Filed 12/3/18 In re M.B. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re M.B. et al., Persons Coming Under the Juvenile Court Law.	B287692
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ASHLEY F., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK03941)

APPEAL from orders of the Superior Court of Los Angeles County, Joshua D. Wayser, Judge. Dismissed in part and conditionally affirmed and remanded with directions in part.

Elizabeth Klippi, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Peter Ferrera, Principal Deputy County Counsel, for Plaintiff and Respondent.

Ashley F. (mother) appeals from the juvenile court's jurisdiction findings and disposition orders removing her son M.B. and her daughter S. T. from her custody. Her sole contention is that the juvenile court and the Los Angeles County Department of Children and Family Services (Department) failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.; ICWA) and California's parallel statutory scheme. As to S.T., we agree that the Department failed to comply with ICWA's inquiry and notice requirements, remand the matter to allow the Department and the juvenile court to remedy that violation of federal and state law, and otherwise conditionally affirm the order. As to M.B., we dismiss because mother has abandoned the appeal as to her son.

FACTUAL AND PROCEDURAL SUMMARY

The facts underlying the dependency proceedings are not pertinent to the sole issue raised in this appeal. Briefly, the juvenile court sustained a petition on behalf of S.T. pursuant to Welfare and Institutions Code[1] section 300, subdivisions (b) and (j), finding that mother had demonstrated a limited ability to

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[1] Undesignated section references are to the Welfare and Institutions Code.

provide proper care and supervision for her. Mother failed to understand how to prepare formula for S.T.'s feedings and how to follow medical staff's instructions to suction her mucus, and mother had demonstrated an inability to schedule feedings for her infant daughter. S.T.'s half-sibling M.B. was a current dependent of the juvenile court due to mother's caretaking issues, and her limitations placed S.T. at risk of serious physical harm. At the disposition hearing, the juvenile court removed S.T. from mother's custody.[2]

According to the detention report for the January 17, 2017 hearing, on January 12, 2017, S.T.'s alleged father, George F., signed an Indian ancestry questionnaire indicating that he has Creek Indian ancestry but was not registered with the tribe.[3] Mother also signed an Indian ancestry questionnaire indicating that she has Indian ancestry but could not remember the name.

At the detention hearing on January 17, 2017, mother filed a parental notification of Indian status form. She marked a box stating "I may have Indian ancestry," and wrote the words "paternal grandparent" and "Blackfeet." Noting mother's claim, the juvenile court ordered the Department "to make inquiry" with respect to her potential Indian ancestry, while reviewing the court file to confirm whether ICWA findings had been made in M.B.'s case. The Department's counsel told the juvenile court that, according to her file, the court had determined in 2014 that ICWA did not apply. The court then stated, "I'll certainly deal with ICWA and I'll hold off on ICWA until we get [George] in. If

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[2] It appears that S.T. was either in the hospital or in the care of a maternal relative throughout these proceedings.

[3] Mother reportedly married George on January 7, 2017.

he indicates no ICWA, I will stick with the prior ICWA finding once I get the file back so that I can review the issues. [¶] So ICWA finding will be deferred pending appearance of [S.T.'s] father," to determine paternity, and for the clerk to order the prior court file. According to the minute order, "[m]other claims possible American Indian heritage through the Blackfeet tribe. Mother shall provide any information to support Indian heritage to [the Department]. The court defers making ICWA findings until 1/18/17 . . . ."

On January 18, 2017, George appeared, counsel was appointed for him, and he filed a parental notification of Indian status form, marking a box indicating he had "no Indian ancestry as far as I know." The juvenile court deferred paternity findings pending the Department's investigation. There was no mention of ICWA.

In its March 14, 2017 jurisdiction and disposition report, the Department stated that the Indian Child Welfare Act "does or may apply" to S.T., indicating that "[m]other claims Blackfeet heritage, although on 03/04/2014, the [c]ourt found that the Indian Child Welfare Act does not apply as to mother." There was no mention of George's reported Creek ancestry. The Department reported that mother claimed another man (K.W.) was S.T.'s biological father, but the Department's due diligence search for him was unsuccessful. Without discussion in the report, the Department attached copies of notice of the dependency proceedings sent to the Blackfeet Tribe, Bureau of Indian Affairs, and the Secretary of the Interior on February 27, 2017.[4]

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[4] K.W. was identified as S.T.'s father in the notice.

