Filed 10/19/17 Adoption of Dakota G. CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

Adoption of DAKOTA G., a Minor.	2d Juv. No. B280212 (Super. Ct. No. A017427) (Ventura County)
SUSAN G. and GEOFFREY G., Petitioners and Respondents, v. MARVIN D., Objector and Appellant.	

Marvin D., the biological father of Dakota G., appeals from the judgment terminating his parental rights and freeing Dakota for adoption by her maternal grandparents, respondents Susan G. and Geoffrey G. (Fam. Code, § 7822.) Appellant claims that respondents did not comply with the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C.S. § 1901 et seq.). Statutory and case law require that we reverse and remand with directions to comply with ICWA. (Welf. & Inst. Code, § 224.2,

subds. (a) & (d); 25 U.S.C.S. § 1912(a); *In re Isaiah W.* (2016) 1 Cal.5th 1, 5.)[1]

Facts and Procedural History

Dakota's mother, April G., is homeless and suffers from bipolar personality disorder and substance abuse. Respondents became Dakota's primary caregivers after Dakota was born and were appointed temporary guardians in October 2014. The guardianship petition stated that Dakota was a member of or eligible for membership in the Alaska Tlingit Tribe. April consented to the guardianship but appellant was homeless and could not be found. On November 13, 2014, appellant appeared and consented to the temporary guardianship. On December 23, 2014, the trial court appointed respondents as Dakota's legal guardians. (*In re Guardianship of Dakota G.*, Ventura County Sup. Ct., case no. 56-2014-00459012-PR-GP-OXN.)

On July 31, 2015, respondents filed an ADOPT-200 Adoption Request and an ADOPT-220 Adoption of Indian Child form to free Dakota for adoption. The Adoption Request stated that appellant was homeless, had an extensive criminal record, and failed to provide for Dakota's support or communicate with the child.

On May 6, 2016 appellant appeared in custody. The trial court appointed counsel for appellant and continued the matter because ICWA issues still had to be resolved. Ventura County Human Services Agency (HSA) reported that Dakota's biological mother (April) was a recognized member of the Tlingit Tribe of Alaska, "a sovereign entity represented by CCTHITA

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

(Central Council of the Tlingit and Haida Indian Tribes of Alaska)." Respondents told HSA that their attorney was in the process of resolving any ICWA related issues.

On June 2, 2016, the trial court asked if the tribe had been contacted yet. Respondents' trial counsel replied, "I'm in the process of doing that. . . . It's a little bit complicated." Respondents filed an ICWA-030 Notice, calendaring the matter for an October 14, 2016 hearing. The ICWA notice stated that the biological maternal grandmother (Melodee Dawn W) [*sic*] was deceased and failed to list the names and addresses of the maternal grandfather and maternal great-grandparents.

On November 9, 2016, the trial court found that the Tlingit and Haida Tribes of Alaska had been served with the ICWA notice, that the tribes had not responded, and that ICWA did not apply.

At the January 6, 2017 hearing to terminate parental rights, appellant said that he had been in jail off and on and lacked the resources to contact respondents or support Dakota. The trial court found that appellant left Dakota in respondents' care and custody for a period in excess of six months, and failed to communicate with the child or provide support. The court terminated appellant's parental rights and freed Dakota for adoption. (Fam. Code, § 7822.)

ICWA

In *In re Isaiah W.*, *supra*, 1 Cal.5th 1, our Supreme Court held that ICWA imposes a continuing duty on the juvenile court to inquire whether a child in a dependency proceeding is or may be an Indian child. (*Id.* at p. 6.) If the trial court knows or has reason to know that an Indian child is involved, notice of the proceedings must be given to the relevant tribe or tribes. (*Id*. at

p. 8; see 25 U.S.C.S. § 1912(a); Welf. & Inst. Code, § 224.2, subd. (a).)

ICWA applies to private adoption proceedings brought under Family Code section 7822. (*In re Suzanna L.* (2002) 104 Cal.App.4th 223, 226-227; *In re Crystal K.* (1990) 226 Cal.App.3d 655, 657.) ICWA defines "a child custody proceeding" to include any proceeding for termination of parental rights or adoptive placement. (25 U.S.C.S. § 1903(1)(ii) & (iv).) ICWA notice is required where there is information the child may have Indian heritage and may be an Indian child, a matter for the ultimate decision of the tribe. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 849; *In re H.G.* (2015) 234 Cal.App.4th 906, 908 [ICWA applies to children who are of Eskimo decent].)

