Filed 7/6/15 In re N.T. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re N.T. et al., Persons Coming Under the Juvenile Court Law.	B256790 (Los Angeles County Super. Ct. No. CK92294)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. TRICIA T., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Robin Kesler, Referee. Reversed and Remanded.

Janice A. Jenkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Mother Tricia T. (mother) appeals from the jurisdiction and disposition orders on a petition under Welfare and Institutions Code section 342[1] with respect to her sons, ten-year-old N.T. and seven-year-old T.T. Her sole contention is that the juvenile court and the Los Angeles Department of Children and Family Services (DCFS) failed to comply with the Indian Child Welfare Act (the ICWA). We agree, conditionally reverse, and remand for compliance.

BACKGROUND

We confine our summary of the record to the issue of the ICWA compliance. The case began in August 2012 with the filing of a section 300 petition, which alleged (as later sustained by the juvenile court) that N. and T. were at risk of harm under section 300, subdivision (b), based on mother's use of cocaine and marijuana and her mental and emotional problems (including bipolar disorder). Mother identified N.'s father as Brandon W. The identity of T.'s father is not relevant to this appeal.

The detention report stated that the ICWA "may apply," because mother "states that [the] maternal grandmother may have American Indian [a]ncestry." Mother filed a Parental Notification of Indian Status. In the box for the tribal name, she wrote, "Nebraska," and described the Indian ancestors as "MGM Claudia [F.] – deceased" and "MGA Candis [F.]." At the disposition hearing, the court placed N. and T. in foster care, and ordered DCFS "to contact the maternal side of the family" to investigate the claim of American Indian heritage and to file a supplemental report.

Although the court ordered only an investigation on the maternal side, the September 2012 jurisdiction report summarized the social worker's investigation

---

[1] Undesignated section references are to the Welfare and Institutions Code.

on both the maternal and paternal sides. With respect to mother's side, the report stated that the social worker spoke by telephone with mother's aunt, T.T., who said that she believed she had Cherokee heritage through her maternal great aunt, Candice D., who had a different father than Ms. T.'s other maternal great aunt, Gail H. Ms. T. did not know the names, dates of birth, birth places, or contact information of the possible Indian ancestors and asked the social worker to telephone both of the great aunts to get more information. On September 11, 2012, the social worker spoke by telephone with Candice D, who identified herself as the sister of T.T.'s mother, Claudia T. Ms. D. told the social worker that her great-grandfather, whom she believed to be deceased, "was reported to be a full-blood Native American Indian from Omaha, Nebraska." Ms. D. stated that she did not know his name, date of birth or contact information. On September 11 and 12, 2012, the social worker left telephone messages for Gail H. "requesting contact in regards to American Indian Heritage for the family." There was no further information provided during the pendency of the case regarding whether Gail H. ever responded, or whether further efforts were made to contact her.

With respect to the paternal side, Brandon had informed the social worker that he was in a sexual relationship with mother during the time she became pregnant with N. He considered himself to be N.'s father and had contact with N. at the paternal grandmother's home. The social worker spoke by telephone with N.'s paternal grandmother, Jocelyn W., who said that her maternal great-great-great-great grandmother (Mary C.) was a Choctaw Indian and had died a few years ago. Ms. W. did not know her date of birth, birth place or place of burial. Ms. W. stated that her paternal great-great-great-great-great grandfather was a full-blooded Blackfoot Indian and believed that he was deceased. Ms. W. stated that she did not know his name, date of birth, birth place or place of burial.

Based on this information, the social worker reported that N. had possible Choctaw or Blackfoot heritage, referring only to his possible Indian ancestry on his father's side, and failing to mention his possible Cherokee heritage on mother's side. The report stated that T. had possible Cherokee heritage, referring to mother's ancestry, and that the ICWA eligibility of both children was "[u]known."

At the jurisdiction hearing on September 17, 2012, the court sustained the allegations in the petition described above under section 300, subdivision (b). The reporter's transcript of the hearing is not in the record on appeal. The minute order from the hearing is silent as to the ICWA.

For the disposition hearing held on December 17, 2012, DCFS repeated the summary contained in the September 2012 jurisdiction report regarding attempts to investigate Indian heritage. At the disposition hearing, the court released the children to mother. However, a reporter's transcript of the hearing is not included in the record on appeal, and the minute order from the hearing makes no reference to the ICWA.

In January 2013, the court found that Brandon was not N.'s presumed father and denied him reunification services. The court ordered reunification services for mother. The minute order is silent as to the ICWA (there is no reporter's transcript of the hearing).

