Filed 10/10/18 In re Gabriel C. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re GABRIEL C., et al. Persons Coming Under the Juvenile Court Law.	B289538 (Los Angeles County Super. Ct. No. CK84244)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CASSANDRA C., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Steven Ipson, Juvenile Court Referee. Conditionally affirmed and remanded with directions.

William Hook, under appointment by the Court of Appeal, for Appellant Cassandra C.

Mary C. Wickham, County Counsel, R. Kristin P. Miles, Assistant County Counsel, and Peter Ferrera, Deputy County Counsel, for Plaintiff and Respondent.

Cassandra C. (Mother), the mother of minors Gabriel C. and J.C., appeals from the juvenile court's order terminating parental rights over the children under Welfare and Institutions Code[1] section 366.26. On appeal, Mother contends the juvenile court and the Department of Children and Family Services (DCFS) failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). We agree there was not an adequate investigation of the children's possible Indian ancestry in these proceedings. We therefore remand the matter to allow the juvenile court and the DCFS to comply with ICWA and otherwise conditionally affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Juvenile Dependency History

Mother and Daniel C. (Father) are the parents of Gabriel C. (a boy born November 2011) and J.C. (a boy born January 2013). Mother and Father also have four older children. In February 2011, the juvenile court sustained a dependency petition filed on behalf of the four older children based on Father's drug use and the parents' failure to provide the children with a sanitary home and proper medical care. In March 2011, the court found that ICWA did not apply to the older children. Gabriel was detained at birth and declared a dependent of the court in January 2012 based on the parents' neglect of his older siblings and failure to participate in their case plans. In January 2012, the court found that ICWA also did not apply to Gabriel.

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[1] Unless otherwise stated, all further statutory references are to the Welfare and Institutions Code.

The juvenile court terminated parental rights over the four older children in November 2012. Mother thereafter challenged the court's ICWA findings on appeal in case number B245621, contending the DCFS failed to adequately investigate her claim that the maternal grandfather was a descendant of the Cherokee tribe.[2] In April 2013, this court dismissed the appeal pursuant to a joint stipulation for limited reversal, and remanded the matter to the juvenile court. The order of remand directed the juvenile court to order the DCFS to provide ICWA notice to the Cherokee tribes, the Bureau of Indian Affairs, and the Secretary of the Interior, and to conduct all proceedings in compliance with ICWA if one of the tribes determined that the children were Indian children.

In July 2013, Gabriel was returned to Mother's custody with family maintenance services. The juvenile court terminated its dependency jurisdiction over Gabriel in February 2014. At that time, Mother was granted sole legal and physical custody of the child with monitored visitation for Father.

II. Initiation of the Current Dependency Proceedings

On January 15, 2015, the DCFS filed the current dependency petition on behalf of Gabriel and J.C. The petition alleged that the children were at substantial risk of harm because Mother had a history of alcohol abuse and had relapsed within the past year, and Father had an extensive criminal history and was serving a 15-year prison sentence. Prior to filing the petition, the DCFS interviewed Mother on October 16, 2014.

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[2] This court has granted the DCFS's request to incorporate by reference the record from the prior appeal in case number B245621 into the instant appeal.

Mother reported to the DCFS at that time that the maternal grandfather had Cherokee ancestry.

At the January 15, 2015 detention hearing, the juvenile court found there was prima facie evidence that Gabriel and J.C. were persons described by section 300, and ordered that they be detained from their parents. At the detention hearing, Mother signed a Judicial Council Parental Notification of Indian Status form in which she checked a box stating that one or more of her family members was a member of a federally recognized tribe. The form also included a handwritten notation that "prior evaluations" were "insufficient." The court made a finding at the hearing that it had no reason to know that Gabriel and J.C. were Indian children, but ordered the DCFS to continue to investigate the ICWA issue. The matter was set for an adjudication hearing on March 17, 2015.

