Filed 11/22/17 In re Maya C. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re MAYA C., a Person Coming Under the Juvenile Court Law.	B278986 (Los Angeles County Super. Ct. No. CK19154)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANTONIO C., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Kristen Byrdsong, Judge. Affirmed.

Andre F.F. Toscano, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Jacklyn K. Louie, Deputy County Counsel, for Plaintiff and Respondent.

Antonio C. (Father), whose parental rights to his daughter Maya C. (born January 2014) (Child) were terminated in a September 13, 2016 order, contends that a "limited reversal" of orders made on September 13, 2016, is required because the dependency court and the Los Angeles County Department of Children and Family Services (DCFS) failed to comply with the requirements of the Indian Child Welfare Act (ICWA). We determine Father's claim lacks merit and affirm.

STATEMENT OF THE CASE AND OF THE FACTS

1. Referral and Detention

In January 2014, DCFS received a hospital referral that T. S. (Mother) had just given birth to the Child and both had tested positive for methamphetamine. After a case social worker (CSW) responded, a hospital social worker reported that Mother's lack of hygiene on admission to the hospital indicated Mother was homeless. Mother told hospital staff Father was incarcerated; she would provide no further information. DCFS verified Father had been arrested on December 28, 2013, and was incarcerated. Prior to the scheduled discharge of the Child from the hospital, DCFS detained her from Mother and Father, based on probable cause the Child's health and safety were threatened, and the dependency court placed the Child in foster care.

DCFS filed a Welfare and Institutions Code section 300[1] petition to have the Child declared a dependent child of the court, alleging the Child was suffering the risk of serious physical harm due to the parents' history of domestic violence (§ 300, subd. (a)); Mother and Father had failed to protect the Child as a result of their history of drug use and domestic violence (§ 300, subd. (b)(1)); and the parents' domestic violence in the presence of the Child's

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

sister, Alicia C., constituted an abuse of that sibling, endangering the Child (§ 300, subd. (j)).

At the time the juvenile dependency petition was filed based on the facts relating to the Child, Mother and Father already had an open juvenile dependency case involving Alicia C., the Child's sibling, arising from acts of domestic violence between the parents. The petition relating to the Child was filed under the same case number as the prior case.[2]

At a hearing on January 13, 2014, with Father present in custody, but not Mother appearing, the dependency court detained the Child in hospital care.

2. Jurisdiction and Disposition

The jurisdiction and disposition hearing was held on February 19, 2014, again with Father present in custody, and combined with a six-month review hearing (§ 366.21, subd. (e)) relating to Alicia C. The dependency court sustained the petition as to the Child, declared her a dependent of the court, and removed her from the custody of her parents. Family reunification services were ordered as to Father only, and a six-month review hearing was set relating to the Child. Mother had not been located and remained "whereabouts unknown" throughout proceedings as to the Child.

3. Subsequent Hearings Prior the Permanency Plan Hearing

Following their appointment as foster parents of the Child, on April 1, 2015, the foster parents submitted a request to be declared the Child's de facto parents, detailing an extensive relationship with the Child, for whom

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[2] This appeal concerns only the Child. Two previous adjudications have been made under the same case number, involving Alicia C. and Angelica S. (a half sister who was placed for adoption after Mother's parental rights were terminated as to her). Neither of those children, nor Mother, herself a former dependent of the dependency courts, is a party to this appeal.

they had by that time been the caregivers for approximately 15 months. That request was granted the next month.

On September 15, 2015, the Child's older sibling, Alicia C., was released to Father's care, but Father's reunification services relating to the Child were terminated because the court had determined the Child to be a special needs child, Father had not taken any courses to help him care for her, and his visits with the Child had been inconsistent and irregular.

4. The Change Petition and Permanency Plan Hearing

The hearing to determine the permanency plan for the Child (§ 366.26) was continued several times, principally due to difficulty in giving notice to Mother. (As Mother was homeless, DCFS had asked to serve her by publication; eventually she was located and personally served.) In the interval, Father filed a petition to modify the court's order terminating his reunification services with the Child (§ 388). The court held a combined change petition and permanency hearing on September 13, 2016, at which the court denied Father's petition and terminated Father's and Mother's parental rights over the Child. Father filed a timely notice of appeal of "all orders and findings."

CONTENTION AND DISCUSSION

The sole contention Father presents on appeal is that the failures of DCFS and the dependency court to comply with ICWA requirements require reversal of the order terminating his parental rights. We disagree.

I. Legal Standard

"When a dependency court has reason to know the proceeding involves an Indian child, the Department must notify the Indian child's tribe, or, if the tribe's identity or location cannot be determined, the Bureau of Indian Affairs, of the pending proceedings and of the right to intervene; and no

proceeding to place the child in foster care or terminate parental rights shall be held until at least 10 days after the tribe or Bureau of Indian Affairs has received the notice. (25 U.S.C. § 1912, subd. (a); 25 C.F.R. § 23.11(c)(12) (2003.)) . . . . The notice must include the names of the child's ancestors and other identifying information, if known, and be sent registered mail, return receipt requested. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.)" (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 383-384.)

