Filed 8/28/18 In re J.M. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 J.M., a Person Coming Under the Juvenile Court Law.	B286966 (Los Angeles County Super. Ct. No. DK22724)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. H.E., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Michael W. Whitaker, Judge. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

H.E. (mother) appeals from the dependency court's finding that the Indian Child Welfare Act (ICWA) did not apply to her son, J.M. J.M. was removed from his father (hereafter father) after he was found wandering alone at night while in father's care. At the time, mother and father had an informal, mutual custody arrangement in which J.M. alternated living with each parent. The court found mother to be a nonoffending parent, and placed J.M. in her physical custody. As neither DCFS nor the court contemplated placing J.M. in foster care, and because J.M. remained in mother's sole physical custody, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2017, the Los Angeles County Department of Children and Family Services (DCFS) filed a dependency petition pursuant to Welfare and Institutions Code section 300, subdivision (b)(1)[1] after three-year-old J.M. was found wandering alone across a busy highway at 12:45 a.m. The petition alleged that father endangered J.M. by leaving him home alone at night with no supervision. DCFS made no allegations against mother. At the time, mother and father had an informal custody arrangement whereby J.M. lived with each parent on alternating weeks; the event leading to DCFS intervention occurred while J.M. was in father's care.

At the May 3, 2017 detention hearing, the court detained J.M. from father and released him to mother. Father had informed DCFS that his great-great paternal grandmother was a

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

full-blooded Cherokee Indian, but did not know whether anyone in the family was registered with the tribe. The court ordered DCFS to investigate the family's Indian heritage, including interviewing father's relatives, and ordered DCFS to send ICWA notices to the Bureau of Indian Affairs (BIA), the Secretary of the Interior (SOA), and the Cherokee tribes.

On June 12, 2017 Father completed an ICWA form 020, "Parental Notification of Indian Status," stating that his mother would have more information about his family's Indian ancestry. Father provided his mother's telephone number on the form. Mother reported she had no Indian ancestry. DCFS sent ICWA notices to the BIA, the SOI, and the Cherokee tribes. The notices identified J.M.'s name, date and place of birth; mother's name, current address, and date of birth; father's name, former address, and date of birth; the paternal grandmother's name and date of birth; and the paternal great-grandmother's name and date of death.

DCFS received a letter from the Eastern Band of Cherokee Tribes, dated June 15, 2017, stating that J.M. is neither registered nor eligible to register as a member of the tribe and is not considered an "Indian Child" in relation to their tribe as defined in the Indian Child Welfare Act. DCFS received a letter dated June 12, 2017 from the United Keetoowah Band of Cherokee Indians stating there was no evidence that J.M. was a descendant from anyone on the Keetoowah Roll.

At a jurisdiction and disposition hearing held on July 21, 2017, the court found the allegation under Welfare and Institutions Code section 300, subdivision (b)(1) true against father, and found mother a nonoffending parent. The court also noted that ICWA notices were sent on June 2, 2017, that "more

than 60 days [had] passed,"[2] and that "no information has been provided with respect to the minor child being an Indian Child within the meaning of ICWA." The court also stated, "because the minor child has been placed with the mother, ICWA would not apply to a home of parent order." After a conference in chambers with all counsel present, the court continued the disposition hearing pending an assessment by DCFS pursuant to Welfare and Institutions Code section 360, subdivision (b).[3]

At the continued disposition hearing on September 21, 2017, the court declared J.M. a dependent of the court, removed him from father's physical custody, retained him in mother's custody, and ordered DCFS to provide Father with reunification services. The court also found "no outstanding . . . ICWA issues."[4]

DISCUSSION

Mother argues the juvenile court erred at the July 21, 2017 hearing when it found that notice was proper and that the ICWA did not apply. Mother therefore asks that we remand the case to

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[2] As discussed below, the court erred in stating 60 days had passed since the ICWA notices were sent on June 2, 2017.

[3] Under Welfare and Institutions Code 360, subdivision (b), the court may "without adjudicating the child a dependent child of the court, order that services be provided to keep the family together" and place the child and the child's parent under the supervision of a DCFS social worker for an appropriate period of time.

[4] On March 19, 2018, while the instant appeal was pending, the court terminated jurisdiction over J.M., awarded the mother and father joint legal custody, and granted mother primary physical custody.

the juvenile court for proper inquiry and notice pursuant to the ICWA.

Under the ICWA, notice must be sent whenever it is known or there is reason to know that a child involved in a " 'child custody proceeding' " might be a member or eligible for membership in a federally recognized Indian tribe. (25 U.S.C. §§ 1903(1), 1912(a); *In re M.R.* (2017) 7 Cal.App.5th 886, 903–904.) Under the ICWA, child custody proceedings include foster care placement, termination of parental rights, preadoptive placement, and adoptive placement. (25 U.S.C. § 1903(1).) In California, the court, DCFS, and the probation department have an "affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings *if the child is at risk of entering foster care or is in foster care*." (Welf. & Inst. Code, § 224.3, subd. (a), italics added.) If "proper and adequate notice" has been provided, and none of the notified tribes or the BIA has provided a "determinative response" within 60 days of receiving the notice, "the court may determine that the [ICWA] does not apply to the proceedings." (Welf. & Inst. Code, § 224.3, subd. (e)(3).)[5]

Here, although the trial court erred in determining that 60 days had passed between June 2, 2017 (when the notices were

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[5] If a tribe or the BIA subsequently confirms that the child is an Indian child, the court "shall reverse its determination of the inapplicability of the [ICWA] and apply the act prospectively." (Welf. & Inst. Code, § 224.3, subd. (e)(3).)

sent) and the July 21, 2017 hearing,[6] the error is harmless because neither DCFS nor the court expressed any intention to place J.M. in foster care. " '[B]y its own terms, [the ICWA] requires notice only when child welfare authorities seek permanent foster care or termination of parental rights; it does not require notice *anytime* a child of possible or actual Native American descent is involved in a dependency proceeding.' " (*In re M.R.*, *supra*, 7 Cal.App.5th 886, 904.) And, the ICWA "and its attendant notice requirements do not apply to a proceeding in which a dependent child is removed from one parent and placed with another." (*Ibid*; *In re J.B.* (2009) 178 Cal.App.4th 751, 757.) The ICWA would only have applied to J.M. if DCFS or the court sought to place him in foster care, preadoptive placement, or adoptive placement; or sought to terminate either parent's parental rights. As J.M. was placed with Mother, the ICWA did not apply.

Mother was declared a nonoffending parent, and J.M. was immediately placed in her care upon detention from father. J.M. remained in mother's care throughout the dependency proceedings, and mother was ultimately awarded primary physical custody. DCFS did not request placement outside the home, nor did the court contemplate placing J.M. anywhere but in mother's care. Accordingly, we affirm the court's finding that the ICWA did not apply to J.M.

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[6] Not only are there 49 days between the two dates, the 60 days began to run when the tribes and the BIA received notice, not when DCFS sent the ICWA forms. (Welf. & Inst. Code, § 224.3, subd. (e)(3).)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.