III. Jurisdiction and Disposition Hearings

Following the detention hearing, Mother reported to the DCFS that the children had possible Indian ancestry on both the maternal and paternal sides of the family. Mother indicated, however, that she did not know which tribes and did not have a tribal affiliation card for her or the children. On March 4, 2015, the case social worker tried to contact the paternal grandmother to inquire about possible Indian ancestry on Father's side of the family, but her telephone number was disconnected. The DCFS reported that it had no other contact information for the paternal grandmother. On March 5, 2015, the social worker contacted the maternal grandmother about Mother's possible Indian ancestry. The maternal grandmother stated that she thought there was some Indian ancestry on the maternal grandfather's side of the family, but she did not know the name of the tribe and was

unaware of any family member having a tribal affiliation card. The social worker was unable to interview the maternal grandfather, however, because he was suffering from dementia and was in an assisted living facility.

On March 17, 2015, the juvenile court held the jurisdiction hearing for Gabriel and J.C. The court sustained the section 300 petition as to Mother, and continued the matter for adjudication of the counts alleged against Father. On October 29, 2015, the court sustained the petition as to Father, and set the matter for a contested disposition hearing. At the disposition hearing held on February 8, 2016, the court declared Gabriel and J.C. dependents of the court pursuant to section 300, subdivision (b), and ordered that the children be removed from parental custody and suitably placed by the DCFS. The court granted family reunification services to Mother, but denied reunification services to Father based on his incarceration. At the disposition hearing, the court again made a finding that it had no reason to know that ICWA applied to the case, and did not order that notice be sent to any tribe or the Bureau of Indian Affairs.

IV. Section 366.26 Permanency Planning Hearing

An 18-month review hearing was held on May 24, 2017. The juvenile court found that Mother was only partially compliant with her case plan and terminated her reunification services. The court set the matter for a section 366.26 hearing to select a permanent plan for the children.

On September 17, 2017, Mother filed a section 388 petition for modification. She requested that the children be returned to her custody with an order for continued drug and alcohol testing and participation in a 12-step treatment program. Alternatively, she requested that her reunification services be reinstated with

unmonitored visitation. In her petition, Mother asserted that she had been maintaining her sobriety and actively participating in services, and that she was residing in a sober living home that was suitable for the children. On January 25, and April 11, 2018, the court held an evidentiary hearing on the section 388 petition and took the matter under submission. The court also continued the section 366.26 permanency planning hearing.

On April 11, 2018, the juvenile court held the section 366.26 hearing for Gabriel and J.C. At the start of the hearing, the court also issued its ruling on the section 388 petition. The court denied the petition, finding that Mother's circumstances had changed, but that modification would not be in the children's best interests. The court then addressed the permanent plan for the children. Mother asked that her parental rights not be terminated based on the beneficial parent-child relationship exception (§ 366.26, subd. (c)(1)(B)(i)). The court found that Mother did not have an established bond with the children and the beneficial parent-child relationship exception did not apply. The court terminated parental rights over Gabriel and J.C., and ordered adoption as the permanent plan for both children.

At the conclusion of the section 366.26 hearing, the juvenile court asked counsel whether ICWA applied to the case. Counsel for the children responded, "The reports indicate not." After reviewing her notes, counsel for the DCFS stated, "Your Honor, in looking back, it looks like the court previously made that finding that it does not apply." The court then stated that its prior finding would "continue to be the finding of the court," and the "Indian Child Welfare Act does not apply." Following the termination of parental rights, Mother filed a timely notice of appeal.

DISCUSSION

On appeal, Mother asserts the order terminating parental rights over Gabriel and J.C. must be conditionally reversed and the matter remanded to the juvenile court because both the court and the DCFS failed to comply with the requirements of ICWA. Mother specifically argues that the juvenile court erred in finding that ICWA did not apply to this case because the DCFS failed to make an adequate inquiry as to Father's possible Indian ancestry despite receiving information that there may be Indian ancestry on both the maternal and paternal sides of the family.

