Filed 11/18/13 In re X.S. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re X.S. et al., Persons Coming Under the Juvenile Court Law.	B247295 (Los Angeles County Super. Ct. No. CK93270)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.S. et al., Defendants and Appellants.	

APPEALS from an order of the Superior Court of Los Angeles County. Rudolph A. Diaz, Judge. Affirmed with directions.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant Father.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant Mother.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

The parents of two dependent children challenge a disposition order on the ground that the juvenile court failed to adhere to the mandates of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.; Welf. & Inst. Code, § 224 et seq.) The Department of Children and Family Services (DCFS) concedes that the correct procedures were not followed. Though we affirm the disposition, we remand the case to the juvenile court to follow ICWA procedures.

FACTS

K.H.. (Mother) and M.S. (Father) are the parents of X.S. (born in 2008) and K.S. (born in 2011). In March 2012, sheriff's deputies were called to the family home. When they arrived, Mother was violent and belligerent: she scuffled with the deputies, they punched and "tased" her, then arrested her for domestic violence against Father. The family has prior referrals for domestic violence, in 2010 (when Father tried to strangle Mother) and 2011. Mother's arrest and the family history of domestic violence generated a referral to DCFS. The parents rebuffed a social worker's attempt to investigate the referral.

A warrant issued for the removal of the children from the parental home. They were detained on April 25, 2012, and placed in foster care. In the detention report, Father "reported having Indian ancestry on [the] paternal side but indicated that he was unsure of the tribe. He stated that the mother reported having both Cherokee and Blackfoot Indian ancestry."

DCFS filed a petition on behalf of the children, alleging that the parents have a history of engaging in violent altercations; Mother repeatedly struck Father's face in the presence of the children on March 31, 2012; Father choked Mother on December 28, 2010, while she was pregnant with K.S., in the presence of X.S.; remedial services failed to resolve family problems and the parents continue to engage in violent conduct, endangering the children's physical health and safety and placing them at risk of harm.

At a hearing on April 30, 2012, the court found a prima facie case for detaining the children from parental custody. Inquiry was made about the children's Indian ancestry. Father believed that his great grandmother might be Indian. The court stated, "I am

going to direct [DCFS] to further investigate whether or not ICWA is applicable in this case." Father and Mother filed "Parental Notification of Indian Status" forms indicating that they may have Cherokee (and, in Mother's case) Blackfoot ancestry.

Mother made her first appearance in the case at a hearing on May 18, 2012, and denied the allegations in the petition. The topic of the hearing was whether the children could be safely released into the care of the maternal grandmother, who was previously accused of mistreating Mother when Mother was a teenager. During the hearing, Mother became angry, uttered a profanity, and left the courtroom. The proceedings concluded without any discussion of ICWA; nevertheless, the minute order states, "After interview of the mother, the court finds that ICWA does not apply." The reporter's transcript contains no interview of either Mother or the maternal grandmother, who was present.

The jurisdiction/disposition report states that "On 05/18/2012, the Court made a finding that ICWA does not apply." Mother denied being physically violent with Father before the deputies arrived; rather, they were having a "heated" argument at 3:00 a.m. The children saw Mother get punched in the face and tased by the deputies. Mother denied that Father choked her in 2010, while she was pregnant. Mother admitted that "I do have an anger problem." Father denied that he and Mother had a physical altercation on the day of her arrest, and denied that he choked Mother in 2010. Neither Mother nor Father took any classes following the 2010 referral, and were "uncooperative" with DCFS. The arresting deputies' report of the incident shows that Father told them he was punched five or six times and slapped two or three times by Mother.

Mother pleaded no contest to charges of resisting arrest. A count of spousal battery was dismissed. She was sentenced to two years of summary probation.

The petition was adjudicated on November 15, 2012. Father and Mother failed to show up on time for the hearing. The court sustained a count that the children are at substantial risk of harm because their parents have a history of engaging in violent altercations; Mother repeatedly struck Father in the face with her hands and fists on March 31, 2012; Father choked Mother while she was pregnant with K.S., in the presence of X.S.; remedial services failed to resolve the family problems in that Mother and Father

continue to engage in violent altercations. The court dismissed a count of serious physical harm. The court described the evidence as "overwhelming in this case."

