Filed 5/11/17 In re Caroline E. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re CAROLINE E. et al., Persons Coming Under the Juvenile Court Law.	B278811
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. EMMANUEL E., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK02085)

APPEAL from an order of the Superior Court of Los Angeles County, Robert S. Draper, Judge. Affirmed.

Patricia K. Saucier, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Sally Son, Associate County Counsel for Plaintiff and Respondent.

This appeal concerns three children born to Karina E. (mother) and Emmanuel E. (father): Caroline E. (born in October 2012), Daniel E. (born in August 2013), and Victoria E. (born in July 2014). Mother and father's fourth child, M.E. (born in May 2015), is not a subject of this appeal.

Father contends that the order terminating his parental rights must be conditionally reversed because the Los Angeles County Department of Children and Family Services (DCFS) failed to conduct an inquiry into father's Indian ancestry, as required by the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). Because we conclude that any error was not prejudicial, we affirm the order terminating parental rights.

I.
Dependency Proceedings

A. Caroline and Daniel

On November 1, 2013, DCFS filed a juvenile dependency petition on behalf of Caroline, Daniel, and their two older half-siblings, Alize M. and Crystal M.[1] The petition alleged the children were at substantial risk of harm within the meaning of Welfare and Institutions Code[2] section 300, subdivision (b) because mother and Daniel had tested positive for amphetamines and methamphetamines at Daniel's birth. The petition also alleged father had a history of illegal drug use and had cared for Caroline while under the influence of drugs.

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[1] Alize and Crystal were placed with their father, and the juvenile court terminated its jurisdiction over them in October 2014. They are not subjects of this appeal.

[2] All subsequent undesignated statutory references are to the Welfare and Institutions Code.

When interviewed at the hospital on August 28, 2013, mother and father both stated they did not have any Indian ancestry. Father subsequently signed a Form ICWA-020 stating that to his knowledge, he had no Indian ancestry.

At the November 1, 2013 detention hearing, the court ordered the children released to mother. However, after mother missed three drug tests in January 2014 and father appeared to be on drugs during an interview with DCFS, the children were detained on January 23, 2014. On January 28, 2014, the court found that the ICWA-020 forms had been signed and filed, and that ICWA did not apply.

At the adjudication hearing on March 12, 2014, the court sustained the dependency petition and ordered reunification services for both parents.

In September 2014, father was incarcerated. On October 30, 2014, the juvenile court found father was not in compliance with his case plan, and it terminated his reunification services as to Caroline and Daniel.

B. Victoria

Mother gave birth to Victoria in July 2014. DCFS filed a juvenile dependency petition on behalf of Victoria on January 23, 2015, pursuant to section 300, subdivisions (b) and (j). The petition alleged that mother tested positive for amphetamine use on January 7, 2015, and that Victoria's siblings were juvenile court dependents. On January 23, 2015, the juvenile court found a prima facie case for detaining Victoria.

On January 30, 2015, father signed a Form ICWA-020 stating that he "*may* have Indian ancestry." (Italics added.) Father did not identify a tribe or band in which he might be eligible for membership, however. The same day, the court

ordered DCFS to "follow up regarding possible ICWA through paternal family side."

On March 13, 2015, the juvenile court sustained the allegations of the petition and ordered DCFS to provide reunification services to both parents.

C. M.E.

Mother tested positive for amphetamines on May 26, 2015, four days before giving birth to M.E. DCFS detained M.E. on June 1, 2015.

On June 4, 2015, father completed and filed a Form ICWA-020 as to M.E., which stated that to his knowledge, he had no Indian heritage. The same day, at M.E.'s detention hearing, the court made a finding that it did not have reason to know that M.E. was an Indian child under ICWA. On July 16, 2015, the court sustained the petition as to M.E.

II.
Termination of Father's Parental Rights

On July 16, 2015, the court found mother in minimal compliance with her case plan and terminated her reunification services as to Caroline and Daniel. On October 29, 2015, the court terminated mother's and father's reunification services as to Victoria, and denied both parents reunification services as to M.E.

The court terminated parental rights as to M.E. on June 23, 2016, and to Caroline, Daniel, and Victoria on October 27, 2016.

On July 12, 2016, father filed a notice of appeal from the June 23, 2016 order terminating parental rights as to M.E. On September 22, 2016, father's appointed appellate counsel filed a "no issue" brief pursuant to *In re Phoenix H.* (2009) 47 Cal.4th

835. Father was notified of his right to file a letter identifying appellate contentions or arguments, but he failed to do so. His appeal as to M.E. was dismissed as abandoned on November 3, 2016.

