Filed 12/20/18 In re A.W. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 A.W., a Person Coming Under the Juvenile Court Law.	B290673 (Los Angeles County Super. Ct. No. DK12572)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. NICOLE R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Karin Borzakian, Commissioner. Conditionally reversed and remanded.

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

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Sally Son, Deputy County Counsel, for Plaintiff and Respondent.

Nicole R. (mother) appeals from the juvenile court's order under Welfare and Institutions Code section 366.26[1] terminating her parental rights as to her daughter A.W. Mother claims the juvenile court and respondent Los Angeles Department of Children and Family Services (DCFS) failed to investigate adequately her claim of possible Indian heritage, as required under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and its corresponding provisions under California law (see § 224 et seq.). We agree with mother. DCFS failed to interview family members identified as potentially having relevant information, and did not inquire further as to certain specific claims made by mother. We conditionally reverse the juvenile court's order and remand for the limited purpose of complying with ICWA.

BACKGROUND

We limit our recitation of the facts to those relevant to the ICWA issue on appeal, and do not provide a comprehensive summary of the proceedings below.

On November 12, 2015, DCFS filed a juvenile dependency petition under section 300 seeking to detain A.W. from mother

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

and father J.W. (father). The petition alleged that mother and father had a history of domestic violence and substance abuse, and that father suffered from mental illness that he was not treating properly.

The petition attached an ICWA-010(A) form indicating A.W. might have Indian ancestry. In the detention report, DCFS stated that on October 28, 2015, mother "reported that her family has Redhawk Native American ancestry from North Dakota. [Mother] stated that she believes that she could receive tribal benefits but is not currently on the registry."

Mother submitted an ICWA-020 form, also filed on November 12, 2015, in which she had checked both the box indicating that she "may have Indian ancestry" and the box indicating that she had no Indian ancestry as far as she knew. The word "Sioux" was handwritten next to the box indicating possible Indian ancestry. Father submitted an ICWA-020 form indicating he did not have any Indian ancestry as far as he knew.

At the detention hearing, the juvenile court asked mother about her Indian ancestry. Mother said, "I do have my father's registration number. I have the location." The record does not indicate to what "location" mother was referring. The juvenile court told mother to provide the information to DCFS, and stated it would not direct DCFS to take further action until mother provided more information. Mother stated her father's name but said she did not have his telephone number. The juvenile court asked if mother had her father's parents' contact information, and mother said she did not, nor did she remember their names, having only spoken to them once or twice in her life. Mother said she was adopted, and her counsel stated that mother's father's "side of the family was not in her life." The juvenile court said, "I

got you. All right. [¶] So you get some information. Okay." Mother said she would. The hearing was continued, and the juvenile court ordered A.W. detained.

According to the jurisdiction and disposition report, a DCFS social worker spoke with mother on December 4, 2015 "about her claim of Native American Heritage." Mother "stated that she did not have time to really think when she was asked the question by DCFS and again by the Court" about her heritage. Mother "stated that she grew up hearing stories" from her mother and maternal grandmother "that she might have Indian on her father's side of the family." Mother "never knew her father and ha[d] no information on any member of his family."

The report stated that the social worker asked mother for contact information for either mother's mother or maternal grandmother, "but due to them not being on good speaking terms, [mother] stated that she really does not know if there is any Indian in her and that if so, because this would be through the lineage of paternal relatives, whom she does not know at all, she stated that she does not believe she has Indian [heritage]." The social worker asked mother why she had "identified the Red Hawk tribe as a prospective connection." Mother "stated that she really did not know; it was the first thing that came to her mind. She stated that she really has no idea if any of the comments she heard in the past was true and she again stated that she wanted to go on record as stating that there is no known Native American heritage in her family lineage."

The report stated that on December 17, 2015, the social worker contacted mother's mother Ernestina C. and asked about any Indian heritage. Ernestina C. said mother's maternal

grandmother had researched whether there was Indian heritage on mother's paternal side of the family. Ernestina C. said that as a result of "barriers allegedly created by matters such as residence and drug use by maternal relatives, there was no means of truly authenticating if there was Indian history. [Ernestina C.] stated that she ha[d] no idea as to what tribes were researched, but she kn[ew] that nothing became of the search and therefore d[id] not believe there [was] any Indian heritage that would apply to [A.W.]."

Mother did not appear at the jurisdiction and disposition hearing on August 4, 2016, and the juvenile court denied her counsel's request for a continuance. The juvenile court found that ICWA did not apply to A.W. Citing the jurisdiction and disposition report, the juvenile court stated, "The appropriate ICWA inquiries were made of the maternal side of the child's family. No tribes can be identified. Family has done some research of their own to see if they could locate any tribal information. None was identified." The juvenile court also noted that father had "indicated he had no [Indian] heritage."

