Filed 4/18/18 In re Kristin W. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 KRISTIN W., et al., Persons Coming Under the Juvenile Court Law.	B280959
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent. v. Sh.W., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK01497)

APPEAL from an order of the Superior Court of Los Angeles County. Stephen Marpet, Judge. Affirmed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel for Plaintiff and Respondent.

A Welfare & Institutions Code section 300 petition was filed on behalf of Kristin W. (born Sept. 1999); Harmony W. (born Aug. 2001); T.W. (born Jan. 2004); and S.W. (born Jun. 2009) in September 2013.[1]

On March 9, 2015, Sh.W., mother of the four children (mother) filed a notice of appeal from termination of her family reunification services as to S.W. Mother argued that the order must be reversed due to the juvenile court's failure to comply with the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). On January 27, 2016, this court filed a nonpublished opinion holding that substantial evidence supported the juvenile court's determination that ICWA was inapplicable and no error occurred. (*In re S.W.* (Jan. 27, 2016, B263250) (the January 2016 case).)

The present appeal was filed on February 1, 2017. Mother appeals from a January 20, 2017 order granting placement of T.W. with maternal grandmother (MGM) in Chicago, Illinois. Mother again raises a challenge under ICWA. She argues that the juvenile court erred in finding that ICWA did not apply and by failing to make sufficient continuing inquiry under ICWA.

The January 2016 case constitutes law of the case as to the juvenile court's findings regarding ICWA from the date of the petition (Sept. 2013) through mother's first notice of appeal (Mar. 9, 2015).[2] Thus, this appeal addresses only the juvenile court's

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

Each of the four children has a different father, none of whom are parties to this appeal.

[2] Although the first appeal only concerned S.W., the only possible evidence of Indian ancestry as to any of the children was provided by mother. Mother does not claim that any of the

continuing duty under ICWA during the time period between March 9, 2015 (the date of mother's prior notice of appeal) and February 1, 2017 (the date of the notice of appeal in this matter).

During this nearly two-year period, mother filed three section 388 petitions.[3] Two of the section 388 petitions did not list any Indian heritage. The most recent one, filed December 14, 2016, identified five Indian tribes. This evidence fits with mother's pattern throughout these proceedings of alternately denying and claiming Indian heritage in various tribes. Under the circumstances of this case, we find that the conflicting and unsupported information provided by mother over three years into the proceeding did not constitute "reason to know" that any of the children were Indian children and did not trigger a continuing duty of the court to inquire further. Therefore, we affirm the court's order.

COMBINED FACTUAL AND PROCEDURAL HISTORY

Events predating the prior notice of appeal in this case

On August 4, 2013, the Department of Children and Family Services (DCFS) received a referral alleging an incident of domestic violence between mother and her boyfriend Kendrick G. All four children were present in the home at the time of the

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children has Indian ancestry from the child's father. In addition, all four children were included in the same proceeding. Therefore, the prior unpublished opinion addressed the evidence as to all four children, and is law of the case as to the juvenile court's ICWA findings concerning all four children.

[3] Mother has filed a total of six petitions pursuant to section 388 throughout these proceedings. Section 388 allows a parent to request that the court modify an order on the grounds of changed circumstance or new evidence. All six of mother's petitions have been denied.

dispute. Kristin called 911, and paramedics transported mother to the hospital.

During the investigation, DCFS received information suggesting that there had been violence between mother and S.W.'s father, James B., as well. When interviewed, S.W.'s siblings told the social worker that mother had been involved in violence with Kendrick but not with James. Mother denied all allegations, stating that she had recently moved the family from Chicago to California.

On September 26, 2013, DCFS filed a section 300 petition on behalf of the children, alleging that James physically abused them, that James and mother had a history of domestic violence, that mother frequently left the children home alone at night, and that mother had medically neglected Kristin by failing to obtain necessary medical treatment. The accompanying detention report noted that on August 5, 2013, mother and James denied having Indian ancestry.

At the September 26, 2013 detention hearing, the juvenile court found a prima facie case that the children were described by section 300, detained them from mother, granted mother monitored visits, and ordered DCFS to provide mother family reunification services. After making inquiry of mother, and inquiring as to the possible Indian heritage of the children's respective fathers, the court also found "It's not an ICWA case."