A. Governing Law

ICWA provides that "[i]n any involuntary proceeding in a [s]tate court, where the court knows or has reason to know that an Indian child is involved, the party seeking 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 child protective agency or the court knows or has reason to know that an Indian child is involved in the proceedings. (§ 224.3, subd. (d).) Juvenile courts and child protective agencies "have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings. . . ." (§ 224.3, subd. (a); see also Cal. Rules of Court, rule 5.481(a); *In re Isaiah W.* (2016) 1 Cal.5th 1, 15 ["juvenile court has an affirmative and

continuing duty in all dependency proceedings to inquire into a child's Indian status"].)

Once the juvenile court or the child protective agency "knows or has reason to know that an Indian child is involved, the social worker . . . is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members . . ., and contacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility." (§ 224.3, subd. (c); see also Cal. Rules of Court, rule 5.481(a)(4)(A).) The circumstances that may provide reason to know the child is an Indian child include, without limitation, when a member of the child's extended family 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 parents, grandparents or great-grandparents are or were a member of a tribe. (§ 224.3, subd. (b)(1); see *In re Isaiah W.*, *supra*, 1 Cal.5th at p. 15 ["section 224.3, subdivision (b) sets forth a nonexhaustive list of 'circumstances that may provide reason to know the child is an Indian child'"]; *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1386-1387 [because only the tribe may determine whether the child is a member or eligible for membership, there is no general blood quantum requirement or "remoteness" exception to the ICWA notice requirements].) "[A]n adequate investigation of a family member's belief a child may have Indian ancestry is essential to ensuring a tribe entitled to ICWA notice will receive it." (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 787.)

B. The DCFS Failed to Adequately Investigate the Children's Possible Indian Ancestry

Mother asserts that both the juvenile court and the DCFS failed to comply with their affirmative and continuing duty of inquiry under ICWA because the DCFS did not adequately investigate Mother's claim that the children had Indian ancestry on the paternal side of the family, and the juvenile court did not ensure that an appropriate inquiry had been made before finding that ICWA did not apply. The DCFS concedes it failed to make the proper inquiry with respect to the paternal family's Indian ancestry, but contends the error was harmless. We conclude the DCFS's lack of compliance with the requirements of ICWA was not harmless, and accordingly, remand the matter to allow the DCFS and the juvenile court to make the proper inquiry.

The record reflects that, following the January 15, 2015 detention hearing, Mother informed the case social worker that the children may have Indian ancestry on both the maternal and paternal sides of the family. On March 4, 2015, the social worker attempted to contact the paternal grandmother to inquire about Father's possible Indian ancestry, but her telephone number had been disconnected. Thereafter, the social worker did not make any effort to further investigate whether the children may have Indian ancestry on the paternal side of their family. The social worker did not attempt to interview Father (who was then incarcerated), or to contact any other paternal relatives regarding the children's possible Indian ancestry. The social worker also did not mail the Judicial Council Parental Notification of Indian Status form to Father at the prison where he was incarcerated, or provide the form to his counsel for Father to complete. The DCFS's minimal efforts to investigate Mother's claim that the

children may have Indian ancestry on the paternal side of the family did not satisfy its affirmative duty of inquiry under ICWA.

The DCFS nevertheless claims that its lack of compliance with ICWA was harmless in this case because the juvenile court found in the prior dependency case involving the children's older siblings that ICWA did not apply based on information provided by Father. Specifically, on November 22, 2010, Father made his first appearance in the dependency proceedings involving the four older children. Through his counsel, Father informed the court that the paternal great-grandmother might have Indian ancestry, but he did not know how to contact the paternal grandfather. Father also reported that he had learned this information from a paternal great-uncle who "did our ancestry," but he had no way to contact the great-uncle. The court found that, based on Father's representations, there was no reason to know that the children were Indian children within the meaning of ICWA. No one objected to the court's finding at the November 22, 2010 hearing.[3]

Based on this prior finding by the juvenile court, the DCFS argues that a limited reversal and remand for compliance with ICWA would serve no legitimate purpose because Father could not identify a specific tribe or available relative with knowledge regarding his family's possible Indian ancestry. This argument, however, ignores the DCFS's "affirmative and continuing duty" to inquire into a child's Indian status. (§ 224.3, subd. (a).) The