"To fulfill its responsibility, [DCFS first] has an affirmative and continuing duty to inquire about, and if possible obtain, this information. (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1116; § 224.2, subd. (a)(5)(C); 25 C.F.R. 23.11(d)(3) (2011); [Cal. Rules of Court,] rule 5.481(a)(4).) Thus, a social worker who knows or has reason to know the child is Indian '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 to gather the information required in paragraph (5) of subdivision (a) of Section 224.2 . . . .' (§ 224.3, subd. (c).)" (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396.)[3] To trigger these requirements there need only be evidence "'*suggest*[*ing*]' the minor 'may' be an Indian child within the purview of [ICWA]. (*Dwayne P.* [*v. Superior Court* (2002)] 103 Cal.App.4th [247,] 258)." (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1407, original italics.)

The dependency court has its own inquiry obligations. At his or her "first appearance," the court must "order the parent, Indian custodian, or guardian" to complete a "*Parental Notification of Indian Status* (form ICWA-020)." (Cal. Rules of Court, rule 5.481(a)(2), original italics.) If no such

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[3] Following enactment of ICWA by the federal government, California adopted statutes and regulations to implement its obligations. (See §§ 224-224.6 and Cal. Rules of Court, rules 5.480-5.487.)

person appears, the dependency court must "order the person or entity that has the inquiry duty under this rule to use reasonable diligence to find and inform the parent, Indian custodian, or guardian that the court has ordered" that individual to complete the form. (Cal. Rules of Court, rule 5.481(a)(3).)

Notwithstanding the paramount importance of ICWA, violations of ICWA "may be held harmless when . . . even if notice had been given, the child would not have been found to be an Indian child, and hence the substantive provisions of the ICWA would not have applied ([*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424]; *In re Antoinette S.* [, *supra*,] 104 Cal.App.4th [at pp.] 1411–1413). Moreover, any failure to comply with a higher standard under California law, above and beyond what the ICWA itself requires, must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error. (Cal. Const., art. VI, 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162; see also *In re A.B.* (2008) 164 Cal.App.4th 832, 839; *In re H.B.* (2008) 161 Cal.App.4th 115, 121-122.)

II. Additional Facts

Father does not claim Native American heritage; nevertheless, he may, and does, assert a defect in compliance with ICWA requirements on appeal. "Even a non-Indian parent has rights under the ICWA." (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339.) Such a parent, "although not Indian," has standing to assert an ICWA notice violation on appeal. (*Ibid.*; see also *In re B.R.* (2009) 176 Cal.App.4th 773, 779-780.)

While Father raises this issue, he also has requested, and we have granted, his request that we take judicial notice of Mother's denial of any claim of Native American ancestry, which Mother set out in the Parental

Notification of Indian Status form which she filed in connection with proceedings concerning her daughter Alicia C. On April 8, 2013, the dependency court found ICWA did not apply as to Alicia C. Mother has filed no more recent document in which she claims Native American heritage.

Apparently out of an abundance of caution, or lack of recollection that Mother had denied any Native American heritage with respect to Alicia C., at the time DCFS filed its January 13, 2014 petition relating to the Child, it checked a box in its filing stating, "The Indian Child Welfare Act does or may apply." Later, at the detention hearing concerning the Child, the dependency court stated, "ICWA . . . findings are deferred." Still later in these proceedings, DCFS reported, "The Indian Child Welfare Act does not apply." And, the court made that determination without sending any notices to any tribes as would be required were there cause to send such notices.

III. The Claim that the Court's Failure to Inquire of Mother Concerning Native American Ancestry Lacks Merit

Father contends that the dependency court should have made further inquiry of Mother to determine if she had Native American ancestry and that the failure to do so was error requiring reversal; he also claims DCFS had ICWA compliance obligations that it did not meet. There is no merit to these claims.

Mother filed the required disavowal of Native American ancestry with respect to Maya C.'s sibling (in a petition with the same case number, albeit a different petition). Once the dependency court realized that Mother had done so, it made a determination that ICWA did not apply.

Under these circumstances, there was no need to engage in the notification process required by ICWA. Neither the court nor DCFS had any

obligation to give notice; indeed, there was no tribal body to which any notice might be sent.

Father's claim is predicated upon an abstract duty of the dependency court to fulfill ICWA requirements. Acknowledging the existence of such a duty, we determine that it did not arise in this case and, even if it had arisen, the dependency court's "failure" to discharge that duty in this case was harmless. Thus, in *In re E.W.* (2009) 170 Cal.App.4th 396, ICWA notices were mailed relating to one sibling but not the other. The court concluded the ICWA error was harmless. (*Id.* at pp. 400-401.)

When, as here, "[b]oth biological parents deny any Indian heritage . . . there is no tribe to notify of the proceedings." (*In re A.B.* (2008) 164 Cal.App.4th 832, 843.) Any legal error under such circumstance is clearly harmless.

DISPOSITION

The September 13, 2016 order terminating Father's parental rights is affirmed.

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GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.