Filed 5/5/17 In re P.W. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re P.W., A Person Coming Under the Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. W.Y., Defendant and Appellant.	B277210 (Los Angeles County Super. Ct. No. CK91413)

APPEAL from an order of the Superior Court of Los Angeles County, Marilyn Kading Martinez and Steff Padilla, Commissioners. Conditionally affirmed and remanded.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Brian Mahler, Associate County Counsel, for Plaintiff and Respondent.

In this appeal from a juvenile court order terminating parental rights (Welf. & Inst. Code, § 366.26),[1] mother, appellant W.Y., contends the record does not show that the Department of Children and Family Services (department) and the juvenile court complied with the inquiry and notice requirements of the federal Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). We agree, and remand for further proceedings. (See *In re Michael V.* (2016) 3 Cal.App.5th 225, 236 (*Michael V.*).)

FACTUAL AND PROCEDURAL BACKGROUND

Our discussion focuses on facts relevant to the ICWA issue.

Mother, born in 1993, is a former dependent minor whose case was closed on May 18, 2011. On that same date, mother gave birth to a daughter, P.W. The department received referrals regarding P.W. in May, June, and August 2011. In response to these referrals, Children's Social Workers (CSW) Norris and Pacheco contacted mother on several occasions. On September 23, 2011, mother told Pacheco that she had no Indian ancestry.

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

In December 2011, CSW Pacheco learned that mother was homeless. Pacheco tried but was unable to contact mother by cell phone.

In January 2012, the department filed a dependency petition on behalf of P.W. The petition contained two counts: that mother had placed P.W. at risk by caring for her while under the influence of marijuana (count b-1), and by leaving her with a third party without making an appropriate plan for her care and supervision (count b-2). In its accompanying detention report, the department stated that the whereabouts of mother and P.W. remained unknown. The department sought a protective custody warrant for P.W.

On January 12, 2012, the juvenile court found the department had made a prima facie showing that P.W. was a dependent child, and ordered that the child be detained. It issued a protective custody warrant for P.W. and an arrest warrant for mother.

On March 2, 2012, mother's youth advocate, Ms. Anderson, requested information about this case from Investigating Social Worker Obika. Obika informed Anderson that mother needed to contact the department and bring P.W. to the department's office on Vermont Avenue. Mother scheduled a meeting with Obika on March 5, 2012, but did not keep the appointment. Mother left a message stating that she would not meet with anyone from the department without consulting an attorney.

On March 7, 2012, mother appeared in dependency court to inquire about the status of this case. On that date, mother filled out an ICWA-020 form stating she "may have Indian ancestry," but was "unsure what tribe(s)." Later that day, mother's youth

advocate brought P.W. to the department's office. The department placed P.W. in a nonrelative foster home.

Mother did not appear at the March 9, 2012 pretrial resolution conference, but was represented by counsel. Counsel stated that mother had obtained housing through her youth advocate. As to mother's statement on the ICWA-020 form that she may have Indian heritage, the juvenile court (Commissioner Marilyn Kading Martinez) stated: "I have mother's ICWA notification, and based on that, I find that it is only speculative that there may be – that ICWA may apply, and given that speculation and lack of any additional information, I find there is no reason to know that the Indian Child Welfare Act applies." Counsel for mother and the department said they had no objections to this finding.

The March 9, 2012 minute order was similarly phrased: "Parental notification of Indian status received from mother's counsel stating that mother has possible American Indian heritage but unsure of which tribe. [¶] Court finds that there is only speculat[ion] as to [Indian] heritage."[2]

When mother appeared at the April 26, 2012 pretrial resolution conference, she was asked no questions about her claim of possible Indian heritage. Nor was the department directed to investigate mother's claim of possible Indian ancestry.

On May 16, 2012, the department filed a first amended petition. At the combined jurisdiction and disposition hearing on June 27, 2012, the juvenile court dismissed counts b-1 (marijuana use) and b-2 (leaving P.W. with a third party without making appropriate plans for her care), and sustained amended count b-3

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[2] Mother was arrested on felony charges in Los Angeles on March 9, 2012, and in Santa Monica on March 19, 2012.

(domestic violence between mother and her male companion Adam W. while the child was in the home).

The six-month and 12-month review hearings were held on December 19, 2012, and June 19, 2013, respectively. ~(CT 225-226, 2 CT 265-266)~ No ICWA issues were addressed at those hearings. At the end of the 12-month reunification period, the juvenile court terminated mother's reunification services and scheduled a section 366.26 permanency planning hearing.

At the May 19, 2014 permanency planning hearing, the court found that P.W. was not likely to be adopted, and ordered a permanent plan of foster care. At the August 2015 permanency plan review hearing, the court was informed that P.W.'s previous caretaker, Ms. K., was interested in adopting her. The following month, P.W. was placed with Ms. K. Eventually, Ms. K. requested a new placement for P.W., and the child was placed with Mr. and Mrs. B., her current prospective adoptive parents, in February 2016.