Here the ICWA notice was defective in the following respects: First, it failed to attach a copy of the adoption petition or disclose that the proceeding was to terminate parental rights in a private adoption proceeding. (§ 224.2, subd. (a)(5)(D) [notice shall include a copy of petition by which the proceeding was initiated].) Instead, the notice stated that the matter was calendared for an "ICWA Review Hearing."

Second, the ICWA notice failed to list the name of the Indian tribes in which Dakota was a member or may be eligible for membership. (§ 224.2, subd. (a)(5)(B); 25 C.F.R. § 23.111(b)(1) (2017).) We have taken judicial notice of an Ancestry Chart prepared and authenticated by Raven Hunter of the Central Council Tlingit & Haida Indian Tribes of Alaska (CCTHITA). (Evid. Code, §§ 452, subd. (b); 459, subd. (a) [reviewing court shall take judicial notice of each matter trial court was required to notice under Evid. Code, §§ 451 or 453]; Code Civ. Proc., § 909 [taking additional evidence on appeal]; see *In re Christopher I.*

(2003) 106 Cal.App.4th 533, 562-563 [augmentation of record to take additional evidence in ICWA appeal].) Hunter is a family social worker for CCTHITA and declares that the Ancestry Chart is an official tribal document used to determine which tribal communities have a connection with a child who may be subject to ICWA. CCTHITA assists Alaskan tribal communities in identifying children who are or may be enrolled members of a federally recognized Alaskan tribe but the determination as to whether a child qualifies as an Indian child under ICWA must be made by each tribal community with whom the child has a connection. The Ancestry Chart and Hunter's declaration reflect that Dakota has connections with the Ketchikan and Klawock tribes who, according to the Department of Interior, Bureau of Indian Affairs have designated tribal agents for service of ICWA notice in Ketchikan and Klawock, Alaska respectively. (Dept. of Interior, Bureau of Indian Affairs, Indian Child Welfare Act; *Designated Tribal Agents for Service of Notice*, 81 Fed. Reg. 10887, 10892 (Mar. 2, 2016).) Here, the ICWA notice does not name either tribe or indicate that the notice was served on the tribes. To satisfy the notice of provisions of ICWA, respondents were required to send proper notice to all possible tribal affiliations. (*In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.)

The ICWA notice also fails to list the names of Dakota's biological grandfather and great-grandparents, "including maiden, married, and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known." (§ 224.2, subd. (a)(5)(C); *In re Breanna S.* (2017) 8 Cal.App 5th 636, 651.) Respondents listed two Indian maternal grandmothers (Melodie W. and Joyce B.) on the

ADOPT-220 form but failed to list Joyce B. in the ICWA notice. The ICWA notice states that the second grandmother, Melodee W., [*sic*] is deceased but does not list her maiden, married and former names or aliases, and other identifying information. (§ 224.2, subd. (a)(5)(C).) The ICWA notice also fails to list the maternal great grandfather, Arnold Jack J., whose name appears on the CCTHITA Ancestry Chart.

Because proper ICWA notice was not given, we are compelled to reverse and remand with directions to comply with ICWA. (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111 [failure to require compliance with ICWA notice requirements is prejudicial error]; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424 [prejudicial error]; *In re Nikki R.*, *supra*, 106 Cal.App.4th at p. 855 [ICWA error warranted reversal of Welf. & Inst. Code § 366.26 order and remand for compliance with ICWA notice requirements].) Compliance with ICWA is not a mere technicality. (*In re Elizabeth W.*, *supra*, 120 Cal.App.4th at p. 908; see *In re Desiree F.* (2000) 83 Cal.App.4th 460, 474 [state courts have no jurisdiction to proceed with dependency proceedings involving a possible Indian child until a period of at least 10 days after appropriate individuals and entities have received ICWA notice].)

Guardianship Proceeding

Appellant complains that ICWA notice was not given in the guardianship proceeding. (See *Guardianship of D.W.* (2013) 221 Cal.App.4th 242, 249.) Because respondents were acting in propria persona when the guardianship petition was filed, it was the trial court's responsibility to provide ICWA notice. (*Id.* at p. 250; Cal. Rules of Court, rule 7.1015(c)(4).) Appellant, however, did not appeal from the December 23, 2014

guardianship order and is precluded from raising the ICWA issue at this late a date.

