Filed 12/16/19 Matter of Emmanuel C. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COUR OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In the Matter of EMMANUEL C., A Person Coming Under Juvenile Court Law.	B291919 (Los Angeles County Super. Ct. No. 18CCJP02092A)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KEVIN J., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Natalie P. Stone, Judge. Affirmed.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, Kristine Miles, Assistant County Counsel, Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Kevin J. challenges the juvenile court's findings and orders entered at the jurisdiction and disposition hearings as to his son, Emmanuel C. His sole claim is that the Department of Children and Family Services ("DCFS") failed to comply with the notice provisions of the Indian Child Welfare Act ("ICWA"). Though we agree that ICWA applied and DCFS failed to give the requisite notice, we conclude any resulting error was harmless and affirm the court's orders.

Emmanuel's parents, Kevin and Q ("mother"), were not married, and had been separated for at least two years. Emmanuel lived with mother, who had sole legal and physical custody. On March 28, 2018, DCFS detained Emmanuel, who was six years old, because mother had been arrested on a charge of child endangerment for leaving Emmanuel home alone. DCFS filed a petition under Welfare and Institutions Code section 300, subdivision (b) (hereinafter "Section 300(b)") alleging that mother had

established a detrimental and endangering situation for Emmanuel by leaving him home alone.

The court found Kevin to be Emmanuel's presumed father and on May 10, 2018, Kevin filed a Parental Notification of Indian Status form (ICWA-020), stating he "may have Indian ancestry. Blackfoot." However, though Emmanuel was placed in foster care for more than four months before being released to his mother, DCFS failed to notify the Blackfeet tribe of the proceedings. Instead, DCFS apparently sent a letter to the Bureau of Indian Affairs ("BIA"), which responded that it was unable to help because DCFS had not indicated to which tribe Emmanuel might belong. At the August 7, 2018, disposition hearing, based on BIA's response, DCFS asked the court to "make a no I.C.W.A. finding." Without objection, the court found ICWA inapplicable. Kevin contends this was error, and that the court's findings and orders must be conditionally reversed and the matter remanded for compliance with ICWA's notice provisions. As detailed below, we find ICWA applied and DCFS failed to comply with ICWA's notice provisions but conclude the resulting error was harmless. Accordingly, we affirm the court's orders.

STATEMENT OF RELEVANT FACTS

A. *The Family*

Emmanuel was born November of 2011 and was six years old when he was detained in this case. Mother and Kevin were not married and had been separated for at least two years. Mother claimed Kevin had physically abused her

when they were together. On June 3, 2016, mother was awarded sole legal and physical custody of Emmanuel. Emmanuel was living with mother when he was detained.

B. *Mother Leaves Emmanuel Home Alone; DCFS Files a Petition*

On March 28, 2018, Emmanuel dreamed that Kevin had murdered mother, and that there was blood all over the apartment in which Emmanuel and mother lived. Emmanuel awoke, found the apartment empty, and became frightened. He ran to a neighboring apartment and told the neighbor his father had just murdered his mother, and that there was blood everywhere. The neighbor called 911.

Law enforcement arrived and discovered there was no blood. They called mother and learned she was unharmed, though not at home. She did not return home until an hour after law enforcement called her. When she did return, law enforcement arrested her for child endangerment. DCFS detained Emmanuel and initially placed him with mother's parents. Two days later, however, after receiving CLETS (California Enforcement Telecommunication System) information, DCFS determined mother's parents were unqualified to care for Emmanuel, and thereafter placed him in foster care. In April 2018, DCFS filed a Section 300(b) petition alleging mother had established a detrimental and endangering situation for Emmanuel by leaving him home alone.

C. *Kevin Claims "Blackfoot" Ancestry; DCFS Fails to Notify Blackfeet Tribe*

On April 4, 2018, the court found Kevin to be Emmanuel's presumed father. On May 10, 2018, Kevin filed a Parental Notification of Indian Status form (ICWA-020), stating he "may have Indian ancestry. Blackfoot." The court ordered DCFS to investigate this claim. On May 21, 2018, DCFS filed an amended petition, adding a second count under Section 300(b), alleging mother and Kevin created a detrimental home environment for Emmanuel because they failed to maintain a healthy relationship with each other. DCFS alleged a history of domestic violence, some of which occurred in front of Emmanuel.