Mother and Father were provided with referrals to parenting, anger management, individual and marriage counseling and domestic violence on July 9, 2012. In January 2013, the parents' program director reported that the parents re-enrolled in the program on December 12, 2012. They attended parenting and substance abuse treatment once a week, although it was recommended they have at least three sessions per week. They have not participated in anger management, giving repeated excuses for the lapse. Parental visits go well: the children are very happy to see their parents and cry when the visits end. Mother physically attacked and yelled loudly at Father at court on November 15, 2012; she had to be restrained by a bailiff. Mother continues to deny any domestic violence.

At the disposition hearing, the court found by clear and convincing evidence that there is a substantial danger if the children are returned to the parents, and vested custody in DCFS. Mother and Father were ordered to participate in a domestic violence program; anger management; counseling; and parenting. They were given monitored visitation.

DISCUSSION

Mother and Father appeal from the disposition. (Welf. & Inst. Code, § 395.) Neither parent challenges the juvenile court's jurisdictional findings. Nor do they question the case plan set forth in the disposition. The only issue on appeal is whether the court followed the ICWA mandates. DCFS concedes that the proper procedures were not followed, because the record contains no proof that any investigation was done into the children's possible tribal ancestry.

As the parties agree, the purpose of ICWA is to protect the interests of Indian children and promote the stability and security of Indian families. (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32-37.) State and federal law require that notice be given to tribes when there is reason to know that a child is Indian. (25 U.S.C. § 1912; Welf. & Inst. Code, § 224.2.) A child's status under ICWA cannot be

waived by the parents' failure to raise it in the trial court. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408; *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1166.)

In this instance, Father initially reported having Indian ancestry, but was unsure of the tribe. Later, he identified the tribe as Cherokee. Mother signed a notification of Indian status listing Cherokee and Blackfoot ancestry through her paternal grandfather. Although a minute order shows that the court "interviewed" Mother and determined that the ICWA does not apply, this colloquy is not in the reporter's transcript. Moreover, there is no indication that Father was interviewed about his ancestry.

DCFS and the court had a duty to inquire about parental Indian ancestry. There must be some proof that authorities interviewed the parents and extended family members. (*In re Gabriel G.*, *supra*, 206 Cal.App.4th at pp. 1165-1166.) If an agency knows that an Indian child is or may be involved, the agency must investigate the child's Indian status and send notices to the tribe or tribes that are involved. (Cal. Rules of Court, rule 5.481; *In re H.B.* (2008) 161 Cal.App.4th 115, 120-121.)

This Court follows the rule that when there is a failure to follow ICWA procedures before disposition, all jurisdictional and dispositional orders remain in effect while there is "a limited remand to the juvenile court for the Department to comply with the notice requirements of the ICWA, with directions to the juvenile court depending on the outcome of such notice. If, after proper notice is given under the ICWA, [the child] is determined not to be an Indian child and the ICWA does not apply, prior defective notice becomes harmless error. . . . Alternatively, after proper notice under the ICWA, if [the child] is determined to be an Indian child and the ICWA applies to these proceedings, [the child] can then petition the juvenile court to invalidate orders" that violate ICWA. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 385; 25 U.S.C. § 1914; *In re Gabriel G.*, *supra*, 206 Cal.App.4th at p. 1166. Accord: *In re Veronica C.* (2007) 157 Cal.App.4th 179, 186-189; *In re Christian P.* (2012) 208 Cal.App.4th 437, 452.) "[T]o hold otherwise would deprive the [trial] court of all authority over the dependent child, requiring the immediate return of the child to the parents whose fitness was in doubt." (*In re Brooke C.*, *supra*, 127 Cal.App.4th at p. 385; *In re G.L.* (2009) 177 Cal.App.4th 683,

696.) Mother and Father do not attempt to show that they would have obtained a more favorable result in the absence of the error; thus, reversal is not required. (*In re G.L.*, at pp. 695-696; *In re H.B.*, *supra*, 161 Cal.App.4th at pp. 121-122.)

DISPOSITION

The disposition order is affirmed and the matter is remanded with directions to the juvenile court that it order DCFS to comply with the inquiry and notice provisions of the ICWA. After proper notice under the ICWA, if X.S. and K.S. are determined to be Indian children and if the ICWA applies to these proceedings, the children or their parents may petition the juvenile court to invalidate the orders that violated the ICWA.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

FERNS, 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.