Filed 2/21/18 In re A.V. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re A.V., a Person Coming Under the Juvenile Court Law.	B284884 (Los Angeles County Super. Ct. No. DK09413)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.Q., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa R. Jaskol, Judge. Affirmed.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

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

The juvenile court terminated the parental rights of mother, T.Q., and presumed father, E.V., to their seven-year-old daughter, A.V., freeing the child for adoption by her current caretakers. (Welf. & Inst. Code, § 366.26.)[1] Only mother appeals, contending the court's failure to initiate notice under the Indian Child Welfare Act (ICWA) as to father's potential Indian heritage compels per se reversal. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother had just turned 16 when A.V. was born; father was 18 years old. The child spent most of her early years living with the maternal grandmother. However, in 2015, A.V., not yet five years of age, was living with mother and mother's boyfriend when mother was arrested for substance abuse. Father was either deported or voluntarily moved to Mexico in 2014; his whereabouts were unknown at the time the child was detained from mother.

At the February 4, 2015 detention hearing, the juvenile court determined father was A.V.'s presumed father. A.V. had a relationship with the paternal grandparents, who resided locally. The juvenile court ordered "[d]ue diligence for the father, including trying to track him down or locate him through the paternal grandparents."

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

Mother indicated at the detention hearing she might have American Indian heritage on the maternal grandfather's side of the family. Notices pursuant to ICWA were sent as to mother.[2] The juvenile court asked mother if father had American Indian heritage, and mother replied he did not, prompting the juvenile court to reply, "No reason to know ICWA would apply [to father]."

The paternal grandmother appeared at most hearings. She was present on December 8, 2015, assisted by a Spanish language interpreter. The paternal grandmother was placed under oath and the juvenile court asked her if father had any American Indian heritage. The paternal grandmother replied, "No" and added, "Not that I'm aware of."

Father was not present for the December 8, 2015 hearing, or the hearing that followed on January 21, 2016, when the juvenile court appointed counsel to represent him. In response to the juvenile court's question, father's counsel stated, "With respect to the father, there's no reason to know ICWA would apply in this case, Your Honor." The judge reiterated there was still "no reason to know ICWA applies [as to father]."

Father did appear in court, represented by court-appointed counsel, for the May 16, 2017 hearing. ICWA was not addressed at that time.

The parental rights of both mother and father were terminated on August 7, 2017, and A.V. was freed for adoption by her maternal-relative caretakers. Only mother appeals; her appeal is timely.

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[2] It was later determined A.V. has no American Indian heritage on mother's side of the family.

DISCUSSION

"ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) If, after the [dependency] petition is filed, the juvenile court 'knows or has reason to know that an Indian child is involved,' notice of the pending proceeding and the right to intervene must be sent to the tribe or the Bureau of Indian Affairs (BIA) if the tribal affiliation is not known. (25 U.S.C. § 1912; Welf. & Inst. Code, § 224.2; see Cal. Rules of Court, rule 5.481(b).)" (*In re E.G.* (2009) 170 Cal.App.4th 1530, 1533.)

Section 224.3, subdivision (a) imposes on the juvenile court and the Department of Children and Family Services (DCFS) "an affirmative and continuing duty to inquire whether a child . . . may be an Indian child in all dependency proceedings . . . if the child is . . . in foster care." A list of "circumstances that may provide reason to know the child is an Indian child include, but are not limited to," information that suggests the child is either a member of, or eligible for membership in, a tribe or the child or her family are living in a predominantly Indian community or receiving tribal benefits or services. (§ 224.3, subd. (b); see also Cal. Rules of Court, rule 5.481.)

Mother has standing to raise ICWA issues as they relate to father. (*In re B.R.* (2009) 176 Cal.App.4th 773, 779.) An ICWA notice issue may be raised for the first time on appeal. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.)

Here, however, the juvenile court neither knew nor had reason to know that A.V. was an Indian child based on father's heritage. The juvenile court addressed father's potential American Indian heritage at three hearings: the February 4, 2015 detention hearing, where mother was asked if father had any American Indian heritage and she replied he did not; the December 8, 2015 hearing, where the paternal grandmother, under oath, told the court she was not aware of any American Indian heritage on father's side of the family; and finally, the January 21, 2016 hearing, when father's court-appointed counsel advised the court he had no information suggesting father had any American Indian heritage.[3] The requirement to provide ICWA notice based on father's heritage was never triggered.

As mother asserts, father himself was not asked about any American Indian heritage at the one hearing he did attend, on May 16, 2017. Nonetheless, even if we determined the court erred in failing to ask father about any Indian heritage when he was present in court, mother has not demonstrated any harm justifying reversal. In this regard, the Court of Appeal has not minced words: "Father complains that he was not asked below whether the child had any Indian heritage. Fair enough. But, there can be no prejudice unless, *if* he had been asked, father *would have* indicated that the child did (or may) have such

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[3] At the time mother filed her opening brief, reporter's transcripts for the December 8, 2015 and January 21, 2016 hearings were not part of the record on appeal. Counsel for DCFS brought the omission to our attention, and the reporter's transcripts for those hearings (as well as the May 8, 2015 hearing) were filed November 29, 2017, and made a part of the record on appeal. Respondent's brief followed, but mother did not file a reply brief.

ancestry. [¶] . . . He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA. He did not. [¶] In the absence of such a representation, the matter amounts to nothing more than trifling with the courts. [Citation.] The knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge and disclosure is a matter entirely within the parent's present control. The ICWA is not a 'get out of jail free' card dealt to parents of non-Indian children, allowing them to avoid a termination order by withholding secret knowledge, keeping an extra ace up their sleeves. Parents cannot spring the matter for the first time on appeal without at least showing their hands. Parents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship, without any showing whatsoever that the interests protected by the ICWA are implicated in any way. [¶] The burden on an appealing parent to make an affirmative representation of Indian heritage is de minimis. In the absence of such a representation, there can be no prejudice and no miscarriage of justice requiring reversal." (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431.)

DISPOSITION

The judgment is affirmed.

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DUNNING, J. *

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.