On June 5, 2018, DCFS contacted Kevin to ask about his claimed Indian ancestry. Kevin stated his maternal great-grandmother had Indian ancestry, and that she was "Lightfoot" and came from Omaha, Nebraska. Kevin advised that his great-grandmother was living with his grandmother, and his grandmother would have more information. Kevin's grandmother confirmed Indian ancestry but was unable to specify a tribe. Kevin's great-grandmother also was unable to provide any relevant information.

On July 18, 2018, the court sustained the Section 300(b) petition but continued the disposition hearing to August 7, 2018, at the request of Emmanuel's counsel. Over mother's request that Emmanuel be placed with her until the disposition hearing, the court ordered Emmanuel to remain detained in "Shelter Care" under DCFS supervision.

On July 23, 2018, DCFS received a letter from the Bureau of Indian Affairs stating that BIA was returning DCFS's letter of inquiry "due to insufficient information to determine tribal affiliation (25 CFR 23.11 (d)) or you have not identified a tribe." Despite two requests by Kevin's counsel, no copy of the letter DCFS allegedly sent to BIA is included in the record.[1] Nothing in the record suggests DCFS sent notice to any tribe.

D. *The Court Finds ICWA Inapplicable; Kevin Appeals*

At the August 7, 2018, disposition hearing, DCFS represented to the court that, based on the Last Minute Information filed with the court -- which contained the July 23, 2018, BIA letter -- there appeared to be "insufficient information to determine whether I.C.W.A. applies." DCFS requested the court make "a no I.C.W.A. finding." Upon

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[1] In response to the first request, the superior court clerk provided another copy of the Parental Notification of Indian Status (ICWA-020) form that was already in the record. In response to the second request making clear counsel was seeking, among other documents, "[a]ny and all notices sent to the Indian tribes and Bureau of Indian Affairs . . . ," the superior court clerk responded that "[a] signed copy of the ICWA 030 [what could have been used to give notice to BIA or the tribe] was never submitted to [the] trial court. After inquiring with DCFS, the Appeals Unit has learned that DCFS is in possession of an unsigned copy in their file. This was never made a part of the trial court's record. If counsel would like a copy of the unsigned ICWA 030 please ask County Counsel to release it to you."

hearing no objection and having "no reason to believe the child may be an Indian child," the court determined that ICWA did not apply. The court made no explicit finding that ICWA notice was properly given.

Regarding disposition, both Emmanuel's and mother's counsel requested a "home of parent mother order." DCFS disagreed, stating "a home of parent mother [order] would be premature at this time. Requesting suitable placement." The court removed Emmanuel from Kevin and ordered Emmanuel released to mother under DCFS supervision. On August 8, 2018, Kevin filed the instant appeal.

DISCUSSION

Kevin's sole argument on appeal is that: "In the present case, the Blackfeet Tribe was not noticed of these dependency proceedings despite the father's completion of the ICWA-020 claiming Blackfoot heritage. The findings and orders must be conditionally reversed, and the matter remanded for compliance with the notice provisions of the ICWA." As detailed below, we find ICWA did apply and DCFS failed to comply with ICWA's notice provisions, but any resulting error was harmless.

A. *ICWA Applies*

"In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the 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,

by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).)

"'[F]oster care placement'" is defined as "any action removing an Indian child from its parent . . . for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent . . . cannot have the child returned upon demand, but where parental rights have not been terminated." (25 U.S.C. § 1903(1)(i).)

At the July 18, 2018, jurisdictional hearing, the court found jurisdiction and ordered Emmanuel to remain in "Shelter Care." Thus, this was a hearing in which Emmanuel was placed in an institution where his mother could not have him returned upon demand. Under the plain language of ICWA, notice to Emmanuel's potential tribe was required if Emmanuel was an "Indian child."

