Filed 3/21/13 In re T.R. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re T.R., a Person Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.R., Defendant and Appellant.	B243267 (Los Angeles County Super. Ct. No. CK92786)

APPEAL from orders of the Superior Court of Los Angeles County, Sherri Sobel, Juvenile Court Referee. Affirmed and remanded with directions.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

K.R. (father) appeals jurisdictional findings and dispositional orders made with respect to nine-year-old T.R. Father contends the jurisdictional findings are not supported by substantial evidence and the matter must be remanded for notice under the Indian Child Welfare Act (ICWA). We reject father's sufficiency contention and affirm the orders of the juvenile court but agree the matter must be remanded for notice under the ICWA.

FACTS AND PROCEDURAL BACKGROUND

1. *Detention.*

On March 26, 2012, the Department of Children and Family Services (the Department) received a referral alleging physical abuse of T.R. by mother. A social worker met with mother and T.R. in downtown Long Beach. Out of mother's presence, T.R. told the social worker mother hit him with a telephone cord 20 to 30 times for receiving bad grades. The social worker saw marks on T.R.'s arms, legs and buttocks and hailed a police officer who called in a child abuse referral. Another officer arrived within minutes, interviewed T.R. and arrested mother for child endangerment.

Mother told the social worker father was in jail. The social worker learned father had been arrested on January 3, 2012, and had a release date of December 23, 2012.

On March 29, 2012, the Department filed a petition alleging T.R. was a dependent child within the meaning of Welfare and Institutions Code section 300, subdivisions (a) and (b).[1]

At the detention hearing, the juvenile court ordered T.R. detained and granted father monitored visits upon his release from custody. Mother indicated she had no American Indian ancestry. When asked about father, who was not present at the hearing, mother indicated he too had no American Indian ancestry. Based on these responses, the juvenile court found the ICWA did not apply.

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[1] Subsequent unspecified statutory references are to the Welfare and Institutions Code.

2. *Amended petition*.

On April 19, 2012, the Department filed a first amended petition which added allegations that mother and father had a history of engaging in violent altercations in T.R.'s presence, thereby rendering the child a dependent within the meaning of section 300, subdivisions (a) and (b).

The detention report included the family's child welfare history which commenced in February of 2005 with a referral indicating mother neglected T.R. by allowing the child access to a hot iron which burned his hand. Mother stated father made the referral after they argued about child care. The referral was closed as unfounded.

On May 11, 2005, the Department received a referral indicating mother and father had been arrested after an incident of domestic violence. Mother indicated she and father engaged in mutual combat during a custody exchange. Father claimed mother was the aggressor and denied that he touched mother. Mother obtained a restraining order at the social worker's request and the Department closed the referral as inconclusive because T.R. was not present during the incident.[2]

On August 10, 2005, and July 8, 2006, the Department received referrals indicating mother failed to protect T.R. from a broken window and father neglected T.R. by providing insufficient nourishment, respectively. These referrals were closed as unfounded as it appeared father made the first referral and mother made the second to obtain leverage in their custody dispute.

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[2] According to a Long Beach Police Department report related to the 2005 domestic violence incident, mother went to father's home to pick up T.R. Mother claimed father choked her and she bit him on the forearm. Father claimed mother entered his home without permission and screamed about father's new girlfriend. Father called the police and attempted to defend himself by putting his arm around mother but she bit him. When father jerked his arm away, he hit mother in the nose. A police officer was unable to determine who had been the aggressor and arrested mother and father for domestic violence.

A referral received on May 17, 2011, indicated father had been arrested for domestic violence towards mother. Mother stated father engaged in domestic violence at least once a week and T.R. "always witnesses the domestic violence by father." Mother was in the process of obtaining a restraining order. T.R. stated he did not like it when father argued with mother but the child was doing well in school and an allegation of emotional abuse was closed as inconclusive.

The detention report filed with the first amended petition indicated mother told the social worker T.R. has "seen his dad choke me. He's seen his dad hit me. And I'm not going to defend myself. So he's seen us get into fights." T.R. told the social worker the last time he saw father, mother and father "got in a fight." T.R. admitted mother and father had fought prior to that incident of domestic violence but did not want to talk about it.

The social worker interviewed father in jail. Father stated mother instigated their altercations and, in the last incident of domestic violence, mother hit father and scratched him. Father denied he had ever hit mother but admitted T.R. had been present a few times during their altercations.

The report indicated father's criminal history commenced in 1985 and included convictions for disorderly conduct in 1995, forgery in 1998, contempt in 1998, bookmaking in 1999 and 2000, driving on a suspended license in 2003, an undisclosed felony in 2004 following an arrest for criminal threats and carjacking, two convictions of burglary in 2008, and possession for sale of marijuana in January of 2012, for which father had been sentenced to two years in state prison.

