Filed 1/8/18 In re S.O. CA

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 S.O., a Person Coming Under the Juvenile Court Law.	B277820 (Los Angeles County Super. Ct. No. DK01085)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.O., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Joshua D. Wayser, Judge. Affirmed.

Lisa A. Raneri, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Julia Roberson, Deputy County Counsel, for Plaintiff and Respondent.

Following the entry of orders at dispositional and 18-month permanency planning hearings (Welf. & Inst. Code, §§ 342 & 366.22, respectively[1]) at which the juvenile court removed S.O.[2] (the child) (born April 2014) from both K.O. (Father) and J.K. (Mother), Father filed a Request to Change Order petition pursuant to section 388 (the petition). In the petition, Father asked the juvenile court to reverse an earlier order terminating family reunification services. Father now asks that we reverse the juvenile court's order denying the petition. He also contends that reversal is required because the juvenile court and the child welfare agencies did not comply with the Indian Child Welfare Act (ICWA). We determine the court did not abuse its discretion in denying the petition and that Father's ICWA contentions are moot. Accordingly, we affirm.

BACKGROUND

On June 30, 2014, the Orange County Social Services Agency (OCSSA) filed a petition in Orange County Superior Court alleging the child, then two months old, required the protection of the court (§ 300) because she had been abused and neglected or was at risk of being abused or neglected. OCSSA alleged Father had a substantial criminal history and was then incarcerated and unable to care for S.O. OCCSA also alleged Mother, who was then herself in custody at the Orange County Juvenile Hall, could not care for the child. The Orange County juvenile court held a detention hearing the following day and ordered the child detained.

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

[2] The child was originally listed in court filings as S.K. However, her birth certificate states that her name is S.O. and later documents refer to her by that name, as we do.

On July 23, 2014, the court adjudicated the matter and found the allegations of the petition true, as amended. It also found the child's legal residence to be in Los Angeles County and therefore transferred the dependency proceeding to the Los Angeles Superior Court.

On September 24, 2014, the juvenile court in Los Angeles County held a disposition hearing. All prior reports as well as recent statements of information were admitted into evidence without objection. These records included a Parental Notification of Indian Status by each parent; Mother indicating Blackfoot ancestry, Father indicating Cherokee. The court found Father to be the presumed father of the child and declared the child a dependent child and removed her from her parents' custody. At the recommendation of the Los Angeles County Department of Children and Family Services (DCFS), the court ordered family reunification services for Father, who was ordered to complete a parenting program and was allowed monitored visitation with the child upon his release from custody.

At the six-month review hearing on March 25, 2015 (§ 366.21, subd. (e)), the court ordered family reunification services to continue. At the 12-month review hearing (§ 366.21, subd. (f)) on September 24, 2015, Father was also allowed unmonitored visitation with the child.

On October 26, 2015, DCFS filed a subsequent petition (§ 342) alleging that on October 14, 2015, Mother had abducted the child during one of her monitored visits. Nine hours later, the child was located and again detained.

In a January 28, 2016 Status Review Report, DCFS reported that Father continued to have difficulties arriving for visits with the child on time and continued to be only partly in compliance with court-ordered parenting and family reunification classes, having missed four full months of classes in

the fall of 2015. DCFS recommended that family reunification services be terminated for Father and for Mother.[3]

The court held a dispositional hearing (relating to the section 342 petition), and an 18-month permanency planning hearing (§ 366.22), on April 20, 2016. In a Last Minute Information for the Court filed prior to the hearing, DCFS reported that it had seen a Facebook posting in which Father indicated he was a current user of marijuana. In a second such report filed in advance of the hearing, DCFS reported that Father had failed to re-enroll in parenting classes until "recently" and had "not made any effort to complete the program."

At the hearing on April 20, 2016, the court ordered the child removed from both parents and set a selection and implementation hearing (§ 366.26). Father's family reunification services were terminated.

