Filed 3/29/17 In re V.R. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 V.R., et al., Persons Coming Under the Juvenile Court Law.	B276678 (Los Angeles County Super. Ct. No. CK90698)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.R., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Terry T. Truong, Judge. Conditionally reversed and remanded.

Lori N. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Jacklyn K. Louie, Principal Deputy County Counsel, for Plaintiff and Respondent.

T.R. (Mother) appeals from the dependency court's order terminating her parental rights under Welfare and Institutions Code[1] section 366.26 to her twin daughters, V.R. and A.R. (born in October 2011). Without contesting the merits of the order, Mother contends it should be reversed because the court and the Department of Children and Family Services (DCFS) did not inquire of the children's father whether he had Indian ancestry and thus failed to comply with the Indian Child Welfare Act (ICWA). DCFS does not oppose remand for the proper ICWA inquiry, but nonetheless argues that the matter should be remanded without reversing the termination order. We disagree and accordingly, we conditionally reverse the termination order and remand for compliance with the ICWA notice requirements.

FACTUAL AND PROCEDURAL HISTORY[2]

In late October 2013, DCFS filed a section 300 dependency petition on behalf of V.R. and A.R. under subdivision (b) alleging that Mother,[3] had a history of engaging in physical altercations with her male companion while the children were present.

Although the children's father, J.M., did not appear at the detention hearing, based on information provided by Mother, the court found that he was the presumed father of the children.[4] The court found that the children were not Indian children based solely

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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 Mother's appeal we discuss only the facts pertinent to the ICWA notice.

[3] The children's father is not a party to this appeal.

[4] The children's parents were not married or in a relationship at the time of the proceedings.

on an inquiry of Mother in which she stated that she had no Indian ancestry. The record does not, however, reflect that the court or DCFS ever made any specific inquiry as to whether the children's father had Native American ancestry.

The court sustained the petition and ordered reunification services for Mother. After the evidence presented at the review hearings had revealed, that Mother had not complied with her case plan, the court terminated reunification services and set a section 366.26 hearing.

In September 2015, shortly before the initially scheduled section 366.26 hearing, the children's father contacted DCFS, confirmed that he was the children's biological father and stated that he had been paying child support to the state for the children. According to DCFS, he also stated that he was unable to care for the girls and that he wanted them to be adopted by a family that could provide a home for them.

The children's father appeared for the first time at the January 22, 2016 section 366.26 hearing, and advised the court that he had never visited the children and did not oppose the termination of his parental rights. On July 15, 2016, the juvenile court terminated parental rights. Mother timely appeals.

DISCUSSION

Mother argues,[5] DCFS concedes, and we agree, that the court and DCFS erred by failing to fulfill their duty of inquiry of the

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[5] Although she claims no American Indian ancestry, Mother has standing to assert an ICWA notice violation on appeal. (See *In re Jonathon* S. (2005) 129 Cal.App.4th 334, 339 [holding non-Indian parent may be aggrieved, for purposes of standing to assert ICWA error on appeal]; see also 25 U.S.C. § 1914; Cal. Rules of Court, rule 5.486(a) [termination of parental rights may be challenged on the ground of lack of ICWA notice by the

children's father for ICWA purposes and that the error warrants remanding the matter to the dependency court to conduct a proper ICWA inquiry. (See Cal. Rules of Court, rule 5.481(a) [DCFS and the court "have an affirmative and continuing duty to inquire whether a [dependent] child is or may be an Indian child"]; *In re Asia L.* (2003) 107 Cal.App.4th 498, 506 [the dependency court must determine whether proper notice was given and whether the ICWA applies and "the record must reflect that the court considered the issue and decided whether ICWA applies"]; *In re J.N.* (2006) 138 Cal.App.4th 450, 461-462 [failure to conduct the ICWA inquiry requires remand].)

Here, the only point of contention between the parties is whether this court should conditionally reverse the termination order and remand to conduct the ICWA inquiry or remand for the ICWA inquiry *without* reversing the termination order.

DCFS contends remand without reversal of the termination order is appropriate because Mother has made no showing that the ICWA would have applied and because the children's father does not oppose termination of his parental rights. DCFS relies on *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 (*Rebecca R.)* to support this contention. In *Rebecca R.,* on appeal the father contended the ICWA was violated because the record contained no documentation to show that the social services agency had asked him whether he had Indian ancestry, even though it had been ordered to do so. The appellate court concluded that any error was harmless because "there can be no prejudice unless, if he had been asked, father would have indicated that the child did (or may) have such ancestry." (*Rebecca R., supra,* 143 Cal.App.4th at p. 1431, italics omitted.) The court explained: "Father is here, now, before this

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dependent child, a parent or Indian custodian from whose custody the child was removed].)

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." (*Ibid*.)

Rebecca R. is distinguishable. Essential to *Rebecca R.'s* prejudice analysis is the fact that the father complained on appeal that he was not asked about his Indian ancestry. Here, Mother does not argue that she was not asked about her Indian heritage and in fact, she indicated that she does not have any Indian ancestry. Rather, she contends that the children's father was not asked about his Indian heritage. Thus, unlike the situation in *Rebecca R.,* we cannot say that the "knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge." (*Rebecca R., supra,* 143 Cal.App.4th at p. 1431.) Indeed, there is nothing in the record to indicate that Mother has any knowledge of the children's father's ancestry, and he, the parent who presumably does have knowledge about his ancestry, is not before this court. To hold the error harmless, we would have to speculate that the children's father would deny such ancestry if asked, which we decline to do. (See *In re J.N., supra,* 138 Cal.App.4th at p. 461 [the court refused to speculate about parent's response to an ICWA inquiry].)

In addition, the fact that children's father does not oppose the termination of his parental rights is not dispositive of whether the termination order should be conditionally reversed in this case. Indeed, the error compromised other requirements, rights, and

benefits provided under the ICWA to the children and the tribes. For example, the ICWA sets higher evidentiary standards than state law for the termination of parental rights to Indian children. (See 25 U.S.C. § 1912(d)-(f).)[6] And because there is no reason to believe that the court applied the higher ICWA standards in terminating parental rights, then the termination order must be conditionally reversed in this case irrespective of one parent's lack of opposition to that order. Most importantly, given the children's father's acquiescence to the termination order, if the children have Indian heritage a tribe may want to intervene to place the children.

Consequently, because the dependency court failed to ensure compliance with the ICWA requirements, in our view, the better approach in this case is to conditionally reverse the order terminating parental rights. This "does not mean the trial court must go back to square one," but that the court ensures that the ICWA requirements are met. (*In re Suzanna L.* (2002) 104 Cal.App.4th 223, 237; see *In re Francisco W.* (2006) 139 Cal.App.4th 695, 705 ["The limited reversal approach is well adapted to dependency cases involving termination of parental rights in which we find the only error is defective ICWA notice"].)

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[6] An order terminating parental rights to an Indian child must be "supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(f).)

DISPOSITION

The order terminating parental rights is conditionally reversed and the case is remanded to the dependency court with directions to inquire of the children's father, J.M. whether V.R. and A.R. are or may be Indian children. (See Cal. Rules of Court, rule 5.481(a).) If the inquiry produces no evidence that the minors are or may be Indian children, or if there is no intervention or assertion of jurisdiction by any tribe after proper notice, then the juvenile court may reinstate the order terminating parental rights. (See *In re Francisco W., supra,* 139 Cal.App.4th at p. 708.)

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

JOHNSON, J.