Filed 7/25/18 In re Leia H. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re LEIA H., a Person Coming Under the Juvenile Court Law.	B286826 (Los Angeles County Super. Ct. No. DK09450)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.H., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Connie R. Quinones, Joshua D. Wayser, Judges. Reversed and remanded with directions.

Jill Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Stephanie Jo Reagan, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

K.H., father of three-year-old Leia H., appeals from the juvenile court's Welfare and Institutions Code section 366.26[1] order terminating his parental rights, claiming the juvenile court and the Department of Children and Family Services (DCFS) failed to comply with their inquiry duties under the Indian Child Welfare Act (ICWA). Because the juvenile court and DCFS did not comply with ICWA's inquiry requirements, we conditionally reverse the order terminating father's parental rights and remand this case with directions to the juvenile court to ensure full compliance with ICWA.

BACKGROUND[2]

I. The Prior Dependency Case

On February 9, 2015, DCFS filed a dependency case concerning father's alleged physical abuse of Leia's mother, C.D.[3]

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1 All statutory citations are to the Welfare and Institutions Code.

2 Because the only issue on appeal concerns ICWA compliance, we focus our background on facts bearing on that issue.

3 Mother is not a party to this appeal.

In that case, father and mother signed Parental Notification of Indian Status forms checking the box that stated "I have no Indian ancestry as far as I know." The juvenile court found ICWA did not apply.

II. The Current Dependency Case

On January 19, 2016, DCFS filed a section 300 petition that alleged, as subsequently sustained, that mother had a six-year history of substance abuse, including heroin, and was a current abuser of alcohol, rendering her unable to provide Leia with regular care and supervision. The petition further alleged that mother left Leia with maternal grandfather without making an appropriate plan for the child's ongoing care and supervision and that mother failed to provide the child with the basic necessities of life such as food, clothing, shelter, and medical care.

Attached to the section 300 petition was a January 14, 2016, Indian Child Inquiry Attachment signed by a DCFS social worker. According to boxes checked on the form, an Indian child inquiry was made about Leia, and she had no known Indian ancestry.

DCFS's January 19, 2016, Detention Report referred to the family's prior dependency case. In the Indian Child Welfare Act Status section of the report, DCFS reported, "On 2/09/15, the Court made the finding that the Indian Child Welfare Act does not apply in this case."

Father, who was not named in the section 300 petition, did not appear at the January 19, 2016, detention hearing. Mother appeared. In connection with her appearance, mother completed a Parental Notification of Indian Status form, checking the box

next to the statement: "I have no Indian ancestry as far as I know."

At the hearing, the juvenile court stated to mother, "You've indicated you have no Native American ancestry as far as you know." Mother responded, "Correct." The juvenile court asked if mother knew whether father had Native American ancestry. Mother responded, "I know—I think he does." The juvenile court asked mother, "Do you have any information?" DCFS's attorney interjected, "I note that on 2-9-15 the court found that he did not—that ICWA did not apply." The discussion ended there. The minute order for the hearing states that the juvenile court found that ICWA did not apply.

At the May 11, 2016, jurisdictional hearing, the juvenile court sustained the section 300 petition. Father did not personally attend the hearing, but he appeared through counsel.

In its Status Review Report for the November 9, 2016, sixth-month review hearing, the Department reported that the juvenile court found at the detention hearing that ICWA did not apply. It recommended the juvenile court terminate family reunification services.[4] The juvenile court continued the hearing to January 11, 2017.

Father was physically present for the first time at the January 11, 2017, hearing, but the juvenile court did not ask father any questions about his Native American ancestry and did not order him to complete a Parental Notification of Indian Status form. No such completed form from father for the current dependency case is in the record on appeal.

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[4] Reunification services had not been ordered for father.

Ultimately, on December 5, 2017, after a hearing, the juvenile court issued its section 366.26 order terminating mother's and father's parental rights. The court freed Leia from the custody and control of her parents, found her to be adoptable, and designated maternal grandfather as the prospective adoptive parent.

DISCUSSION

Father contends the juvenile court and DCFS failed to comply with their ICWA inquiry duties. We agree.

I. Standard of Review

Challenges to the adequacy of ICWA inquiries are reviewed for substantial evidence. (See *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 941-943.) "When the facts are undisputed, we review independently whether ICWA requirements have been satisfied. [Citation.]" (*In re Michael V.* (2016) 3 Cal.App.5th 225, fn. 5.)