On August 2, 2016, Father filed the petition, in which he asked the court to reconsider its decision terminating reunification services for him, and for the child to be returned "home." During the selection and implementation hearing on August 17, 2016, the court reviewed Father's petition. After that review, the court stated, "I am going to deny the [section] 388 [petition]." Father then requested a full hearing on his petition, to which the court responded, "I respectfully deny that. I think we have changing circumstances. Not change of circumstances."

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[3] No specific order with respect to Father's obligation to take parenting and family reunification classes appears in the body of the minute order of this date. That order contains a reference to an attached "adjudication," but that document is not in the record on appeal. There is an order that "All prior orders not in conflict shall remain in full force and effect."

Because Mother is not a party to this appeal, we include only limited information as to her.

The court indicated in the order on Father's petition that "the request does not state new evidence or a change of circumstances"; and "the proposed change of order . . . does not promote the best interest of the child."

Father timely appealed the denial of his petition.

CONTENTIONS

Father contends the juvenile court abused its discretion by summarily denying the petition. He also contends the order must be reversed because the juvenile court and DCFS did not comply with ICWA's inquiry or notice requirements. DCFS does not dispute Father's ICWA contentions on the merits, contending instead that they are moot.

DISCUSSION

I. The Summary Denial of Father's Change Petition Was Not Reversible Error

A. Additional Facts Relating to Father's Petition Claim

Father met Mother when he was 17 and she was 15, at a time when both were in Juvenile Hall. They became friendly. They have never been married.

Father was released from jail on January 9, 2015, and on January 28, 2015, DCFS, provided him with "referrals for court order[ed] services." In January 2015 (and December 2014, prior to his release from jail), Father "had inconsistent visitation with" the child, but was observed to be "attentive" to her.

On March 16, 2015, Father informed the case social worker (CSW) he had "enrolled in parenting classes." By the time the March 25, 2015 Status Review Report for the six-month review hearing was filed, Father had not provided the CSW with proof of enrollment. DCFS reported that he was in "partial compliance."

In the September 24, 2015 Status Review Report for the 12-month review hearing, DCFS reported Father to be enrolled in parenting classes, and that he had only "completed 2 classes prior to having several absences which resulted in father being terminated from the program." It appears that Father's failures to attend were a result of his being incarcerated in Los Angeles County Jail for 40 days, from May 15, 2015 through June 23, 2015, "due to allegations of assault with a deadly weapon on a Peace Officer." Father reported to DCFS the "charge was dropped because there was no evidence."[4] Because Father had re-enrolled in parenting classes, DCFS reported that he was "in process" of compliance. DCFS also reported that during the reunification period Father often "arrive[d] at the visits [with the child] one hour late." Nevertheless, DCFS recommended Father's reunification services continue.

In the December 17, 2015 Jurisdiction/Disposition Report relating to the subsequent petition, DCFS reported Father continued to have "some issues with visitation where he has arrived late to the visits or returned the child late after the visits." Father also failed to confirm he would attend scheduled visits, and (improperly) allowed "mother to be present during his unmonitored visit." DCFS expressed concerns about these facts, but found he was "still in the process of completing parenting" classes, and recommended his family reunification services continue. DCFS stated its belief that it was "evident that both parents continue to struggle with ensuring the child's safety and [in] complying with court orders."

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[4] Father provided no documentation to support this claimed disposition. DCFS later obtained an abbreviated criminal history which indicated Father had in fact been convicted of auto theft with a prior and had been sentenced on a probation violation to 40 days in county jail.

In the January 28, 2016 Status Review Report relating to the 18-month permanency planning hearing, DCFS recommended Father's family reunification services be terminated. In the opinion of DCFS, Father's arrest while the dependency proceeding was underway "demonstrates that he continues to engage in criminal activities." Father also still had difficulties arriving to the visits on time, returning the child on time, and in allowing Mother to be present during his visits. Regarding parenting classes, Father told DCFS that one of the locations at which he had taken some classes "had closed before he could finish the last 4 [parenting] classes." DCFS later determined Father had not attended parenting classes at all from September 2015 through December 2015. Father also told DCFS he was planning to resume classes on January 13 2016; and he did re-enroll on January 16, 2016. He also provided no updated information relating to his employment. By this time, DCFS stated its view that Father had not "demonstrated the ability to care for the child."