On June 16, 2017, the juvenile court found George to be S.T.'s presumed father and sustained the dependency petition but continued the disposition hearing. On October 17, 2017, the juvenile court removed S.T. from her parents' custody, ordering monitored visitation for mother and George.

Mother filed a timely notice of appeal from the juvenile court's October 17, 2017 findings and order.

After filing her opening brief, mother filed a request for judicial notice of the juvenile court's July 19, 2018 order in which the court ordered the Department "to address ICWA and have attached copies of all notices[,] return receipts, and letters from tribes[, and] the report is to address all statements made by [George] regarding his [I]ndian heritage claim, inquiry[,] and att[a]ch copies of his statements." We grant the request.

DISCUSSION[5]

1. *Standard of Review*

We review the juvenile court's findings regarding ICWA's applicability and the Department's compliance with its

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[5] In her notice of appeal, mother stated that the appeal pertained to both S.T. and her older half-sibling M.B. (born in February 2014), and mother's opening brief addressed both children. However, mother later requested that we take judicial notice of the juvenile court's June 19, 2018 minute order, directing the Department to comply with ICWA in regard to M.B. We granted that request. At the same time, citing the June 19, 2018 order as to M.B., mother filed an amended opening brief, stating that, although her notice of appeal (and opening brief) referenced both M.B. and S.T., the issue in this appeal is the Department's compliance with ICWA and its California counterpart with regard to S.T. only. Accordingly, mother's appeal with respect to M.B. is dismissed as abandoned.

requirements for substantial evidence. (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.) Deficiencies in ICWA inquiry and notice may constitute harmless error when, even if proper notice had been given, the child would not have been found to be an Indian child. (*Ibid.*)

2. *Applicable Law*

Through ICWA, "[C]ongress declared a national policy '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 . . . .' [Citation.]" (*In re W.B., Jr.* (2012) 55 Cal.4th 30, 48.) These "minimum standards . . . include the requirement of notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.' (25 U.S.C. § 1912(a).)" (*In re Isaiah W.* (2016) 1 Cal.5th 1, 8.) "Importantly, '[t]he relevant question is not whether the evidence . . . supports a finding that the minor[] [is an] Indian child[]; it is whether the evidence triggers the notice requirement of ICWA so that the tribes themselves may make that determination.' [Citation.]" (*Id.* at p. 15.)

In California, "persistent noncompliance with ICWA led the Legislature in 2006 to 'incorporate[] ICWA's requirements into California statutory law.' [Citations.]" (*In re Abbigail A.* (2016) 1 Cal.5th 83, 91; see also *In re Breanna S.* (2017) 8 Cal.App.5th 636, 650 [California law "incorporates and enhances ICWA's requirements"].) Pursuant to section 224.3, subdivision (a), 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 dependency proceedings if the child is at risk of entering or is in foster care.

Subdivision (b) of section 224.3 enumerates a non-exhaustive list of "circumstances that may provide reason to know [a] child is an Indian child," including a circumstance in which a "person having an interest in the child . . . provides information *suggesting* the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (Italics added.) If the juvenile court or the social worker knows or has reason to know that an Indian child is involved, as soon as practicable, the social worker "is required to make further inquiry regarding the possible Indian status of the child . . . by interviewing the parents . . . and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2 . . . ."[6]

3. *The Issue of S.T.'s Possible Creek Heritage*

In January 2017, the Department informed the juvenile court that S.T. "may have Indian ancestry," and the Indian Child Welfare Act "does or may apply." When the social worker met with George in person, he signed an Indian ancestry questionnaire indicating that he had Creek ancestry but reported that he was not registered with the tribe. Six days later, he

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[6] Subdivision (a)(5) of section 224.2 specifies the mandatory contents of the notice. It must include "[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, 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."

signed a parental notification of Indian status form, marking a box to indicate he had "no Indian ancestry as far as I know." The court found George to be S.T.'s presumed father at the jurisdiction hearing on June 16, 2017. It does not appear that the juvenile court addressed ICWA after the January 2017 detention hearing.

