whether or not any relative could provide an appropriate home for M.M. as an alternative to placement in foster care. The Department concluded no maternal relative provided a suitable placement for M.M.

Despite repeated efforts, the Department was unable to establish any contact with father to conduct an ICWA investigation or to have father participate in the court-ordered Multidisciplinary Assessment Team review. Following the January 27, 2010 detention hearing and up through mid-March 2010, the Department left father at least seven separate telephone messages asking for any additional information regarding his claimed Seminole heritage. Father did not return any of the calls. The Department verified that

father's phone number remained in working order with a voicemail message identifying the number as father's telephone number. It was the same number on which the social worker had reached father the day before the detention hearing to explain the nature of M.M.'s detention. Father also failed to appear for his court-ordered paternity test. Father never tried to visit M.M. during this time period.

At the jurisdiction and dispositional hearing in April 2010, the court sustained counts (a)(1) and (b)(2) as to mother for inappropriate physical discipline and because mother's termination of prescribed medication for mental illness placed M.M. at risk of harm. The court sustained counts (b)(3) and (g)(1) as to father for failure to provide. The Department advised the court that it had done its best to try to contact father to complete an ICWA investigation, but had been unsuccessful. Based on what little information father had provided at the detention hearing, the Department had served ICWA notices. Counsel for father stated on the record that his office had not been able to establish any contact with father "for months."

The Department mailed ICWA notices to the regional office of the BIA in Sacramento, the Secretary of the United States Department of Interior, the Seminole Tribe of Florida, and the Seminole Nation of Oklahoma. The ICWA notices included a copy of M.M.'s birth certificate and accurate identifying information regarding M.M., mother and father. The notices identified the maternal grandparents and indicated that no Indian heritage was claimed through M.M.'s maternal lineage. The notices further stated that father claimed Seminole heritage through his paternal grandmother, name unknown. The notice did not mention that the unnamed paternal great-grandmother was reported to live in Tampa Bay, Florida.

Both Seminole tribes responded to the ICWA notices, declining to intervene in the proceedings. Both tribes indicated that based on the information provided, M.M. was not eligible for tribal membership. Neither tribe requested the Department to forward additional information. BIA responded with a letter acknowledging receipt of the notice and indicating no further action would be taken by BIA since the Department had noticed

the Seminole tribes. The notices, certified mail receipts, and responses were filed with the court.

On July 12, 2010, the juvenile court found the ICWA notices were adequate and that ICWA did not apply.

At the November 17, 2010 review hearing, father appeared with counsel. The juvenile court was provided documentation that father had complied with a court-ordered paternity test in child support proceedings pending in another court, which had confirmed he was M.M.'s biological father. The court declared father the biological father of M.M. Father did not seek a court order changing his status; specifically, he did not ask to be declared presumed father. We are aware of no facts in the record to suggest that there was ever any basis for the court to declare him a presumed father.

Over the next 14 months leading up to the permanency planning hearing, father participated in less than 10 monitored visits with M.M. Supplemental reports submitted by the Department indicated that mother continued to suffer from severe psychiatric impairment and had not made substantial progress on her case plan. Both parents had shown an inability to commit to consistent visitation with M.M. and an unwillingness to communicate with the Department. A home study was completed and approved for the foster parents of M.M. to become her prospective adoptive parents, in the event parental rights were terminated.

At the contested permanency planning hearing held January 26, 2012, both mother and father filed petitions pursuant to Welfare and Institutions Code section 388. Father requested that he be declared a presumed father and granted reunification services as he recently had been able to secure employment and now wanted to care for M.M. He did not offer any new information regarding his claimed Seminole heritage. The juvenile court denied both motions. After hearing testimony and argument, the juvenile court found, by clear and convincing evidence, that M.M. was adoptable and terminated mother's and father's parental rights. This appeal followed.

DISCUSSION

Father contends the juvenile court and the Department failed to discharge their continuing duty to inquire about whether M.M. was an Indian child within the meaning of ICWA. Father argues the ICWA notices sent to the Seminole tribes in March 2010, before his paternity of M.M. was determined, were inadequate and incomplete, containing the response "unknown" to most of the paternal relative information, and specifically failing to indicate that father's paternal grandmother resided in Tampa Bay, Florida. He contends the juvenile court erred in deeming the notices were adequate. We find no merit in any of father's arguments.

The notice requirements of ICWA serve the salient purpose of protecting Indian children and providing a mechanism for the maintenance of tribal and familial ties for those Indian children faced with the prospect of placement in the foster care system. (25 U.S.C. § 1901; see also *In re Desiree F*. (2000) 83 Cal.App.4th 460, 469.) The threshold of information necessary to trigger ICWA notice requirements is low. (*In re Gabriel G*. (2012) 206 Cal.App.4th 1160, 1165.) Father provided almost no information to the Department, claiming only Seminole heritage through an unnamed grandmother who he said lived in Tampa Bay, Florida. Despite the vagueness of this scrap of information, the juvenile court ordered the Department to conduct an investigation and give ICWA notice.

The Department did everything reasonably possible to investigate whether father had any additional information. The Department was required to make such inquiry "as soon as practicable." (Welf. & Inst. Code, § 224.3, subd. (c); see also Cal. Rules of Court, rule 5.481(a)(4).) For almost two months following the detention hearing, the Department attempted to contact and interview father about his claimed Seminole heritage. There were no other paternal relatives known to the Department to whom it could turn as an alternate source of family information. There is no explanation in the record why father failed to return any of the numerous phone calls made by the Department. During this time, father also failed to respond to the efforts of his court-appointed counsel to get in touch with him. The reasonable inference is that father did not have any additional information to supply.