After further proceedings taking place over the next two years, on June 8, 2018 the court held a hearing under section 366.26 at which it terminated mother's and father's parental rights as to A.W. The juvenile court ordered a permanent plan of adoption, and designated A.W.'s foster parents as the prospective adoptive parents. Mother timely appealed.

DISCUSSION

ICWA requires that notice be provided "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.' "

(*In re Isaiah W.* (2016) 1 Cal.5th 1, 8 (*Isaiah W)*, quoting 25 U.S.C. § 1912(a).)[2] One of the circumstances specified under California law "that may provide reason to know [a] child is an Indian child" is when "a member of the child's extended family provides information suggesting . . . one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1).) Once the juvenile court or a DCFS social worker "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," including "by interviewing the parents . . . and extended family members" and contacting "the tribes in which the child may be a member or eligible for membership." (*Id.*, subd. (c).) "[T]he burden of coming forward with information to determine whether an Indian child may be involved and ICWA notice required in a dependency proceeding does not rest entirely—or even primarily—on the child and his or her family. Juvenile courts and child protective agencies have 'an affirmative and continuing duty to inquire' whether a

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[2] If the juvenile court "has reason to know an Indian child may be involved in the pending dependency proceeding but the identity of the child's tribe cannot be determined, ICWA requires notice be given to the federal Bureau of Indian Affairs." (*In re Michael V.* (2016) 3 Cal.App.5th 225, 232 (*Michael V.*), citing 25 U.S.C. §§ 1903(11), 1912(a).) "In addition, the California statute requires any notice sent to the child's parents, Indian custodians or tribe to 'also be sent directly to the Secretary of the Interior' unless the Secretary of the Interior has waived notice in writing." (*Michael V.*, *supra*, 3 Cal.App.5th at p. 232, citing § 224.2, subd. (a)(4).)

dependent child is or may be an Indian child." (*Michael V.*, *supra*, 3 Cal.App.5th at p. 233; see § 224.3, subd. (a).)

Although mother did not appeal the juvenile court's finding at the jurisdiction and disposition hearing that ICWA did not apply, she is not precluded from raising the issue in this appeal given the juvenile court's continuing duty of inquiry under ICWA. (See *Isaiah W.*, *supra*, 1 Cal.5th at p. 10.)

Mother contends that DCFS did not investigate adequately her claim of possible Indian ancestry as required under section 224.3. She claims DCFS, in addition to speaking with her mother Ernestina C., should also have spoken to her maternal grandmother, whom Ernestina C. said had researched mother's Indian heritage. Mother further claims DCFS should have attempted to contact her father, the purported source of her Indian heritage, or other members of his side of the family. Mother also argues DCFS should have questioned Ernestina C. further, given that she was present throughout the dependency proceedings, or mother's sister, who "was very involved in the case" and "sought placement of A.W."

We agree with mother that DCFS's investigation was inadequate. Mother said she had heard from both her mother Ernestina C. and her maternal grandmother that she had Indian heritage, and Ernestina C. said the maternal grandmother had researched the issue. The record does not reflect, however, that DCFS attempted to speak with mother's maternal grandmother to learn, among other things, what she might have told mother about mother's heritage, why she had conducted the research, and what, if anything, that research had shown. While Ernestina C. provided some information on the subject, it is not clear she had first-hand knowledge of the research the maternal

grandmother conducted, nor did the social worker ask her why the maternal grandmother conducted the research. Further, the record does not indicate that DCFS attempted to contact any of mother's paternal relatives, the relatives through whom mother claimed possible Indian ancestry, for more information.

In the absence of "genuine efforts" to locate and interview family members that might have relevant information, we cannot conclude DCFS complied with its duty of inquiry under the circumstances of this case. (See *Michael V.*, *supra*, 3 Cal.App.5th at p. 236.) In *Michael V.*, mother Kristina C. told the juvenile court that when she herself was a child in dependency proceedings seven years earlier, she heard from a social worker that her own mother was a " 'full-blood Indian' " from two tribes, although Kristina C. did not recall the names of the tribes. (*Michael V.*, *supra*, at p. 230.) The juvenile court ordered DCFS to investigate and provide notice to the tribes if ICWA was triggered. (*Ibid.*) DCFS interviewed Kristina C. further, but she provided no new information. (*Id.* at pp. 230-231.) DCFS also reviewed Kristina C.'s file from her own dependency case and concluded "there was no indication the family had Indian ancestry and no information was found as to the names of possible tribes." (*Id.* at p. 231.) The juvenile court concluded ICWA did not apply. (*Ibid.*)

Our colleagues in Division Seven held that the investigation by DCFS was inadequate, noting several deficiencies. (*Michael V.*, *supra*, 3 Cal.App.5th at p. 235.) Among other things, DCFS had not attempted to contact Kristina C.'s mother, "even though it was she who reportedly had the direct link to a tribe," and had not interviewed Kristina C.'s siblings to see if they had more information. (*Ibid.*) The court remanded

the case, ordering the juvenile court to direct DCFS "to conduct a meaningful investigation into Kristina's claim of Indian ancestry, including making genuine efforts to locate other family members who might have information." (*Id.* at p. 236.) Here, similarly, the record does not reflect that DCFS made adequate efforts to interview relevant family members.