On November 2, 2016, father filed a notice of appeal from the October 27, 2016 order terminating parental rights as to Caroline, Daniel, and Victoria.

DISCUSSION

Father's sole contention on appeal is that the order terminating his parental rights must be conditionally reversed because DCFS failed to conduct a proper ICWA inquiry after the court ordered it to do so in January 2015. Father acknowledges that he subsequently advised the court that he was not aware of any Indian ancestry, but he urges that a "conflict in the evidence"—that is, his conflicting representations about his possible Indian ancestry—required further inquiry.

For the reasons that follow, we conclude that DCFS's failure to conduct an ICWA inquiry was harmless. We therefore affirm the order terminating father's parental rights as to Caroline, Daniel, and Victoria.

I.
Legal Standards

"Congress enacted ICWA in 1978 in response to 'rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.' [Citation.] ICWA declared that 'it is the policy of this Nation to protect the best interests of Indian children and to promote the

stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. . . .' (25 U.S.C. § 1902.)" (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8.)

Notice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. (*In re Isaiah W.*, *supra*, 1 Cal.5th at pp. 8-9.) Accordingly, ICWA provides, "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe" of the pending proceedings and its right to intervene. (25 U.S.C. § 1912(a).) Similarly, California law requires notice to the Indian custodian and the Indian child's tribe in accordance with section 224.2, subdivision (a)(5), if the Department or court knows or has reason to know that an Indian child is involved in the proceedings. (§ 224.3, subd. (d); see Cal. Rules of Court, rule 5.481(b)(1) [notice is required "[i]f it is known or there is reason to know that an Indian child is involved in a proceeding listed in rule 5.480," which includes all dependency cases filed under section 300].)

If the court fails to ask a parent about his or her Indian heritage, a limited reversal of an order or judgment and remand for proper inquiry and any required notice may be necessary. (*In re A.B.* (2008) 164 Cal.App.4th 832, 839.) Reversal is not

warranted, however, when the court's noncompliance with the inquiry requirement constitutes harmless error. (*Ibid.*; see also *In re H.B.* (2008) 161 Cal.App.4th 115, 121.)

II.
Father Has Not Demonstrated that DCFS's Failure to Make an ICWA Inquiry Is Reversible Error

The relevant facts are undisputed: In January 2015, father represented to the juvenile court in a Form ICWA-020 filed in connection with Victoria's detention hearing that he "may have Indian ancestry"; four months later, in June 2015, father represented in a Form ICWA-020 filed in connection with M.E.'s detention hearing that he did *not* have Indian ancestry. DCFS did not comply with the juvenile court's January 2015 order to investigate father's claim of Indian ancestry.

Although the parties agree on the relevant facts, they disagree about their legal significance. Father contends that the Form ICWA-020 filed in June 2015 is outside the appellate record and should not be considered; alternatively, father urges that even if we consider the June 2015 Form ICWA-020, it merely creates a conflict in the evidence that requires a limited remand. DCFS contends that the June 2015 Form ICWA-020 is properly before the court and compels the conclusion that any ICWA error was harmless.

We begin by considering the significance of the Form ICWA-020 father filed in June 2015. Father urges that his submission of the form was a "post-judgment event," and thus it should be considered on appeal only in "exceptional circumstances" not present here. We do not agree that the June 2015 Form ICWA-020 was filed postjudgment. To the

contrary, when father filed the Form ICWA-020 in June 2015, parental rights to Caroline, Daniel, and Victoria had not yet been terminated. The court ordered those parental rights terminated 16 months *later*, in October 2016.

Moreover, although DCFS filed a separate dependency petition for M.E. (who was not yet born when the juvenile court adjudicated the petitions as to Caroline, Daniel, and Victoria), the petitions for all four children were filed under the same case number and were considered by the same juvenile court judge. Accordingly, father's June 2015 Form ICWA-020 was before the juvenile court in this proceeding well prior to the entry of the order from which father appeals, and thus it properly is part of our appellate record.

Father next contends that even if the June 2015 Form ICWA-020 is properly before us, it is not dispositive because it merely creates an evidentiary conflict that requires a reversal and limited remand to permit DCFS to conduct a further ICWA inquiry. We do not agree. Although father indisputably made inconsistent statements about his Indian ancestry, his final representation to the juvenile court was that, to his knowledge, he did not have Indian ancestry. This statement does not suggest a conflict in the evidence, but rather that whatever father may have believed in January 2015, he had determined as of June 2015 that he did not have any Indian ancestry.