The Department sent ICWA notices with the limited information available to the two federally recognized Seminole tribes, the regional director of the BIA and the Secretary of the Interior. The notices contained the available information that was required under both federal and state law. (See generally 25 C.F.R. § 23.11(d)(3); Welf. & Inst. Code, § 224.2, subd. (a).) The form of the notices complied with Welfare and Institutions Code section 224.2, subdivision (a)(1) through (4), including certified mail service on the appropriate tribal designees. As for the requested content, the notices also contained all of the information specified in section 224.2, subdivision (a)(5)(A), (B), and (D) through (G), including identification of the dependency proceedings, contact information for the juvenile court, notice of the tribes' right to intervene, and a copy of M.M.'s birth certificate. Father does not dispute that the notices duly contained all of this required information.

Father nonetheless argues the notices were defective for failing to provide all of the biographical data identified in Welfare and Institutions Code section 224.2, subdivision (a)(5)(C). The ICWA notices contained mother's and father's names, current addresses and birthdates, mother's place of birth, the maternal grandparents' names, and that Seminole heritage was claimed through father's unnamed paternal-grandmother. The Department correctly and truthfully stated that the names of the paternal grandparents and paternal great-grandparents were "unknown." The only information actually known to the Department that was not reported was that father's unnamed paternal grandmother lived in Tampa Bay, Florida.

We review the trial court's finding that ICWA notice was adequate for substantial evidence. (*In re J.T.* (2007) 154 Cal.App.4th 986, 991.) Substantial compliance with the notice provisions of ICWA may be sufficient in certain circumstances. (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 566; accord, *In re I.G.* (2005) 133 Cal.App.4th 1246, 1252; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) There is no dispute the notices sent here provided actual notice of the proceedings and the right to intervene, to the two federally recognized Seminole tribes. (See *In re Desiree F.*, *supra*,

83 Cal.App.4th at pp. 469-470 [statute and cases applying ICWA "unequivocally require" actual notice to the tribe of both the proceedings and of the right to intervene].)

The notices similarly contained all of the biographical data *known* to the Department, after two months of diligent attempts to have father disclose the existence of any additional details had proved fruitless. Under both state and federal law, the requirement to include all specified biographical data is limited to that information which is "known" or "available." (See Welf. & Inst. Code, § 224.2, subd. (a)(5)(C); 25 C.F.R. § 23.11(b), (d)(3).) "It is essential to provide the Indian tribe with all *available* information about the child's ancestors, especially the ones with the alleged Indian heritage." (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703, italics added; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1116 [social worker has affirmative duty to " 'inquire about and obtain, if possible,' " all pertinent family history].)

The record solidly supports the juvenile court's determination that ICWA was satisfied and does not apply in this case. We are unable to imagine what more the Department could have done to investigate M.M.'s claimed Seminole ancestry or what additional information the Department might have provided that might have led to a more informed evaluation of M.M.'s claimed Seminole heritage. We do not find the Department neglected its ICWA notice obligations by failing to note that father said his unnamed grandmother lived in Tampa Bay, Florida. With no name, birth date, last known address or any other identifying information, no legal or other purpose is served by stating that an unnamed paternal great-grandmother resided somewhere in Tampa Bay, a large metropolitan city. The duty to investigate is "only one of inquiry and not an absolute duty to ascertain or refute Native American ancestry." (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413.)

This is not a case where the Department simply failed to investigate or undertook only a cursory investigation resulting in service of ICWA notices that did not provide meaningful information to assess the child's status. (See, e.g., *In re A.G.* (2012) 204 Cal.App.4th 1390, 1398 [notices with substantial missing family data deemed inadequate where record reflected no inquiry to father about whether he had additional family

information and no effort to interview father's relatives who were in contact with the court]; *In re S.M.*, *supra*, 118 Cal.App.4th at pp. 1116-1117 [notices with missing biographical data deemed inadequate where social worker failed to inquire of paternal grandmother with whom social worker was in contact despite fact her mother was the family member with the claimed Cherokee heritage and also failed to respond to Cherokee tribes that requested additional information]; *In re D.T.* (2003) 113 Cal.App.4th 1449, 1454-1455 [notices that failed to contain extensive family information which was known to social worker and included in the dispositional report did not provide meaningful notice].) Nor is this a case like *In re Gabriel G.*, where the Department failed to serve *any* ICWA notice at all despite the father having identified his paternal grandfather by name as being a possible member of a Cherokee tribe, but later ambiguously disclaimed his own possible Indian heritage, and the record reflected no effort by the social worker to clarify the father's claim. (*In re Gabriel G.*, *supra*, 206 Cal.App.4th at p. 1168.)

Father is correct that under state law, both the juvenile court and the Department have "an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all proceedings identified in rule 5.480." (Cal Rules of Court, rule 5.481(a); see also Welf. & Inst. Code, § 224.3, subd. (a).) The *continuing* duty requirement is not in ICWA, but is a duty imposed by state law that dictates a higher standard than ICWA. The "failure to comply with a higher state standard, above and beyond what the ICWA itself requires, must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error." (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162; accord, *In re H.B.* (2008) 161 Cal.App.4th 115, 121-122.)

Father makes no attempt to argue that additional information could be provided in further ICWA notices. To this day, up through the filing of his reply brief in this appeal, father has never disclosed *any* additional information that might be included in additional ICWA notices. Father does not claim to have any additional information or to know of any other source of information. Father has therefore failed to show reversible error.

(Cal. Const., art. VI, § 13; *In re N.E*. (2008) 160 Cal.App.4th 766, 769; *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430-1431.)

DISPOSITION

The juvenile court's order of January 26, 2012, terminating parental rights and freeing M.M. for adoption are affirmed.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.