Mother contends that the Department failed to adequately discharge its ICWA investigative duty under section 224.3, subdivision (c) because S.T.'s presumed father George provided information suggesting S.T. may be an Indian child when he met with social workers and claimed Creek ancestry in January 2017. The Department argues that, because George later signed a form stating he had no Indian heritage, no more was required.

At a minimum, after receiving conflicting information on the issue of George's Indian ancestry, both the Department and the juvenile court had a duty of further inquiry.[7] (See *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167–1168.) When a parent identifies a specific tribe, courts generally have concluded that the information provided gives rise to a "reason to know" the child in question is or may be an Indian child. (See e.g., *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1387–1388 [maternal grandmother's report that she had Blackfeet ancestry through her maternal grandfather, even without further substantiation, was sufficient to trigger notice under the ICWA and state law]; *In*

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[7] Neither mother nor the Department address the issue of S.T.'s paternity—whether George or K.W. is her biological father. The Department does not argue that the ICWA does not apply on this basis. (See *In re C.A.* (2018) 24 Cal.App.5th 511, 519 [finding ICWA notice not required for presumed father who was not biological or adoptive father].)

re Damian C. (2009) 178 Cal.App.4th 192, 199.) The Department's reliance on *In re A.B.* (2008) 164 Cal.App.4th 832, 843 is misplaced as no such conflict was presented in that case.

4. *The Issue of Mother's Blackfeet Heritage*

On January 17, 2017, mother filed a parental notification of Indian status form. She marked a box stating "I may have Indian ancestry," and wrote the words "paternal grandparent" and "Blackfeet." The juvenile court then ordered the Department "to make inquiry" with respect to her potential Indian ancestry, indicating that "ICWA finding will be deferred pending appearance of [S.T.'s] father" to determine paternity and for the clerk to order the prior court file.

On February 27, 2017, the Department sent notice of the dependency proceedings involving S.T. to the Blackfeet Tribe, Bureau of Indian Affairs, and the Secretary of the Interior. The form identified mother as "Ashley T[.]," but did not identify any former names, aliases, or her married name. Her former addresses and place of birth were not provided. The maternal grandmother was identified as "T[.]G[.]," with no maiden, married, or former names or aliases provided. Her date of birth was provided. Her current address was stated as "Los Angeles, CA," with no former addresses provided. According to the notice, the maternal grandfather and maternal great-grandmother had Blackfeet heritage. The maternal grandfather was identified as "Mark J[.]," with a current address of "Louisiana," and his date of birth provided; the maternal great-grandmother was "Marjorie J[.]," deceased, with unknown dates and places of birth and death.

Despite the juvenile court's order for the Department to inquire, there is nothing in the record reflecting any effort in this

regard. Although Ashley had her own dependency history with the Department, and the Department referred to a 2014 ICWA finding, there was no further discussion or explanation of the basis for this determination, and there was no biographical information provided for any other relatives, despite discussion of mother's several siblings and other relatives.[8] For example, the Department's report described mother as close to her father who has Blackfeet heritage, but his address is not provided in the notice, and there is no indication in the record that the Department ever contacted him or made any attempt to investigate S.T.'s potential Blackfeet ancestry through him. (See *In re K.R.* (2018) 20 Cal.App.5th 701, 707 ["social services agency must make a meaningful effort to contact specified family members who might have pertinent information"].)

The burden of coming forward with information to determine whether an Indian child may be involved and ICWA notice required "does not rest entirely—or even primarily—on the child and his or her family." (*In re Michael V.* (2016) 3 Cal.App.5th 225, 233.) The Department and the juvenile court have "'an affirmative and continuing duty to inquire.'" (*Ibid.*) The Department had a duty to inquire further under these circumstances (§ 244.3, subd. (a)), and it had a duty to provide ICWA notice sufficient to allow the tribes to determine if S.T. is an Indian child. The Department also had a duty to file with the

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[8] In 2014, in regard to M.B., mother had told the social worker that she "believed she may have 'some Indian in my blood.'" In the Department's April 2014 jurisdiction and disposition report for M.B., the social worker stated that "[r]eview of prior court records concerning the children of Ashley [T.], and cases concerning the maternal grandmother, T[.]G[.], do not document American Indian ancestry."

juvenile court those notices, any responses it received, and proof of required return receipts to allow the court to determine if there was proper and adequate notice before deciding the ultimate issue--whether ICWA applied. The Department did none of these things before the jurisdiction and disposition hearings in S.T.'s case.