Similarly, at the August 7, 2018, disposition hearing, DCFS argued that "home of parent mother would be premature at this time" and requested "suitable placement." In other words, DCFS again sought to place Emmanuel in foster care or an institution where his mother could not have him returned upon demand. Notice to Emmanuel's potential tribe was again required if Emmanuel was an "Indian child."

"'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) "The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs

only a suggestion of Indian ancestry to trigger the notice requirement." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) Here, on May 10, 2018, Kevin indicated he may have Blackfoot ancestry. This suggestion of Indian ancestry, coupled with proceedings in which Emmanuel could have been (and in fact was) placed in foster care, triggered the notice requirement. DCFS was required to notify the Blackfeet tribe.

DCFS argues "[e]ven if DCFS's investigation yielded a reason to know the child was Indian, triggering the ICWA's formal notice requirements, the Act became inapplicable when the juvenile court released the child to mother's custody at the disposition hearing." ICWA's notice provisions are triggered by the placement DCFS seeks, not by the content of the court's subsequent order. DCFS notes but fails to distinguish *In re Jennifer A.* (2002) 103 Cal.App.4th 692 (*Jennifer A.*), where the appellate court rejected this argument. In *Jennifer A.*, like here, the agency recommended that the minor "remain in foster home care." (*Id.* at p. 700.) The juvenile court instead ordered the minor placed in the custody of her father. (*Ibid.*) The agency argued this result rendered ICWA inapplicable. (*Jennifer A., supra,* at p. 700.) The *Jennifer A.* court disagreed:

> "Jennifer had already been placed in temporary foster home care and SSA recommended that the foster home care continue. At the time the court made its order, it was unknown whether, in the months to come, Jennifer might have been placed in permanent foster home care or

> whether her mother's parental rights might ultimately have been terminated. Certainly this was an 'involuntary proceeding' within the meaning of 25 United States Code section 1912(a), and SSA, as the party seeking temporary foster home care, had the obligation to comply with the ICWA notice requirements."

(*Ibid.*)[2] Like the minor in *Jennifer A.*, Emmanuel had also "already been placed in temporary foster home care." Like the agency in *Jennifer A.*, DCFS also sought to keep Emmanuel in foster care at the August 7, 2018 disposition hearing. DCFS was therefore required to comply with ICWA's notice provisions regardless of the actual outcome of the hearing.

B. *DCFS Failed to Comply with the Notice Provisions of ICWA*

DCFS argues it "complied fully with the ICWA" because DCFS "followed the mandates of section 224.2 by

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[2] DCFS's citations to *In re M.R.* (2017) 7 Cal.App.5th 886 and *In re Alexis H.* (2005)132 Cal.App.4th 11 are inapposite because in both cases, the agency never sought to put the minor into foster care. (*In re M.R.*, *supra*, at p. 904 ["Although CFS initially detained Ro.R. with his maternal grandmother, it very shortly thereafter sought to place Ro.R. with [his father], and never sought long-term foster care placement or termination of mother or R.R.'s parental rights."]; *In re Alexis H.*, *supra*, at p. 16 ["The Department did not pursue foster care or adoption, instead recommending from the beginning that the children remain with their mother"].)

asking father about Indian ancestry [. . .], following up with relatives by interviewing the maternal great[-]grandmother [. . .], and sending a letter of inquiry to the Bureau of Indian Affairs, which responded that no further action would be taken until the name of the tribe was learned." But DCFS does not dispute that it failed to contact the Blackfeet tribe. "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify . . . the Indian child's tribe . . . ." (25 U.S.C. § 1912(a).)

DCFS argues it was not required to contact the Blackfeet tribe because "[n]either the Blackfoot [n]or Lightfoot – the two tribes referenced by father [. . .] are listed in the Registry [of tribes entitled to notice under ICWA] (see www.federalregister.gov/documents/2019/05/09/2019-09611.)" First, we note the link DCFS provides is defective and links to nothing. Regardless, while DCFS is correct that "Blackfoot" is not listed as a tribe entitled to notice under ICWA, "Blackfeet" is. (See, e.g., Indian Child Welfare Act; Designated Tribal Agents for Service of Notice, 84 Fed.Reg. 20387, 20420 (May 9, 2019) [listing contact information for the "Blackfeet Tribe of Montana"].) "When Blackfoot heritage is claimed, part of the Agency's duty of inquiry is to clarify whether the parent is actually claiming Blackfoot or Blackfeet heritage so that it can discharge its additional duty to notice the relevant tribes." (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1198.) Under these

circumstances, DCFS was required to provide ICWA notice to the Blackfeet tribe.