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[3] Although Mother challenged the juvenile court's prior ICWA findings on appeal in case number B245621, she only disputed the findings related to the maternal family's possible Indian ancestry. In her prior appeal, Mother did not dispute the court's finding that ICWA did not apply based on the information provided by Father regarding the paternal side of the family.

proceedings where Father reported that he did not know how to contact two relatives with knowledge of the family's Indian ancestry took place almost eight years before the section 366.26 hearing in this case. While Father may not have had sufficient information in November 2010 to warrant further investigation under ICWA, it is possible that his circumstances changed within the past eight years, and that he possessed new information about his family's reported Indian ancestry in April 2018 when parental rights over Gabriel and J.C. were terminated.

Moreover, as the California Supreme Court has explained, "section 224.3(a), which establishes a juvenile court's 'affirmative and continuing duty' to inquire into a child's Indian status, does not contain an exception for situations where no new information is submitted between one proceeding and the next. Unlike a determination of ICWA's inapplicability that is made after 'proper and adequate notice has been provided' and 'neither a tribe nor the [Bureau of Indian Affairs] has provided a determinative response within 60 days' [citation], the juvenile court's determination of ICWA's inapplicability at [a prior] hearing had no effect on its ongoing inquiry and notice obligations . . . ." (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 14.) Accordingly, the juvenile court's finding that ICWA did not apply based on the information provided by Father at the November 2010 proceeding did not relieve the court or the DCFS of the affirmative and continuing duty to inquire whether ICWA might apply at the April 2018 proceeding to terminate parental rights.

In her opening brief, Mother also suggests that the juvenile court's finding at the April 2018 proceeding that ICWA did not apply was not supported by the record because the court stated that it was basing its ruling on its prior ICWA finding, and it is

unclear what finding was made by the court in the older siblings' case following the stipulated reversal and remand for ICWA compliance. It is true that the record on appeal does not disclose what the court determined on remand with respect to Mother's claim of Indian ancestry. However, there is no indication in the record that, following this court's order for conditional reversal and remand, the juvenile court found that ICWA applied to the siblings' case. In fact, Mother noted in the Parental Notification of Indian Status form that she completed for this case that the "prior evaluations" of her possible Indian ancestry were found to be "insufficient." Nonetheless, the court's prior ICWA findings, even if supported by the record in the siblings' case, did not satisfy its affirmative and continuing duty to ensure that an appropriate ICWA inquiry was made in this case.[4]

Because the DCFS did not adequately investigate Mother's claim that Gabriel and J.C. might have Indian ancestry on the paternal side of the family, we remand the matter for the juvenile court to direct the DCFS to conduct an appropriate inquiry into that claim, including making genuine efforts to locate family members who might have information bearing on Gabriel and J.C.'s possible Indian ancestry. If that investigation produces any additional information substantiating Mother's claim, notice must be provided to any tribe that is identified or, if the tribe

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[4] In the current appeal, Mother does not contend that the juvenile court or the DCFS failed to make an appropriate inquiry with respect to her claim that Gabriel and J.C. might have Indian ancestry on the maternal side of the family. Instead, Mother's argument in this appeal is about the DCFS's failure to conduct a proper inquiry into the paternal family's possible Indian ancestry.

cannot be determined, to the Bureau of Indian Affairs. The DCFS thereafter is to notify the court of its actions and file certified mail return receipts for any ICWA notices sent, together with any responses received. The court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether Gabriel and J.C. are Indian children. If the court finds that Gabriel and J.C. are Indian children, it shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and related California law. If not, the court's original section 366.26 order remains in effect. (*In re Elizabeth M.*, *supra*, 19 Cal.App.5th at p. 788; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 655.)

DISPOSITION

The juvenile court's order terminating parental rights over Gabriel and J.C. under section 366.26 is conditionally affirmed, and 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.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.