In a status review report in July 2013, DCFS stated again that the ICWA "does or may apply," and referred to the December 2012 disposition report for additional information. At the hearing on July 26, 2013, the court continued the case for a progress report, and the minute order of the hearing (in the absence of a reporter's transcript) does not mention the ICWA.

For the next hearing in October 2013, the DCFS report was inconsistent with respect to the ICWA. It stated that the ICWA did not apply, but also stated that N.

had possible Choctaw or Blackfoot heritage, that T. had possible Cherokee heritage, and that their the ICWA eligibility was "[u]nknown." The report also referred to the December 2012 disposition report for further information. At the hearing on October 25, 2013 (for which there is no transcript), the court continued the matter for a status review. Nothing in the court's minute order mentions the ICWA.

In January 2014, DCFS filed a section 342 petition alleging that mother allowed T. to stay with unapproved people for 10 days and that both children were not attending school regularly. The detention report for the section 342 petition stated that the ICWA does not apply. Although the report stated that an Indian Ancestry Questionnaire and Indian Child Inquiry form were attached to the report, no such forms are included in the copy of the disposition report in the appellate record.

In the report for the jurisdiction and disposition hearing on the section 342 petition, DCFS stated that the ICWA did not apply, but also stated (as had prior reports) that N. had possible Choctaw or Blackfoot heritage, that T. had possible Cherokee heritage, and that their ICWA eligibility was "[u]nknown." The report also referred to the December 2012 disposition report for further information. Attached to section 342 report was an Indian Child Inquiry form for each child filled out by a social worker. The social worker checked boxes indicating that she had questioned mother and that the children had no known Indian ancestry. On March 11, 2014, the court sustained the section 342 petition. In neither the reported hearing nor the minute order from the hearing is there any mention of the ICWA.

The DCFS interim review report stated without further explanation that the ICWA did not apply. On April 14, 2014, the court removed the children from

mother's custody and ordered that mother receive reunification services. The hearing was reported. The court made no finding whether the ICWA applied at the hearing, and the minute order from the proceeding makes no mention of any such finding.

DISCUSSION

Mother contends that the juvenile court and DCFS failed to comply with the ICWA. We agree, conditionally reverse, and remand for compliance.

"The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) The juvenile court and the Agency have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (Cal. Rules of Court, rule 5.481(a).) If, after the petition is filed, the court 'knows or has reason to know that an Indian child is involved,' notice of the pending proceeding and the right to intervene must be sent to the tribe or the Bureau of Indian Affairs if the tribal affiliation is not known. (25 U.S.C. § 1912; Welf. & Inst. Code, § 224.2; see Cal. Rules of Court, rule 5.481(b).) Failure to comply with the notice provisions and determine whether the ICWA applies is prejudicial error." (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1197.)

The juvenile court is required to make a finding whether the ICWA applies. "'While the record must reflect that the court considered the issue and decided whether ICWA applies, its finding may be either express or implied.'" (*In re E.W.* (2009) 170 Cal.App.4th 396, 404.) "[A]n implicit ruling suffices, at least as long as the reviewing court can be confident that the juvenile court considered the issue

and there is no question but that an explicit ruling would conform to the implicit one." (*Id*. at p. 405.)

Here, the record contains no explicit ruling. DCFS contends that the record on appeal does not contain a reporter's transcript of all the hearings in the case, and that it is possible that a finding the ICWA did not apply was made at one of the unreported hearings. That remote possibility, however, does not render the record insufficient for us to decide the issue. The record includes all the minute orders in the case and the DCFS reports. Had a finding that the ICWA does not apply been made, it is difficult to believe that it would not be reflected in the minute orders of the proceedings and referred to in the DCFS reports filed in the case. Yet no such finding appears in any minute order, and the DCFS reports not only fail to refer to any such finding, they are also in substantial conflict as to the applicability of the ICWA. Further, the reporter's transcripts of the proceedings on the section 342 hearings in March and April 2014, which are in the record on appeal, do not reflect any discussion of the ICWA. Therefore, we are confident that no express ruling on the ICWA applicability was made.