II. Analysis

ICWA imposes on a juvenile court a continuing duty to inquire whether a child is an Indian child. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 6.) Section 224.3, subdivision (a)[5] imposes the same

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[5] Section 224.3, subdivision (a) provides, "The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care."

duty on the juvenile court and DCFS. When DCFS knows or has reason to know that a Native American child is involved in dependency proceedings, section 224.3, subdivision (c)[6] requires DCFS to make further inquiry about the child's ancestry, including interviewing extended family members.

The ICWA duty to inquire further about a child's Native American ancestry arises when "a person having an interest in the child . . . informs or otherwise provides information suggesting that the child is an Indian child to the court[or] the county welfare agency . . . ." (Cal. Rules of Court, rule 5.481(a)(5)(A).) In *In re Alice M.* (2008) 161 Cal.App.4th 1189, the court observed that further inquiry is necessary even when "vague or ambiguous information is provided regarding Indian heritage or association (e.g., 'I think my grandfather has some Indian blood.'; 'My great-grandmother was born on an Indian reservation in New Mexico')." (*Id.* at p. 1200.)

At the detention hearing, mother told the juvenile court that she believed father had Native American ancestry. When

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6 Section 224.3, subdivision (c) provides, "If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer 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, contacting the Bureau of Indian Affairs and the State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership in and contacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility."

the juvenile court began to inquire about the basis for mother's belief, DCFS's attorney stated that the juvenile court, in the prior dependency case, had found that ICWA did not apply. The juvenile court ended its inquiry, apparently based on counsel's representation. Because there is a *continuing* duty to inquire under ICWA, the juvenile court could not simply rely on the prior finding. (See *In re Isaiah W., supra*, 1 Cal.5th at p. 11 ["Section 224.3(e)(3) implicitly recognizes that any finding of ICWA's inapplicability . . . is not conclusive and does not relieve the court of its continuing duty under section 224.3(a) to inquire into a child's Indian status in all dependency proceedings"].) Mother's statement at the detention hearing in the current case was sufficient to trigger the juvenile court's and DCFS's ICWA inquiry obligations. (*In re Alice M., supra,* 161 Cal.App.4th at p. 1200.)

DCFS concedes in its respondent's brief that the ICWA duty of inquiry was not satisfied here, but, relying on *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431, DCFS argues we should not reverse because father has not shown prejudice. Specifically, DCFS argues that any error is harmless because father has not made an offer of proof or other representation in his appeal that had he been asked in the juvenile court, he would have represented he had Native American heritage.

After DCFS filed its respondent's brief, father filed a motion in this court to take additional evidence on appeal. The additional evidence consisted of a declaration from paternal grandmother claiming Native American heritage on both sides of her family—specifically, Sioux ancestry on her mother's side and Cherokee ancestry on her father's side, which her paternal grandmother documented in a memoir. We treat the declaration

as an offer of proof. (See *In re Rebbeca R., supra,* 143 Cal.App.4th at p. 1431 ["Father is here, now, before this court. There is nothing whatever which prevented him, in his briefing or otherwise, from removing any doubt or speculation [about his Native American heritage]. He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA. He did not"].) Accordingly, father has demonstrated prejudice.

Because the juvenile court and DCFS did not comply with ICWA's inquiry provisions, we conditionally reverse the order terminating father's parental rights and remand this case with directions to the juvenile court to ensure full compliance with ICWA. (See *In re Francisco W.* (2006) 139 Cal.App.4th 695, 705-706 ["The limited reversal approach is well adapted to dependency cases involving termination of parental rights in which we find the only error is defective ICWA notice"]; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 740; *In re J.N.* (2006) 138 Cal.App.4th 450, 461-462.)

DISPOSITION

The order terminating father's parental rights is conditionally reversed. The matter is remanded to the juvenile court for the limited purpose of ensuring compliance with ICWA and related California provisions (see, e.g., § 224.3, subd. (c); Cal. Rules of Court, rule 5.481). If, after appropriate inquiry, the juvenile court determines Leia is an Indian child, the court shall proceed as required by ICWA and related California provisions. If the juvenile court determines Leia is not an Indian child, then it shall reinstate the order terminating father's parental rights to Leia and conduct further proceedings as appropriate.

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KIN, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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