Between September 26, 2013, and January 8, 2015, mother filed an ICWA-20 form, two section 388 petitions, and a status review response, in which she claimed to have a variety of Indian ancestry.

On March 9, 2015, mother filed a notice of appeal from an order terminating her reunification services with S.W. Mother argued on appeal that the juvenile court failed to comply with ICWA. On January 27, 2016, this court affirmed the order,

finding that the vague and inconsistent information provided by mother was insufficient to trigger ICWA notice requirements.

Events occurring after the prior notice of appeal in this case

On May 7, 2015, mother filed a section 388 petition seeking unmonitored visits and termination of jurisdiction over the three older children. The petition did not list any Indian heritage. The petition was denied.

On May 21, 2015, a section 366.22 review hearing was held in S.W.'s case. S.W. was placed in the home of his father, with monitored visitation for mother. The goal was to terminate jurisdiction over S.W.

On July 2, 2015, the initial section 366.26 hearing for Kristin, Harmony, and T.W. was held. The court ordered continued placement for the children, with an identified goal of placement in the home of a relative.

On October 23, 2015, DCFS requested a protective custody warrant for Harmony, whose whereabouts were unknown.

On November 12, 2015, mother was present in court for a section 366.26 hearing for Kristin, Harmony, and T.W., and a section 364 review hearing as to S.W. The court continued the section 366.26 hearing for the older three, and terminated jurisdiction over S.W. Termination of jurisdiction was stayed pending receipt of a juvenile custody order. The court also issued a temporary restraining order protecting a DCFS social worker from mother. Harmony was still listed as whereabouts unknown.

On November 16, 2015, the court granted S.W.'s father sole physical and legal custody over S.W. in a juvenile custody "exit" order, awarded mother monitored visitation, and terminated jurisdiction over S.W.

On December 22, 2015, mother filed another petition pursuant to section 388. She did not list any Indian ancestry. The petition was denied.

On December 24, 2015, mother was present in court for a section 366.3 review hearing for Kristin, Harmony and T.W.. The court found that mother's progress had been minimal. The court identified a goal for the girls of permanent placement with a foster parent, relative placement, or adoption with a specific goal of independent living with identification of a caring adult to serve as a lifelong companion. The court noted that the likely date it could identify a permanent plan would be March 10, 2016. Harmony was still AWOL and the court noted that it would identify a specific plan for Harmony once she was located.

On April 15, 2016, DCFS filed a new petition on behalf of S.W., alleging that then six-year-old S.W. was a child described by section 300, subdivision (b), because S.W.'s father had left S.W. in the care and supervision of mother, in spite of court orders. Mother filed a challenge to the court under Code of Civil Procedure section 170.6. Upon transfer to a new courtroom, S.W. was detained in shelter care, with monitored visits for the parents.

On April 22, 2016, the section 366.26 hearing for the three older children was again continued. The court ordered DCFS to update the court as to the best permanent plan for the children.

On June 7, 2016, the court held a section 366.26 hearing for Kristin, Harmony, and T.W. In an addendum report filed the same day, DCFS informed the court that Harmony remained AWOL and no caretaker was willing to commit to a permanent plan of guardianship or adoption of Kristin or T.W. Kristin was in a group home and was not willing to move. T.W. remained in a foster home, but the foster parent was not willing to provide permanency. The three older children were ordered to remain in

placement and DCFS was ordered to present evidence of due diligence in attempting to locate Harmony. The court ordered a transitional independent living plan (TILP) for Kristin.

On June 27, 2016, the second petition filed as to S.W. was found to be true and S.W. was removed from parental custody. Reunification services and monitored visits were ordered for the parents.

On December 8, 2016, the court granted a hearing on a motion by DCFS for a temporary restraining order protecting a second social worker from mother.

On December 14, 2016, mother filed a section 388 petition requesting termination of jurisdiction. In the petition, mother claimed Indian heritage with five tribes: Apache, Cherokee, Crete, Blackfoot, and Redskin. The petition was denied without a hearing.

On January 20, 2017, mother was present for a section 366.21 review hearing for S.W. and section 366.3 review hearing for Kristin, Harmony, and T.W. The parents set S.W.'s review hearing for trial. As to the girls, the court continued their permanent plans. Harmony was still whereabouts unknown. T.W. had been stable in placement and was ready and willing to move to Chicago, Illinois to live with MGM. Over mother's objection, the court ordered that T.W. be placed with MGM in Chicago, Illinois.