3. *Father's arraignment in juvenile court.*

Father appeared in juvenile court on April 19, 2012, and filed a Parental Notification of Indian Status form (ICWA-020(A)) on which he checked a box to indicate he "may have Indian ancestry." On the line adjacent to the checked box, father wrote, "Cherokee (Louisiana)." The juvenile court asked if father had "anything more . . . than just you think there might be something?" Father responded, "Not at the moment, no." Father indicated there were no family members who had any further information and

responded affirmatively when the juvenile court asked: "So you think there's some family lore that you have some Cherokee heritage in your background?" The juvenile court found the case "remains a Non-ICWA case. If [father] has any further information, he needs to provide it to the Department and we'll take the appropriate action."

4. *The jurisdiction report*.

When interviewed for the jurisdiction report, father stated he and mother were in a relationship from 1999 to 2003. In 2004, father sought custody of T.R. in family court but mother moved to Las Vegas with T.R. In November 2010, mother and father reunited but in May of 2011, they argued, mother called the police and father was arrested. When father was released two days later, mother and T.R. had moved from the home and father has not seen mother or T.R. since that time.

Mother told the social worker father was incarcerated while mother and T.R. lived in Las Vegas. When father was released, mother returned to Long Beach and lived with father for approximately two weeks when an incident of domestic violence occurred and mother moved to a shelter. On January 19, 2012, mother married her male companion, L.W.

5. *Adjudication*.

On July 20, 2012, mother filed a waiver of rights and submitted the allegations of the petition on the social reports. After argument, the juvenile court sustained the petition, finding mother inappropriately disciplined T.R. on March 24, 2012, and on prior occasions. The juvenile court also found mother's use of marijuana rendered mother incapable of providing regular care and supervision, mother's male companion, L.W., physically abused the child, and mother and L.W. had a history of engaging in verbal altercations in the child's presence.

As to father, the sustained petition alleged mother and father "have a history of engaging in violent altercations in the child's presence. On a prior occasion in 2011, the father hit and choked the mother. The mother hit and scratched the father. Such violent conduct on the part of the mother and father in the child's presence endangers the child's

physical and emotional health and safety, creates an unsafe home environment, and places the child at risk of physical harm, damage, danger, and physical abuse."

The juvenile court declared T.R. a dependent pursuant to section 300, subdivisions (a) and (b), and found, by clear and convincing evidence, return to parental custody would create a substantial risk of danger to the child's well-being, and there were no reasonable means to protect the child without removal. The juvenile court found father "doesn't need a domestic violence program" but ordered father to participate in an anger management program, parenting class and individual counseling. The juvenile court granted father monitored visitation twice weekly upon his release from custody, which father indicated he anticipated in December of 2012.

CONTENTIONS

Father contends the sustained allegations are not supported by the record and the juvenile court's determination the ICWA does not apply must be reversed.

DISCUSSION

1. *The uncontested allegations sustained as to mother support dependency jurisdiction even if the allegations as to father were reversed.*

As noted by the Department, a jurisdictional finding against one parent is good against both. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1491; *In re P.A.* (2007) 155 Cal.App.4th 1197, 1212; *In re Alysha S.* (1996) 51 Cal.App.4th 393.) Because there are sustained allegations against mother which are not contested, reversal of the jurisdictional findings as to father "will have no practical impact on the pending dependency proceeding, thereby precluding a grant of effective relief." (*In re I.A., supra,* at p. 1491.)

However, even overlooking the uncontested sustained allegations, substantial evidence supports the jurisdictional findings as to father.

2. *The jurisdictional findings as to father are supported by substantial evidence.*

To declare a child a dependent under section 300, the juvenile court must find the allegations of the petition true by a preponderance of the evidence. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318; § 355, subd. (a).) Jurisdictional findings are reviewed

for substantial evidence. We resolve all conflicts and make all reasonable inferences in favor of the order under review. (*In re David M.* (2005) 134 Cal.App.4th 822, 828; *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393; *In re Sheila B.* (1993) 19 Cal.App.4th 187, 199.)

Father contends the evidence did not support the finding T.R. was at substantial risk of suffering serious physical harm inflicted nonaccidentally by father within the meaning of section 300, subdivision (a), and there was no showing of a current risk of harm to T.R. within the meaning of section 300, subdivision (b).[3] Father asserts there was no substantial evidence indicating the parents' history of domestic would be repeated in the future. He notes he was incarcerated at the time of the jurisdiction hearing, the last prior incident of domestic violence between the parents occurred 14 months earlier, father had not had any contact with mother or T.R. since that time, mother is now married to L.W. and there was no evidence that mother and father intended to resume a relationship. Also, the Department investigated two incidents of domestic violence in 2005 between mother and father and concluded both were unfounded. Additionally, the juvenile court apparently did not find the previous incidents of domestic violence to be serious as it declined to order father to participate in domestic violence counseling.