At a continued section 366.26 hearing in August 2016, the court denied mother's request to apply the benefit exception, and terminated her parental rights. The court selected adoption as the permanent plan and designated Mr. and Mrs. B. as P.W.'s prospective adoptive parents. Mother filed a timely appeal from the order terminating her parental rights.

DISCUSSION

Mother contends that because neither the department nor the juvenile court conducted a further inquiry as to her claim of possible Indian heritage, the inquiry requirements of ICWA have not been met in this case. We agree.

I

"ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. (25 U.S.C. § 1902; see *In re Isaiah W.* (2016) 1 Cal.5th 1, 7–8; *In re W.B.* (2012) 55 Cal.4th 30, 47.) For purposes of ICWA, an "'Indian child'" is a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4); see Welf. & Inst. Code, § 224.1, subd. (a) [adopting federal definitions].)" (*Michael V.*, *supra*, 3 Cal.App.5th at pp. 231–232.)

ICWA provides that in any involuntary state court proceeding "where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe" of the pending proceedings and its right to intervene. (25 U.S.C. § 1912(a); see § 224.2 [similar notice requirements under California law].)

A. *Circumstances That May Create a Reason to Know*

The circumstances that may provide reason to know the child is an Indian child include, without limitation: "A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or 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 or one or more of the child's biological

parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1).)

B. *Duty of Further Inquiry*

"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 [BIA] 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." (§ 224.3, subd. (c).)

"The continuing nature of a juvenile court's duty to inquire into a child's Indian status appears on the face of section 224.3(a)." (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 10.) 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."

In re Isaiah W., *supra*, 1 Cal.5th 1 is instructive. In that case, a dependent child, Isaiah, was detained at birth because he had a positive toxicology screen for marijuana and displayed

signs of withdrawal. (*Id.* at p. 6.) His mother, Ashlee, informed the juvenile court at the detention hearing that she "may have American Indian ancestry. The court concluded it had no reason to know that Isaiah was an Indian child but ordered the Department to investigate Ashlee's claims." (*Ibid.*) At the jurisdictional and dispositional hearing, the department reported that "Isaiah's grandfather may have had Blackfeet ancestry and his great-great-grandmother may have been a member of a Cherokee tribe. The court concluded that 'any possibility [that Isaiah is an Indian child] is really too attenuated and remote for it to suggest to this court or . . . for this court to know that the child would fall under the Indian Child Welfare Act.' Accordingly, the court did not order the Department to provide notice to any tribe or to the BIA." (*Ibid.*) Ashlee's parental rights were terminated, and Isaiah was freed for adoption by his foster mother. (*Id.* at p. 7.)

Ashlee appealed from the order terminating her parental rights, contending "the juvenile court had reason to know Isaiah was an Indian child yet failed to order the Department to comply with ICWA's notice requirements." (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 7.) In concluding that the issue was not forfeited by Ashlee's failure to timely appeal from the ICWA finding in the juvenile court's dispositional order (*id.* at pp. 14–15), the Supreme Court stated: "Although the juvenile court in this case found ICWA inapplicable at the January 2012 dispositional hearing, the court had an affirmative and continuing duty to determine ICWA's applicability at the April 2013 hearing to terminate Ashlee's parental rights. The court's April 2013 termination order necessarily subsumed a present determination of ICWA's inapplicability, and Ashlee brought a timely appeal

from the April 2013 order challenging that determination. The fact that Ashlee did not allege ICWA notice error in an appeal from the January 2012 dispositional order does not preclude her from raising the claim in this appeal." (*Id.* at p. 15.) The Supreme Court found that under section 224.3, subdivision (a), which declares an "affirmative and continuing duty" that applies to "all dependency proceedings," the juvenile court had a continuing duty to inquire "whether Isaiah was an Indian child at the April 2013 proceeding to terminate Ashlee's parental rights, even though the court had previously found no reason to know Isaiah was an Indian child at the January 2012 proceeding to place Isaiah in foster care. Because the validity of the April 2013 order is necessarily premised on the juvenile court's fulfillment of that duty, there is nothing improper or untimely about Ashlee's contention in this appeal that the juvenile court erred in discharging that duty." (*Id.* at p.11, italics omitted.)

C. *Final Determination by Tribe or Bureau of Indian Affairs*

Because Indian tribes possess sovereign rights over their own internal affairs, they are the final arbiter of their membership rights. (See *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1386–1387 and cases cited.)

As our Supreme Court explained in *In re Isaiah W.*, *supra*, 1 Cal.5th at page 15, the purpose of providing notice is to allow the tribes to determine whether the minor is an Indian child. For this reason, "social services departments and juvenile courts should inquire about a child's Indian status early in the proceedings and should provide notice at the soonest possible opportunity. Notice must be provided 'where the court knows or has reason to know that an Indian child is involved' (25 U.S.C.