On February 1, 2017, mother appealed from the January 20, 2017 order granting placement of T.W. with MGM in Chicago, Illinois.[4]

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[4] Mother's notice of appeal references a single order: the January 20, 2017 order placing T.W. with MGM in Chicago, Illinois. The parties have not addressed the issue of whether mother's notice of appeal is sufficient to raise the ICWA issue as to all four children. We must liberally construe a notice of

DISCUSSION

I. Standard of review

Where, as here, the trial court has made a finding that ICWA is inapplicable, the finding is reviewed under the substantial evidence standard. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430; *In re Karla C.* (2003) 113 Cal.App.4th 166, 178-179.) Thus, we must uphold the court's orders and findings if any substantial evidence, contradicted or uncontradicted, supports them, and we must indulge all legitimate inferences in favor of affirmance. (*In re John V.* (1992) 5 Cal.App.4th 1201, 1212.) A juvenile court's ICWA finding is also subject to harmless error analysis. (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 16 (*Alexis H.*).)

We accept the juvenile court's credibility determinations. (*In re Cole Y.* (2015) 233 Cal.App.4th 1444, 1451-1452.) "'[W]e must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact. [Citation.]' [Citation.]" (*Id.* at p. 1452.)

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appeal. (Cal. Rules of Court, rule 8.405(a)(3).) Notices of appeal are liberally construed "to implement the strong public policy favoring the hearing of appeals on the merits. [Citation.]" (*Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc.* (1998) 64 Cal.App.4th 955, 960-961.) "This policy is especially vital where the faulty notice of appeal engenders no prejudice and causes no confusion concerning the scope of the appeal. [Citation.]" (*Ibid.*) Here, DCFS has not challenged the notice of appeal and has suffered no prejudice, having had the opportunity to brief the issue on its merits as to all four children. In addition, any finding regarding ICWA as to T.W. will be law of the case as to the other children, as the only evidence of Indian heritage in this case came from mother. Therefore, we liberally construe the notice of appeal to include all orders entered as to all children on January 20, 2017.

II. ICWA

ICWA is federal legislation designed to protect American Indian people and their culture. (25 U.S.C. § 1902; *In re Crystal K.* (1990) 226 Cal.App.3d 655, 661.) ICWA applies to all proceedings involving Indian children that may result in an involuntary foster care placement; guardianship or conservatorship placement; custody placement under Family Code section 3041; declaration freeing the child from the custody and control of one or both parents; termination of parental rights; or adoptive placement. (Cal. Rules of Court, rule 5.480.)

An "Indian child" is defined as any unmarried person under the age of 18 who is (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4); § 224, subd. (c).)

If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved in a dependency proceeding, the social worker or probation officer is required to make further inquiry regarding the possible Indian status of the child as soon as practicable. In a dependency proceeding, there is a continuing duty of the court and DCFS to inquire whether the subject child may be Indian. (See § 224.3, subds. (a), (c).) The social worker or probation officer must interview the parents and extended family members to gather the information required, then contact the Bureau of Indian Affairs and State Department of Social Services for assistance in identifying the tribes of which the child may be a member or eligible for membership. (§ 224.3, subd. (c).) The ICWA's notice provisions are strictly construed because the failure to give proper notice of a dependency proceeding to a tribe forecloses participation by the tribe. (*In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1216; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) Thus the failure to provide proper

notice is prejudicial error requiring reversal and remand. (*Samuel P.*, at p. 1267.)

However, "By its own terms, [ICWA] requires notice only when child welfare authorities seek permanent foster care or termination of parental rights; it does not require notice *anytime* a child of possible or actual Native American descent is involved in a dependency proceeding." (*Alexis H., supra*, 132 Cal.App.4th at p. 14.)

In order for the ICWA requirements to be triggered, there must be "more than a bare suggestion that a child might be an Indian child." (*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520.)

Because ICWA imposes on the juvenile court a continuing duty to inquire whether a child is an Indian child, a parent "may challenge a finding of ICWA's inapplicability in an appeal from the subsequent order, even if she did not raise such a challenge in an appeal from the initial order." (*In re Isaiah W.* (2016) 1 Cal.5th 1, 6.)