In March 2016, Mother reported Father uses marijuana and was affiliated with a street gang called "Neighborhood 40's." (Father later produced a medical marijuana recommendation dated March 9, 2016.) She said Father was not stable enough to care for the child.

Before the April 20, 2016 dispositional hearing and 18-month permanency planning hearing, Father reported to DCFS that he would re-enroll in the parenting program "at the end of April." (By February 22, 2016, Father had completed a total of 12 parenting classes.) DCFS wrote: Father "still has not completed his program or made any effort to complete his program." DCFS also voiced additional concerns about Father's marijuana use, citing "the caregiver's statements that the child is brought back [from visits with Father] with a strong odor of marijuana in her hair, clothing,

diaper bag and jacket." Father also went to at least one visit while under the influence of marijuana. After that occurred, Father agreed to do a drug test, and tested positive for marijuana.

DCFS also reported that Father continued to be "consistently . . . late dropping the child off" after his unmonitored visits, including one visit where he dropped the child off nearly an hour late. DCFS again recommended termination of Father's family reunification services. The court then made an order terminating the order for those services.

The "new evidence" which Father presented in his petition, filed on August 2, 2016, was that after the court terminated his reunification services, between May 4, 2016 and July 13, 2016, he participated in nine additional parenting classes and had completed his parenting program on July 13, 2016.

B. Governing Legal Principles and Standard of Review

"Section 388 accords a parent the right to petition the juvenile court for modification of any of its orders based upon changed circumstances or new evidence. (§ 388; *In re Marilyn H.* (1993) 5 Cal.4th 295, 308-309 . . . .) To obtain the requested modification, the parent must demonstrate both a change of circumstance or new evidence, and that the proposed change is in the best interests of the child. (Cal. Rules of Court, rule 5.570(d); *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)" (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478, fn. omitted; see also *In re G.B.* (2014) 227 Cal.App.4th 1147, 1157.)

"To obtain an evidentiary hearing on a section 388 petition, a parent must make a prima facie showing that circumstances have changed since the prior court order, and that the proposed change will be in the best interests of the child. (Rule 5.570(a), (e); *In re G.B.* [*, supra,*] 227 Cal.App.4th [at p.] 1157

. . . .) To make a prima facie showing under section 388, the allegations of the petition must be specific regarding the evidence to be presented and must not be conclusory. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) A section 388 petition must be liberally construed in favor of granting a hearing to consider the parent's request. (Rule 5.570(a).)" (*In re Alayah J.*, *supra*, 9 Cal.App.5th at p. 478.) However, "the allegations must nonetheless describe specifically how the petition will advance the child's best interests. [Citation.]" (*In re G.B.*, *supra*, 227 Cal.App.4th at p. 1157.) "[T]he change in circumstances must be substantial. [Citation.]" (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) It must reflect "changed" and not "'changing'" circumstances. (*Ibid.*)

"We normally review the grant or denial of a section 388 petition for an abuse of discretion. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.)" (*In re Alayah J.*, *supra*, 9 Cal.App.5th at p. 478.)

C. The Juvenile Court Did Not Abuse Its Discretion

Father did not meet his burden of establishing a prima facie showing that his circumstances had changed or that a new order would be in the child's best interests.

The only new evidence Father presented was that between May 4, 2016 and July 13, 2016, he had participated in nine additional parenting classes and had completed his parenting program. While the parenting program was the reunification service Father had been ordered to undertake, serious concerns had arisen by the time the court terminated his services. Father was incarcerated again while taking his parenting classes and appears to have lied to DCFS about the circumstances of that incarceration. Throughout the reunification period he repeatedly arrived late to pick up the child for his visits with her and returned the child late. He never provided updated

information regarding his employment, and Mother had stated he was not stable enough to care for the child. The child's caregiver had reported the child was brought back from visits with Father with her hair, her clothing and her diaper bag smelling of marijuana. This was evidence Father smoked marijuana in the presence of his infant child. "[E]ven legal use of marijuana can be abuse if it presents a risk of harm to minors." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452.)