"'[I]t is up to the juvenile court to review the information concerning the notice given, the timing of the notice, and the response of the tribe, so that it may make a determination as to the applicability of the ICWA, and thereafter comply with all of its provisions, if applicable.'" (*In re Robert A.* (2007) 147 Cal.App.4th 982, 990; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705, fn. 5 ["the court must decide, one way or the other, whether the ICWA applies"].) "[A]n implicit ruling suffices, at least so long as the reviewing court can be confident that the juvenile court considered the issue and there is no question but that an explicit ruling would conform to the implicit one." (*In re E.W.* (2009) 170 Cal.App.4th 396, 405.) Here there is no indication of the juvenile court's consideration before entering the orders from which mother appeals.

Based on the July 19, 2018 minute order, we recognize that the juvenile court subsequently ordered the Department to document its efforts regarding S.T.'s potential Indian heritage, and it is possible the Department and juvenile court may have discharged these duties thereafter. In these circumstances, the appropriate remedy is a conditional affirmance of the jurisdictional findings and disposition order and remand to the juvenile court with directions. (See *In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 656; *In re Michael V., supra,* 3 Cal.App.5th at p. 236; *In re Kadence P., supra,* 241 Cal.App.4th at p. 1389.)

On remand, if it has not already done so, the juvenile court shall review the Department's reports to determine whether they demonstrate a meaningful investigation into George's and Ashley's claims of Indian ancestry before sending the ICWA notice to the Blackfeet Tribe. (See *In re K.R., supra,* 20 Cal.App.5th at pp. 708–709.) A meaningful investigation must comply with the provisions of section 224.3, subdivision (c) and California Rules of Court, rule 5.481(a)(4)(A), which means a social worker must have, at a minimum, attempted to explore George's own knowledge of any Creek ancestry and to confirm the basis for his contradictory responses. Similarly, as to Ashley's claim of Blackfeet heritage, the social worker must have interviewed Ashley's extended family and documented the information obtained. (*In re K.R.* at pp. 706–707.) New, more complete notices may have to be sent. If the Department demonstrates that it did undertake a meaningful inquiry into George's and Ashley's claims of Indian heritage prior to sending IWCA notice to the Blackfeet Tribe, but failed to document doing so, the juvenile court need only make a finding to that effect on the record or in a minute order.

If, however, there is no documentation that the Department conducted such an inquiry, the juvenile court shall order the Department to conduct such an inquiry and to submit evidence of the efforts it makes to do so. If this inquiry produces any additional information tending to substantiate George's and/or Ashley's claims of Indian ancestry, the Department must give notice to the Creek tribe and/or renotify the Blackfeet tribe with the additional information included in the notice. Upon receipt of the tribe's or tribes' response(s) to any further ICWA notices that may be required, the juvenile court shall then determine whether

the ICWA inquiry and notice requirements have been satisfied, and whether S.T. is an Indian child. If the court finds that she is, the court shall vacate its existing jurisdiction findings and disposition order and proceed in compliance with ICWA and related California law. If the court finds that she is not an Indian child, its jurisdiction findings and disposition order shall remain in effect.

DISPOSITION

The appeal is dismissed as to M.B. The request for judicial notice of the juvenile court's July 19, 2018 order is granted. As to S.T., the jurisdiction findings and disposition order are conditionally affirmed. The matter is remanded to the juvenile court for full compliance with the inquiry and notice provisions of ICWA and related California law and for further proceedings not inconsistent with this opinion.

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MICON, J.*

We concur:

MANELLA, P. J. COLLINS, 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.