Moreover, the record does not support the existence of an implicit ruling. As we have noted, the evidence concerning whether the ICWA applied was in conflict. As of July 2013, DCFS was still reporting that the ICWA "does or may apply." In October 2013, DCFS provided inconsistent information: it stated without explanation that the ICWA did not apply, but also stated that N. had possible Choctaw or Blackfoot heritage, that T. had possible Cherokee heritage, and that their ICWA eligibility was "[u]nknown." In January 2014, the detention report for the section 342 petition stated that the ICWA does not apply. But the report referred to Indian Ancestry Questionnaire and Indian Child Inquiry attachments that are not included in the copy of the disposition report in the clerk's

transcript on appeal. In the later report for the jurisdiction and disposition hearing on the section 342 petition, in March 2014, DCFS inconsistently stated that the ICWA did not apply, but also stated that N. and T. had possible Indian heritage and that their ICWA eligibility was "[u]nknown." Adding to the conflict in evidence, attached to the section 342 report was an Indian Child Inquiry form for each child filled out by a social worker. The social worker checked boxes indicating that she had questioned mother and that mother had said the children had no known Indian ancestry. However, the report also referred to the December 2012 report for information on Indian heritage, which summarized the social worker's investigation that had revealed possible Indian heritage.

On this record of conflicting evidence, it is impossible to say that had the court explicitly ruled on the application of ICWA, it would have ruled that it did not apply. Indeed, given the conflict in the evidence, further investigation was needed before any finding could be made. (See *In re L.S., supra,* 230 Cal.App.4th at p. 1198 ["Given the conflicting and inadequate information on mother's claim of Indian heritage, the court had a duty either to require the Agency to provide a report with complete and accurate information regarding the results of its inquiry and notice or to have the individual responsible for notice to testify in court regarding the inquiry made, the results of the inquiry, and the results of the notices sent"]; *In re Gabriel G*. (2012) 206 Cal.App.4th 1160, 1167-1168 [court and agency have duty to inquire further when parent provides conflicting information about Indian heritage].) Thus, we conclude that the court erred in failing to make any finding regarding the applicability of the ICWA, and that further inquiry is required to determine whether the ICWA applies.

To aid the parties and court on remand, we suggest at least the following additional investigation. "[F]ederal and state law require that the notice sent to the

potentially concerned tribes include 'available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data.' [Citations.] To fulfill its responsibility, the Agency has an affirmative and continuing duty to inquire about, and if possible obtain, this information. [Citations.] 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).) That information '*shall* include' '[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.' (§ 224.2, subd. (a)(5)(C).) Because of their critical importance, ICWA's notice requirements are strictly construed." (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396-1397.)

First, with respect to possible Indian heritage on mother's side, DCFS should make further efforts to contact Gail H. and report on the results of such efforts. The record shows that the social worker left two telephone messages for Ms. H. on September 11 and 12, 2012, but there is never again any reference to whether Ms. H. responded, what information (if any) she provided, or whether additional efforts were made to contact her. This fails to comply with the affirmative and continuing duty of DCFS to inquire about, and if possible obtain, information about N. and T.'s possible Indian ancestry.

Second, DCFS should provide additional information to explain the apparent inconsistency between, on the one hand, mother's original claim of Indian ancestry and the results of the social worker's investigation of that claim in September 2012, and, on the other hand, the Indian Child Inquiry form for each child filled out by a social worker for the section 342 petition, in which the social worker checked boxes indicating that she had questioned mother and that the children had no known Indian ancestry.

Third, with respect to possible Indian heritage on the paternal side, DCFS must at least determine whether a paternity determination has been made that Brandon is or is not N.'s biological father. It is true that until Brandon's biological parentage is established, the requirements of the ICWA are not triggered based on Brandon's possible Indian heritage. (See *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1166, fn. 5.) But on these unique facts, where the record appears to confirm possible Indian heritage through an alleged biological father, the duty to conduct an affirmative and continuing inquiry into the children's possible Indian ancestry reasonably includes the duty to determine whether there has been any determination of biological paternity that would invoke the ICWA.

Finally, based on the results of the additional investigation, the court must resolve any conflicts in the evidence as to the applicability of the ICWA, make a finding whether the ICWA applies, and, if so, order the notification of appropriate tribes, keeping in mind the very low threshold required to invoke the notice provisions.

DISPOSITION

The orders sustaining the section 342 petition and removing the children from mother's custody are reversed and the case remanded to the juvenile

court with directions to order DCFS to further investigate the children's claimed Indian ancestry. Thereafter, the court shall make a finding whether the ICWA applies and direct notification of any appropriate tribes. If, after proper notice, no tribe indicates the children are Indian children within the meaning of the ICWA, the juvenile court shall reinstate the orders on the section 342 petition.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.