This case therefore is analogous to *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, in which a father initially told the court that he "might" have Indian ancestry, but then later said he did not.[3] On that record, the court concluded that ICWA notice was

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[3] *In re Michael V.* (2016) 3 Cal.App.5th 225, cited by father, is distinguishable from the present case. Here, as we have said, father

not required because there was no information that reasonably would suggest the child had Indian heritage: "At the December 6 hearing, father told the juvenile court he might have some Indian heritage and the matter needed to be researched. But he did not mention any tribe name or even know if his great-grandfather had been a member of a tribe. . . . At the February 4 jurisdictional/dispositional hearing, upon inquiry from the court, father's counsel clarified that although father had initially claimed he might have Indian ancestry, he had retracted that claim and did not have any Indian heritage. Father was present at the hearing and represented by counsel. Because father retracted his claim of Indian heritage, and because there was no other basis for suspecting that Jeremiah might be an Indian child, the trial court properly proceeded without ICWA notice." (*Id.* at p. 1521.)

Of course, it is *possible* that father checked the wrong box when he filled out the Form ICWA-020 in June 2015—i.e., that he meant to check the box next to "I may have Indian ancestry," rather than "I have no Indian ancestry as far as I know"—but nothing in father's appellate briefs suggests that is the case. That is, although father repeatedly suggests on appeal that there was a conflict in the evidence, he has not made an *affirmative representation* that he believes he has Indian ancestry.

We find the reasoning of *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 (*Rebecca R.*) instructive. In that case, the father argued that the termination of his parental rights

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told the court in January 2015 that he might have Indian ancestry, but in June 2015 said he did not. In *Michael V.*, in contrast, the parent never disclaimed Indian ancestry.

should be reversed because there was no evidence that the San Bernardino Department of Children's Services had inquired whether father had Indian ancestry. (*Id.* at pp. 1428-1429.) The Court of Appeal declined to reverse, concluding that the father had not demonstrated a miscarriage of justice because on appeal he had not made an affirmative representation of Indian ancestry. The court explained:

"The sole reason an appellate court is put into a position of 'speculation' on the matter is the parent's failure or refusal to tell us. Father complains that he was not asked below whether the child had any Indian heritage. Fair enough. But, there can be no prejudice unless, *if* he had been asked, father *would have* indicated that the child did (or may) have such ancestry.

"Father is here, now, before this court. There is nothing whatever which prevented him, in his briefing or otherwise, from removing any doubt or speculation. He should have made an 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. He did not.

"In the absence of such a representation, the matter amounts to nothing more than trifling with the courts. [Citation.] The knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge and disclosure is a matter entirely within the parent's present control. The ICWA is not a 'get out of jail free' card dealt to parents of non-Indian children, allowing them to avoid a termination order by withholding secret knowledge, keeping an extra ace up their sleeves. Parents cannot spring the matter for the first time on appeal without at least showing their hands. 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.

"The burden on an appealing parent to make an affirmative representation of Indian heritage is de minimis. In the absence of such a representation, there can be no prejudice and no miscarriage of justice requiring reversal." (*Rebecca R.*, *supra*, 143 Cal.App.4th at p. 1431.)

Rebecca R. stands for the proposition that a parent cannot be heard to complain that DCFS or the court failed to conduct an adequate inquiry into his Indian ancestry absent an affirmative representation on appeal that such inquiry would have revealed Indian ancestry sufficient to invoke the ICWA. In the present case, as in *Rebecca R.*, father points to uncertainty in the record, but he has not in any of his appellate submissions made an affirmative representation that he has (or may have) Indian ancestry. Nothing prevented him from doing so. Father thus has failed to demonstrate prejudicial error, and accordingly we affirm the order terminating his parental rights. (See *In re N.E.* (2008) 160 Cal.App.4th 766, 771 [where court failed to make ICWA inquiry, error was not reversible because on appeal parent failed to suggest he had any Indian ancestry]; compare *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1387-1390 [court's failure to make ICWA inquiry required reversal where mother made an affirmative claim on appeal that her father's grandmother was a Seminole Indian].)

DISPOSITION

The order terminating parental rights is affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

JOHNSON (MICHAEL), J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.