The investigation in this case was also inadequate because mother herself provided potentially important information about which it appears DCFS did not inquire further. Specifically, when the juvenile court asked mother at the detention hearing about her claim of Indian heritage, mother said she had her father's "registration number" and referred to a "location." Mother also listed possible Sioux ancestry on her ICWA-020 form. The record does not reflect that DCFS asked mother or anyone else about these specific claims.

DCFS argues that further investigation is unwarranted, and *Michael V.* inapplicable, because mother, when interviewed by the social worker, "unequivocally denied her family had any Indian ancestry" when she said "that she wanted to go on record as stating that there is no known Native American heritage in her family lineage." DCFS asserts that "[m]other essentially said her initial statements were just what came to mind" and were therefore "baseless."

In context, however, mother's statement "on record" was equivocal. According to the jurisdiction and disposition report, mother told the social worker that she had heard stories from both her mother and maternal grandmother that she had Indian heritage. When the social worker asked for their contact information, however, mother said she was not on speaking terms with them and that she did not know if what she had heard from

them was true, nor could she confirm anything with her paternal relatives with whom she had no contact. She then said she did not believe she had Indian heritage. Under these circumstances, it is unclear if mother truly intended to withdraw her earlier claim of Indian heritage, or if she simply was expressing both her own uncertainty and the difficulty in verifying her ancestry given her poor relations with her mother and maternal grandmother and her lack of contact with her paternal relatives. Mother's equivocal statements did not absolve DCFS of its duty of further inquiry.

DCFS asserts that mother and Ernestina C. "reported consistently that any possible Indian ancestry was based on lore," and cites *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1469 for the proposition that "unsupported 'family lore' is insufficient to require [ICWA] notice." Even accepting that proposition, however, DCFS could not know whether or not the "lore" was "unsupported" without interviewing mother's maternal grandmother, who, according to mother, also told her stories of Indian heritage, and according to Ernestina C. had researched the topic.

DCFS argues that mother cannot show prejudice from any ICWA error. DCFS relies on a line of cases addressing a scenario in which the juvenile court and child protective agency have failed to inquire at all as to a parent's Indian heritage. Under those circumstances, courts have held that the error is harmless absent some suggestion on appeal that the parent actually has Indian heritage. (See *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1387-1388 [no prejudice from failure to conduct ICWA inquiry "[w]here the record below fails to demonstrate and the parents have made no offer of proof or other affirmative assertion

of Indian heritage on appeal"]; *In re N.E.* (2008) 160 Cal.App.4th 766, 769 [no prejudice from lack of ICWA inquiry when "absolutely no suggestion by [father] that he in fact has any Indian heritage"]; *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431 [parent cannot raise ICWA inquiry error for first time on appeal absent "an affirmative representation of Indian heritage"].)

These cases have no application here, where mother made affirmative representations to DCFS and the juvenile court that she might have Indian heritage, thus triggering the inquiry duty under ICWA. DCFS again argues that mother recanted those representations when the DCFS social worker interviewed her, but as we have explained, mother's statements were equivocal and did not absolve DCFS of its duty of further inquiry. Because we cannot know what such an inquiry would reveal—for example, what information mother's maternal grandmother might provide—we cannot conclude that failure to conduct that inquiry was harmless.

DISPOSITION

The section 366.26 order terminating mother's parental rights is conditionally reversed, and the matter is remanded for compliance with ICWA and related California law. The juvenile court shall direct DCFS (1) to conduct a more thorough inquiry of A.W.'s possible Indian ancestry; (2) if appropriate, to provide proper notice to any relevant tribes, the Bureau of Indian Affairs, and the Secretary of the Interior as required by ICWA; and (3) to submit those notices and any responses thereto to the juvenile court. The juvenile court thereafter shall make findings concerning the adequacy of DCFS's compliance with ICWA's inquiry and notice requirements and the applicability of ICWA to

this case. If the juvenile court concludes that A.W. is not an Indian child, the juvenile court's original section 366.26 order terminating mother's parental rights shall be reinstated. If the juvenile court concludes that A.W. is an Indian child, it shall conduct further proceedings in accordance with ICWA and related California law.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.