Appellant argues that respondents lacked standing to make the adoption request because it was filed slightly more than six months after the legal guardianship was established. Family Code section 8802, subdivision (a)(1)(D)(ii) provides that a grandparent may file an adoption request if the grandparent was the legal guardian of the child for more than six months and the child was alleged to have been abandoned pursuant to Family Code section 7822. (10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent & Child, § 132, pp. 203-204; *In re Michael R.* (2006) 137 Cal.App.4th 126, 138.) If the child's parent nominated the guardian for a purpose other than adoption for a specified period of time, then the guardianship must have been in existence at least three years before the adoption request is filed. (Fam. Code, § 8802, subd. (a)(1)(D)(iii).)

April, Dakota's birth mother, did not nominate respondents as guardians for a purpose other than adoption. April consented to the guardianship as did appellant. On December 23, 2014, the court appointed respondents as Dakota's legal guardians. The adoption request was filed July 31, 2015, more than six months later and alleged that Dakota was abandoned by appellant within the meaning of Family Code sections 7822 and 8606, subd. (c). On November 18, 2015, April signed an irrevocable parental consent to adoption. Respondents clearly had standing to file the adoption petition. (Fam. Code, § 8802, subd. (a)(1)(D)(ii).)

Abandonment

Appellant argues that the evidence does not support the finding that Dakota was abandoned within the meaning of

Family Code section 7822. Section 7822, subdivision (a)(3) authorizes the termination of parental rights where the child has been left by one parent in the care and custody of the other parent for one year without provision for support or without communication, with the intent to abandon the child. (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010.) A parent "leaves" a child by voluntarily surrendering the child to another person's care and custody. "Case law consistently focuses on the voluntary nature of a parent's abandonment of the parental role rather than on the *physical* desertion by the parent." (*In re Amy A.* (2005) 132 Cal.App.4th 63, 69.)

Abandonment is a question of fact for the trial court based on all the circumstances. (*In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1212.) Appellant did not contact or support Dakota for more than a year which is presumptive evidence of intent to abandon. (Fam. Code, § 7822, subd. (b); *Adoption of A.B.* (2016) 2 Cal.App 5th 912, 923 [father's token efforts to communicate or support child do not overcome statutory presumption].) The parent need not intend to abandon the child permanently; rather, it is sufficient that the parent had the intent to abandon the child during the statutory period. (*In re E.M.* (2014) 228 Cal.App.4th 828, 839.) A parent "'leaves'" a child by voluntarily surrendering the child to another person's care and custody. (*In re Amy A.*, *supra*, 132 Cal.App.4th at p. 69 [existence of a judicial order placing custody of child with one parent does not preclude a finding the other parent "'left'" the child within the meaning of section 7822].) Nor does a parent's incarceration prevent the trial court from finding that the parent "left" or voluntarily surrendered his or her child to the care of the

other parent. (*Adoption of Allison C.*, *supra*, 164 Cal.App.4th at pp. 1011-1012.)

Appellant claims there was no intent to abandon because he was homeless, there was no outstanding child support order, and he lacked the resources to contact Dakota or support her. The trial court found that appellant had the ability to provide support because he worked on and off before trial and had the means and opportunity to communicate with Dakota. Respondent Susan G. testified that she gave appellant her phone number but appellant never called or asked to see Dakota. When respondents told appellant they wanted to adopt Dakota, appellant said they "could have her until she turned 13 and that he would want her back." Substantial evidence supported the finding that Dakota was abandoned. (*Adoption of Allison C.*, *supra*, 164 Cal.App.4th at p. 1011.)

Disposition

The order declaring Dakota free from appellant's custody and control is reversed and the matter is remanded to the trial court for the sole purpose of ensuring compliance with ICWA. The trial court shall make proper inquiry and comply with the notice provisions of the ICWA. If after proper inquiry and notice, the trial court determines the ICWA does not apply, the order declaring Dakota free from appellant's custody and control shall be reinstated.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Tari L. Cody, Judge

Superior Court County of Ventura

Patti L. Dikes, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance for Respondents.