§ 1912(a)), and section 224.3, subdivision (b) sets forth a nonexhaustive list of 'circumstances that may provide reason to know the child is an Indian child.' Importantly, '[t]he relevant question is not whether the evidence . . . supports a finding that the minor[] [is an] Indian child[]; it is whether the evidence triggers the notice requirement of ICWA so that the tribes themselves may make that determination.' (*In re D.C.* (2015) 243 Cal.App.4th 41, 63.) After proper notice has been given, if the tribes respond that the minor is not a member or not eligible for membership, or if neither the BIA nor any tribe provides a determinative response within 60 days, then the court may find that ICWA does not apply to the proceedings. At that point, the court is relieved of its duties of inquiry and notice unless the BIA or a tribe subsequently confirms that the child is an Indian child. '"To maintain stability in placements of children in juvenile proceedings, it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child." [Citations.]' (*In re D.C.*, at p. 63.)" (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 15.)

In re Kadence P., supra, 241 Cal.App.4th 1376 is illustrative. In that case, the mother, Shahida, initially "denied any Indian ancestry and on September 3, 2014 completed a questionnaire to that effect." (*Id.* at p. 1382.) But when Shahida later indicated that the child, Kadence, "may be a member or eligible for membership in the Blackfeet Indian Tribe," the court ordered the child services department "to contact the maternal grandmother to confirm any Indian ancestry." (*Ibid.*) The maternal grandmother told the department "that her father's side of the family had Blackfeet Indian ancestry and recalled photographs of her father's ancestors in Indian dress." (*Ibid.*)

After speaking with her brother, the maternal grandmother reported that the family had "Creek Indian ancestry" and had a maternal ancestor who was part Seminole. (*Ibid.*) After conducting further interviews of family members, the department was unable to substantiate Shahida's claim of possible Blackfeet, Creek, or Seminole ancestry, and did not send notices to any of the tribes or the BIA. (*Id.* at p. 1383.)

On Shahida's appeal from the dispositional order, the appellate court found that "the juvenile court properly inquired about Shahida's Indian ancestry at each hearing, and the Department conscientiously interviewed several family members to obtain additional information." (*In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1386.) However, the matter was remanded with directions to give notice of Kadence's dependency case to the Blackfeet, Creek and Seminole tribes in accordance with ICWA and California law. (*Id.* at p. 1388.)

II

Mother contends the department and the juvenile court erred by failing to conduct a further investigation of her sworn statement in the ICWA-020 form that she may have Indian ancestry. We conclude she is correct.

Mother's statement at the March 9, 2012 pretrial resolution conference that she may have Indian ancestry but was unaware of which tribe was sufficient to trigger a duty of inquiry. (See *In re Isaiah W.*, *supra,* 1 Cal.5th at p. 6.) The standard that triggers the duty of inquiry is lower than the standard for giving notice to the tribes or the BIA. (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200.) The juvenile court erred by failing to require the department to interview mother, examine mother's own dependency case file, and interview her family members to

ascertain whether there was any information to substantiate her claim of possible Indian ancestry. (See *Michael V.*, *supra*, 3 Cal.App.5th at pp. 235–236 [department failed to interview mother's relatives to determine whether there was Indian ancestry on either side of family, necessitating remand for further proceedings].)

Because the duty of inquiry is ongoing, neither the juvenile court nor the department was entitled to rely on the March 9, 2012 ICWA finding at the August 18, 2016 hearing on termination of parental rights. (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 10.) The fact that mother did not initially come forward with additional information to support her assertion of possible Indian ancestry is not determinative. "Importantly for our purposes, the burden of coming forward with information to determine whether an Indian child may be involved and ICWA notice required in a dependency proceeding does not rest entirely—or even primarily—on the child and his or her family. Juvenile courts and child protective agencies have 'an affirmative and continuing duty to inquire' whether a dependent child is or may be an Indian child. (§ 224.3, subd. (a); *In re Isaiah W.*, *supra*, 1 Cal.5th at pp. 9, 10–11; see Cal. Rules of Court, rule 5.481(a); see also *In re W.B.*, *supra*, 55 Cal.4th at pp. 52–53.) This affirmative duty to inquire is triggered whenever the child protective agency or its social worker 'knows or has reason to know that an Indian child is or may be involved . . . .' (Cal. Rules of Court, rule 5.481(a)(4).) At that point, the social worker is required, as soon as practicable, to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility. (§ 224.3,

subd. (c); Cal. Rules of Court, rule 5.481(a)(4)(A); see *In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1386 . . . .)" (*Michael V., supra,* 3 Cal.App.5th at p. 233.)

DISPOSITION

The matter is remanded to the juvenile court and the department is directed to conduct a meaningful investigation of mother's claim of possible Indian ancestry. The department is to make "genuine efforts to locate other family members who might have information bearing on the [child's] possible Indian ancestry. If that investigation produces any additional information substantiating [mother's] claim, notice must be provided to any tribe that is identified or, if the tribe cannot be determined, to the BIA. The Department shall thereafter notify the court of its actions and file certified mail return receipts for any ICWA notices that were sent, together with any responses received. The court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether [P.W. is an] Indian [child]. If the court finds [P.W. is an Indian child], it shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and related California law. If not, the court's original section 366.26 order remains in effect." (*Michael V.*, *supra*, 3 Cal.App.5th at p. 236.)

The order terminating mother's parental rights is conditionally affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.