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[3] A child is dependent within the meaning of section 300, subdivision (a), if "[t]he child has suffered, or there is substantial risk the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian. For the purpose of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which the less serious injury was inflicted, a history of repeated inflictions of injuries on the child, the child's siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm. . . ." (§ 300, subd. (a).)

A child is dependent within the meaning of section 300, subdivision (b) if the child "has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately . . . protect the child . . . ." (§ 300, subd. (b).)

Father concludes there was no current threat of serious physical harm to T.R. due to domestic violence between mother and father and the juvenile court's finding T.R. would be nonaccidentally harmed or neglected by father in the future amounted to speculation which is insufficient to support a finding of dependency. (*In re Steve W.* (1990) 217 Cal.App.3d 10, 22.) He also claims there were only isolated instances of domestic violence, which are insufficient to warrant jurisdiction. (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717.)

Father's arguments are not persuasive.

Although many cases based on exposure to domestic violence are filed under section 300, subdivision (b), section 300, subdivision (a) also may be appropriate when, through exposure to domestic violence, a child suffers, or is at substantial risk of suffering, serious physical harm inflicted nonaccidentally by his or her parents. (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598-599; *In re Daisy H., supra,* 192 Cal.App.4th at p. 717.) Here, mother and father engaged in domestic violence during a custody exchange in 2005 in which father choked mother. After that incident, mother and father separated until November of 2010, when they reunited until another incident of domestic violence occurred in May of 2011. After the Department received the referral related to this incident, mother told the social worker father engaged in domestic violence at least once a week and T.R. "always witnesses the domestic violence by father."

The detention report filed with the first amended petition indicated mother told the social worker T.R. has "seen his dad choke me. He's seen his dad hit me. And I'm not going to defend myself. So he's seen us get into fights." Also, T.R. told the social worker the last time he saw father, mother and father "got in a fight." T.R. admitted mother and father had fought prior to that incident of domestic violence but he did not want to talk about it. Father also admitted T.R. had been present during altercations between mother and father.

The domestic violence between mother and father ceased only when father was incarcerated or the parents were not in contact. Given that father's anticipated release from custody in December of 2012, the juvenile court reasonably could conclude father would renew his relationship with T.R., once again giving rise to an opportunity for domestic violence between the parents which would place T.R. at risk of physical harm inflicted nonaccidentally. (See *In re Heather A.* (1996) 52 Cal.App.4th 183, 194.) Indeed, the 2005 incident of domestic violence occurred while mother and father were separated. Thus, the juvenile court could conclude mother's recent marriage to L.W. would not alter father's proclivity toward domestic violence with respect to mother.

Although the juvenile court did not order father to participate in domestic violence counseling, it did order father to participate in anger management counseling. Nothing in either order contradicts the finding T.R. was at risk of harm due to domestic violence between mother and father.

In re Daisy H., the case cited by father for the proposition isolated instances of domestic violence are insufficient to warrant jurisdiction, is distinguishable. In *Daisy H.*, the only reported incident of domestic violence occurred at least two and probably seven years before the dependency petition was filed, the children denied ever witnessing domestic violence, and there was no indication domestic violence had even occurred in the presence of the children. Here, domestic violence repeatedly occurred in T.R.'s presence and, although mother and father had separated, upon father's release from custody, they will resume contact related to father's visitation with T.R. The fact mother was now in a relationship with L.W. diminished this risk but did not eliminate it.

In sum, the record supports the juvenile court's finding T.R. was at substantial risk of future harm within the meaning of section 300, subdivisions (a) and (b) due to exposure to domestic violence between mother and father.

3. *The ICWA.*

a. *Relevant law.*

"Congress enacted ICWA in 1978 to protect Indian children and their tribes from the erosion of tribal ties and cultural heritage and to preserve future Indian generations. [Citations.] Because ' "the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents" ' [citation], a tribe has the right to intervene in a state court dependency proceeding at any time [citation]." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.)

If the juvenile court or the social worker "knows or has reason to know that an Indian child is involved," the social worker must "make further inquiry regarding the possible Indian status of the child . . . by interviewing the parents . . . and extended family members . . . and contacting . . . any other person that reasonably can be expected to have information regarding the child's membership status or eligibility." (§ 224.3, subd. (c); see also Cal. Rules of Court, rule 5.481(a)(4).)

Section 224.3, subdivision (b) provides in pertinent part: "The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following: [¶] (1) A person having an interest in the child, including . . . a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe . . . ." (§ 224.3, subd. (b)(1); Cal. Rules of Court, rule 5.481(a)(5)(A).) The duty under the ICWA to inquire whether a dependent child is or may be an Indian child is affirmative and continuing. (§ 224.3, subd. (a).)