III. The evidence before the court following mother's first notice of appeal supports the juvenile court's ICWA finding

The issue in this appeal is limited to whether the trial court violated an ongoing duty of inquiry as to ICWA. Because a prior appeal on the same issue was filed in this matter on January 27, 2016, we limit our discussion to the question of whether the evidence subsequent to the previous appeal provided the juvenile court "reason to know" that the siblings were Indian children.[5]

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[5] Under the doctrine of law of the case, the January 27, 2016 unpublished opinion in this matter is binding on all further proceedings. (*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1291.) The doctrine of law of the case serves to promote finality of litigation by preventing a

As mother concedes, there is limited additional relevant evidence on the ICWA issue since mother's first appeal on this issue. Mother references only the three section 388 petitions filed since the first appeal. Only one of those three petitions references possible Indian ancestry.

The trial court did not err in finding that the conflicting information mother provided regarding her possible Indian heritage did not give it reason to know that any of mother's children was an Indian child.

As set forth in the prior opinion on this issue, none of the circumstances under which a court has "reason to know" was present in this matter:

> "Mother initially informed DCFS that she had no ties with Indian ancestry. She then submitted a form to the juvenile court suggesting that she may have Apache, Blackfoot, and Crete Indian ancestry. When the juvenile court inquired about mother's Indian heritage at the September 26, 2013 detention hearing, she admitted that neither she, nor the children, nor the children's respective fathers, were registered members of any Indian tribe. Mother provided no names of any family members who might provide further information. This information was insufficient to trigger ICWA notice requirements."

Mother's continued inconsistency regarding her possible Indian ancestry was also insufficient to trigger ICWA notice requirements. Mother filed six section 388 petitions in all, inconsistently naming tribes and alternately claiming no Indian ancestry at all. The single petition filed during the relevant time

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party from relitigating questions previously decided by a reviewing court. (*Ibid.*) None of the exceptions to doctrine are applicable here. (*Ibid.*)

period referencing Indian tribes referenced five Indian tribes including the "Redskins," an alleged tribe she had never mentioned before. Mother's claims of Indian ancestry were not credible in the context of this case.

Mother's inconsistent claims to various diverse tribes must be viewed in the context of mother's overall credibility. During the proceedings, mother made various accusations against the social workers, including an accusation that DCFS was being paid by the Crips to take her children. She also claimed that her children were Disney actors. Mother also claimed to be employed in movies and music, a claim which MGM denied. Mother had been involuntarily admitted to a psych ward in the past, and claimed that she was a witch.

Issues of credibility are for the trier of fact. (*In re Cole Y., supra,* 233 Cal.App.4th at pp. 1451-1452.) Mother provided numerous false statements to DCFS throughout the proceedings, and in particular, she provided completely irreconcilable statements regarding her supposed Indian ancestry. Under the circumstances, the inconsistent allegations of Indian ancestry stated in the single section 388 petition filed over three years after the commencement of this proceeding did not provide the juvenile court reason to know that any of mother's children might be an Indian child.

IV. Any ICWA error was harmless as to T.W.

ICWA was enacted "out of an increasing concern . . . [over] child welfare practices that separated large numbers of Indian children from their families and tribes, and placed them in non-Indian homes." (*In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1299.) "The stated purpose of the ICWA is to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the *removal of Indian children*

from their families and the *placement of such children in foster care or adoptive homes* which will reflect the unique values of Indian culture . . . .' (25 U.S.C. § 1902.)" (*Santos Y., supra*, at p. 1299, italics added.) Thus, ICWA serves to protect children who are at risk of being separated from their birth families.

T.W. has been placed with MGM. Thus, there is no present issue regarding placement of T.W. in foster care or an adoptive home. The purpose of ICWA is not served by notifying tribes where there is no longer any issue regarding the possible removal of an Indian child from her family, placement of the child in foster care, or adoption.

We need not overturn an ICWA finding when the claimed deficiency in ICWA compliance was harmless. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 652-653.) Even if there had been ICWA error in this proceeding, such noncompliance does not warrant reversal. Any such noncompliance was harmless because T.W. remains with her biological family.[6]

DISPOSITION

The order is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT

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[6] Any error is also arguably harmless as to Kristin, who is now over 18 years old, and Harmony, who has been AWOL since October of 2015, and does not yet have a permanent plan.