Father's petition presented no evidence sufficient to establish a prima facie case that his circumstances had changed or that the best interests of the child would be served by the order he requested. The fact that all of these events had occurred while his parenting program was (intermittently) underway made it all the more urgent for Father to provide evidence in the petition in addition to the single circumstance that he had finally completed the parenting program. For these reasons, the court did not abuse its discretion in finding Father demonstrated at most *changing,* rather than *changed*, circumstances. (*In re Ernesto R.*, *supra*, 230 Cal.App.4th at p. 223.)

Father's reliance on *In re Jeremy W.* (1992) 3 Cal.App.4th 1407 is not persuasive. There, the mother submitted three declarations with her section 388 petition attesting to significant changes that addressed all of the deficiencies in her behavior and in the circumstances that had existed prior to termination of her reunification services. (*Id.* at pp. 1415-1416.) The factual support in the section 388 petition in that case differs markedly from the facts presented in the instant petition. In addition, in this case, Father's behavior raised serious concerns about whether he would ever be able to reunify with the child, concerns which his petition did not allay.

II. Father's ICWA Contentions Are Moot

Father correctly contends, and DCFS does not dispute, that ICWA (25 U.S.C. §§ 1911 et seq.; § 224.2, subd. (d)) was violated. However, Father's contention is moot because judicially noticeable evidence indicates the juvenile court is already making efforts to correct the previous deficiencies in inquiry and in notice.

A. Additional Facts Relating to Father's Claim

Mother filed a Parental Notification of Indian Status form in the Orange County Superior Court proceeding in July 2014. In its initial detention report, OCSSA reported, only with respect to Mother, that she "stated that she may have American Indian Heritage, Blackfoot." OCSSA reported it had "spoken to the child's family in regards to their American Indian ancestry" and had been "provided with all information that the family was able to or willing to provide at this time."[5] Thereafter, required notices were mailed to the Bureau of Indian Affairs (BIA) and the Blackfoot tribe, each of which confirmed receipt of ICWA notices. There is no record of any substantive response.

On July 23, 2014, after the mailing to the tribe and BIA on behalf of Mother, Father filed a Parental Notification of Indian Status form indicating he may have Cherokee ancestry.

Following transfer of the case to Los Angeles Superior Court, DCFS reported in its March 25, 2015 Status Review Report that ICWA "does or may apply," and then repeated information from the earlier OCSSA report to that court. DCFS did not recommend the court order ICWA to be inapplicable. The record on appeal indicates that the juvenile court's file as of this date

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[5] The maternal and paternal grandmothers and a great uncle provided details of their genealogy to support Mother's filing.

contained inquiries of the Blackfoot tribe and BIA on behalf of Mother, but no responses. And there is nothing in the file to indicate that any inquiry was ever made with respect to Father's claim of Cherokee ancestry.

Notwithstanding the contents of the file before the juvenile court on that date, on March 25, 2015, that court determined ICWA did not apply.

Father has made several requests to this Court to take judicial notice of proceedings in the juvenile court. On May 23, 2017, Father asked that we take judicial notice of minute orders of May 11 and May 16, 2017. The May 11 minute order indicates the juvenile court then ordered DCFS "to conduct further ICWA inquires and provide appropriate notice. The May 16 minute order contains information on placement of the child. On June 15, 2017, this Court granted those requests. (Evid. Code, §§ 452, subds. (c) & (d),459, subd. (a)).

On October 27, 2017, Father asked that we take judicial notice of minute orders of proceedings on September 12 and October 18, 2017. The first of these orders directs DCFS to prepare progress report "on ICWA status due in court on October 18, 2017." The second continues the matter "for appropriate notice to the tribes," setting a new hearing date for a status report for November 8, 2017. The Clerk of this Court has also obtained from the juvenile court copies of minute orders for November 8 and November 29, 2017. The first of these orders continues the November 8 ICWA status hearing to November 29, 2017, "for status update on ICWA." The second states that the matter is "on calendar for progress report regarding ICWA notice." That minute order also indicates there is a further hearing (regarding "[t]he 26 Permanency Planning Hearing") on January 17, 2018. We also take judicial notice of these four orders. (Evid. Code, §§ 452, subd. (c)

& (d), 459, subd. (a); *In re N.M.* (2008) 161 Cal.App.4th 253, 268, fn. 9; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-1565.)