When a juvenile court "knows or has reason to know that an Indian child is involved" in a dependency case, it must give the child's tribe notice of the proceedings and its right to intervene. (25 U.S.C. § 1912(a); §§ 224.2, subd. (a), 224.3, subd. (d); Cal. Rules of Court, rule 5.481(b); see also *In re Damian C.* (2009) 178 Cal.App.4th 192, 196.) " 'If the identity or location of . . . the tribe cannot be determined,' the notice need only be given to the BIA [Bureau of Indian Affairs]." (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1157, quoting 25 U.S.C. § 1912(a).)

Because the right to intervene is meaningless unless the tribe receives notification, the ICWA's notice requirements are strictly construed. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) "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. [Citations.]" (*In re Nikki R., supra,* 106 Cal.App.4th at p. 848; *In re Merrick V.* (2004) 122 Cal.App.4th 235, 246; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 256-258.) "A hint may suffice for this minimal showing." (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 549.)

A parent does not waive an ICWA notice issue by failing to raise it below. (*In re Nikki R., supra,* 106 Cal.App.4th at p. 849.) We review a juvenile court's ICWA findings for substantial evidence. (*In re E.W.* (2009) 170 Cal.App.4th 396, 404.)

b. *The information father provided on his ICWA 20 form triggered ICWA notice requirements.*

Father contends the specific information he provided concerning T.R.'s possible Indian ancestry gave rise to a duty on the part of the Department to interview father, extended family members and any other person who reasonably could be expected to have information concerning T.R.'s membership status or eligibility and thereafter to give notice to the Cherokee tribes. (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539.) Father concludes that, because the Department failed in this duty, the finding the ICWA did not apply must be reversed.

It appears this argument has merit. Various appellate courts have held the ICWA notice provisions are not triggered by "vague references" to Indian heritage. (See, e.g., *In re J.D.* (2010) 189 Cal.App.4th 118, 125 [notice not required where paternal grandmother indicated possible Indian ancestry, tribe unknown]; *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520-1521 [father's claim of Indian heritage, without naming the tribe and which he later retracted, insufficient to require notice under the ICWA]; *In re O.K.* (2003) 106 Cal.App.4th 152, 154, 157 [grandmother's statement children may have Indian heritage, no known tribe, "too vague and speculative to give the juvenile court any reason to believe the minors might be Indian children"];

In re Levi U. (2000) 78 Cal.App.4th 191, 194, 198 [paternal grandmother's statement there might be Indian ancestry on her mother's side, tribe unknown, insufficient to trigger notice requirements].)

Here, however, father referred specifically to Cherokee ancestry from Louisiana. This reference was not vague and it triggered the notice requirement. (See, e.g., *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1198 [mother's indication on Parental Notification of Indian Status form the child may be eligible for membership in the "Navajo–Apache" tribes, standing alone, "gave the court reason to know that [the child] *may be* an Indian child."]; *In re J.T.* (2007) 154 Cal.App.4th 986, 988, 993 [notice requirement triggered by references to Cherokee and Sioux heritage]; *In re Damian C., supra,* 178 Cal.App.4th at pp. 195-196 [mother's reference on her ICWA–020 form to Pasqu–Yaqui heritage sufficient to trigger notice requirement]; *Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 257 [parents' statement the child has "Cherokee Indian heritage" sufficient to trigger notice requirement].)

The Indian status of a child need not be certain to trigger ICWA's notice requirements. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1407; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.) Given that the ICWA notice provisions are to be interpreted broadly and it is preferable to err on the side of examining thoroughly whether the child is an Indian child, we conclude father's claim of Cherokee ancestry was sufficient to satisfy the " 'minimal showing required to trigger the statutory notice provisions.' " (*In re Antoinette S., supra,* 104 Cal.App.4th at p. 1407; *Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at pp. 256-257.) Thus, the Department had a duty to inquire further as to T.R.'s Indian heritage and to give notice under the ICWA.

We therefore affirm the juvenile court's orders but remand for ICWA inquiry and notice. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 385.) If, after proper inquiry and notice, a tribe determines T.R. is an Indian child, the tribe, a parent or T.R. may petition the juvenile court to invalidate any orders that violate the ICWA. (25 U.S.C. § 1914.)

DISPOSITION

The orders of the juvenile court are affirmed. The matter is remanded to the juvenile court with directions to order the Department to comply with the inquiry and notice provisions of the ICWA. After proper notice under the ICWA, if it is determined T.R. is an Indian child and the ICWA applies to these proceedings, the child, the parents or the tribe may petition the juvenile court to invalidate any orders that violate the ICWA.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.