DCFS cites four cases for the proposition that it need not give notice under ICWA when there is only a vague reference to Indian ancestry. However, in three of those cases -- *In re Hunter W.* (2011) 200 Cal.App.4th 1454, *In re J.D.* (2010) 189 Cal.App.4th 118, and *In re O.K.* (2003) 106 Cal.App.4th 152 -- no Indian tribe was named. The remaining case, *In re Z.N.* (2009) 181 Cal.App.4th 282 (*Z.N.*), held ICWA notice to be unnecessary when the minor's great-grandmothers might have had Indian ancestry, but the mother was not registered with a tribe and did not believe the great-grandmothers had established any affiliation. (*Id.* at p. 297.)

Recognizing the *Z.N.* holding relied in part on the application of harmless error, at least one appellate panel has discounted *Z.N.*'s evaluation of the great-grandmothers' information as dictum. (*In re B.H.* (2015) 241 Cal.App.4th 603, 608 ["The Court of Appeal opined in dictum that this 'scant and general' information [was] insufficient to 'trigger a duty to notify tribes.' (*Ibid.*) Importantly, however, ICWA notice had been properly provided with respect to some of the parent's other children, and the tribes had previously concluded those other children were not eligible for membership"].) In any event, *Z.N.* did not support its assessment of the great-grandmothers' status with citation to any authority, and case law does not line up with the approach taken in *Z.N.* The suggestion that ICWA notice is, as a matter of law, not required if it is based solely on

information connected to a child's great-grandparent is overbroad (see, e.g., *In re S.E.* (2013) 217 Cal.App.4th 610, 615-616 [requiring ICWA notice to include the known identity of a child's great-great-grandfather]) and inconsistent with the general rule that it is the exclusive province of the tribe to determine membership (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72 fn. 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106; *In re Isaiah W.* (2016) 1 Cal.5th 1, 8; *In re Jack C.* (2011) 192 Cal.App.4th 967, 980.) Accordingly, based on the information provided, DCFS was obligated to give notice to the Blackfeet tribe.[3]

C. *The Error Was Harmless*

"A notice violation under ICWA is subject to harmless error analysis. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 384-385 [25 Cal. Rptr. 3d 590].) 'An appellant seeking reversal for lack of proper ICWA notice must show a reasonable probability that he or she would have obtained a more favorable result in the absence of the error.' (*In re G.L.*

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[3] DCFS notes that the court's determination of ICWA's inapplicability was made without objection from Kevin's counsel. To the extent DCFS argues Kevin's failure to object forfeited his right to challenge the finding on appeal, it is wrong. "'Case law is clear that the issue of ICWA notice is not waived by the parent's failure to first raise it in the trial court.'" (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1166, quoting *In re Nikki R.* (2003) 106 Cal.App.4th 844, 849.)

[(2009)] 177 Cal.App.4th [683] 696.)" (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 715.)

In response to DCFS's contention that "the Act became inapplicable when the juvenile court released the child to mother's custody at the disposition hearing," Kevin agrees that "by the time of disposition the notice provision was no longer in effect due to placement with the mother." We regard Kevin's agreement as an admission that because Emmanuel was ultimately placed with his mother and there is no evidence DCFS has since sought to remove him, DCFS's failure to properly notify the Blackfeet tribe and the resulting finding of ICWA's inapplicability constituted harmless error. Should DCFS contemplate any additional action that might lead to Emmanuel's adoption or placement in foster care, it will be required to comply with the notification requirements of ICWA, and, in particular, notify the Blackfeet tribe.

DISPOSITION

We affirm the court's orders.

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MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.