We discern from these orders that the juvenile court is well aware of the need for ICWA compliance with respect to the Native American heritage of both parents.

B. Governing Legal Principles

1. Relevant ICWA Standards

"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.) The juvenile court has a sua sponte obligation to independently inspect "the information concerning the notice given, the timing of the notice, and the response of the tribe[s], so that [the court] may make a determination as to applicability of the ICWA, and thereafter comply with all of its provisions." (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705.)

"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); 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.)[6] 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* (2002) 104 Cal.App.4th 1401, 1407, original italics.)

Compliance with these requirements advances important interests. Congress enacted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ." (25 U.S.C. § 1902.) ICWA recognizes that "'the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.'" (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 52.)

When proper inquiry is not made and "proper notice is not given under the ICWA, the court's order is voidable. (25 U.S.C. § 1914.)" (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 254.) The reason why failure to give proper notice is so significant is that "failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe." (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) Proper ICWA notice "is absolutely critical [under ICWA] for one of [ICWA's] major purposes is to protect and preserve Indian

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

tribes. (25 U.S.C. § 1901.)" (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 738.)

2. Mootness Standard

"When no effective relief can be granted, an appeal is moot." (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315-1316.) This occurs when ""'an event occurs which renders it impossible for this court, if it should decide the case in favor of [appellant], to grant him or her any effectual relief whatever. [Citations.]'" [Citation.]" (*Id.* at p. 1316.)

C. ICWA Violations Occurred but Father's Claim Is Moot

Father correctly contends there is no indication any court ever made the inquiries required by ICWA with the Cherokee Nation, or conducted the required preliminary inquiry by interviewing Father's relatives to obtain information to send the required notice to either Cherokee Nation tribes or the BIA. Thus, the juvenile court's March 25, 2015 declaration with respect to compliance with ICWA was in error with respect to Father's claim.[7]

The lack of inquiry of and notice by DCFS with respect to Father's ancestry was a violation of its duties under ICWA. (*In re A.G.*, *supra*, 204 Cal.App.4th at p. 1397; see also *In re Isaiah W.* (2016) 1 Cal.5th 1, 6, 10-11.)

Notwithstanding these circumstances, we agree with DCFS that Father's ICWA contentions are moot. The records of which we have taken judicial notice establish the juvenile court is well aware of its obligation and that of DCFS to conduct the appropriate inquiry to assure compliance with

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[7] The circumstances that the proper notices were sent to the Blackfoot tribe and the BIA is sufficient notwithstanding there was no response. The absence of response to properly mailed notices is sufficient to sustain a finding of no ICWA issue. (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1118; *In re Levi U.* (2000) 78 Cal.App.4th 191, 198 [lack of response to properly transmitted ICWA notices is tantamount to determination that the minor was not an "Indian child" within the meaning of ICWA].)

ICWA. That inquiry has taken several months, and the circumstance that the juvenile court has continued the matter indicates it is requiring appropriate compliance with ICWA. Father has already obtained an order directing DCFS to further investigate the family's Native American heritage and to comply with ICWA. That is the only relief to which he is entitled in this Court. As he has already obtained that relief, his appeal on this basis is moot.[8]

DISPOSITION

The August 17, 2016 order denying Father's change petition is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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[8] As DCFS argues, if further inquiry and notice to any of the tribes results in a determination that the child is an Indian child, Father, Mother or the child will have the opportunity to petition the juvenile court to invalidate any order that violated ICWA. (25 U.S.C. § 1914; *In re Brooke C., supra,* 127 Cal.App.4th at pp. 385-386.)

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