Filed 5/15/18 In re Estevan M. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

In re ESTEVAN M. et al., Persons Coming Under the Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. SUSIE R., Defendant and Appellant.	B286095 (Los Angeles County Super. Ct. No. CK78722)

APPEAL from an order of the Superior Court of Los Angeles County, Philip L. Soto, Judge. Affirmed.

Emery El Habiby, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sally Son, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Susie R. appeals from a juvenile court order terminating her parental rights over three children, Estevan M., Ray M., and Jacob M. She contends the juvenile court erred in terminating those rights because the court and the Los Angeles County Department of Children and Family Services failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)). Because any such error was harmless, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2015 the Department filed a petition alleging juvenile court jurisdiction over Estevan, Ray, and Jacob pursuant to Welfare and Institutions Code section 300, subdivision (b).[1] The Department alleged Susie's current, long-term drug use, because of which the juvenile court had exercised jurisdiction over the same children on two previous occasions,[2] rendered her

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

[2] In October 2009 the juvenile court sustained a section 300 petition on behalf of the children based on allegations of domestic violence between Susie and the children's father, Susie's drug abuse, and Jacob's positive toxicology screen for methamphetamine following his birth. The record does not indicate what happened after the court sustained that petition. In February 2013 the juvenile court sustained another section 300 petition on behalf of the children based on allegations of inappropriate discipline by Susie, domestic violence between

unable to provide regular care and supervision for the children. The Department also alleged the children's father, Ray Sr., knew of Susie's drug abuse and failed to protect the children from the risk of harm it created. The juvenile court sustained the petition, and at a section 366.26 selection and implementation hearing in October 2017 the court terminated parental rights and selected adoption as the children's permanent plan. Susie appealed.

DISCUSSION

A. *The ICWA Inquiry and Notice Requirements*

"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. [Citations.] For purposes of ICWA, an 'Indian child' is an unmarried individual under age 18 who is either a member of a federally recognized Indian tribe or is eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe." (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 783 (*Elizabeth M.*); see *In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8 (*Isaiah W.*).)

"As the California Supreme Court explained in *Isaiah W.*, notice to Indian tribes is central to effectuating ICWA's purpose,

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Susie and the children's father, and Susie's drug abuse. The Department states, and Susie does not dispute, the proceeding on that petition concluded with the juvenile court granting full custody of the children to their father, issuing a restraining order against Susie with respect to Estevan, and ordering Susie to have monitored visitation with the other children.

enabling a tribe to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. [Citation.] Notice to the parent or Indian custodian and the Indian child's tribe is required by ICWA in state court proceedings seeking foster care placement or termination of parental rights 'where the court knows or has reason to know that an Indian child is involved.' [Citation.] Similarly, California law requires notice to the parent, legal guardian or Indian custodian and the Indian child's tribe in accordance with section 224.2, subdivision (a)(5), if the Department or court 'knows or has reason to know that an Indian child is involved' in the proceedings." (*Elizabeth M.*, *supra*, 19 Cal.App.5th at p. 784.)

"[A]lthough ICWA itself does not define 'reason to know,' California law, which incorporates and enhances ICWA's requirements, identifies the circumstances that may constitute reason to know the child is an Indian child as including, without limitation, when 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 or one or more of the child's biological parents, grandparents or great-grandparents are or were a member of a tribe.'" (*Elizabeth M.*, *supra*, 19 Cal.App.5th at p. 784, fn. omitted.)

"In addition, new federal regulations to implement ICWA specify a court has 'reason to know' the child is an Indian child if '[a]ny participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child.' [Citation.] These regulations

apply to section 366.26 hearings to terminate parental rights initiated on or after December 12, 2016, even if the child has been involved in dependency proceedings prior to that date." (*Elizabeth M.*, *supra*, 19 Cal.App.5th at pp. 784-785.)

"Judicial Council form ICWA-020, Parental Notification of Indian Status, which the juvenile court must order a parent to complete at his or her first appearance in the dependency proceeding [citation], often provides the court and the child protective agency with the first information 'suggesting' or 'indicating' the child involved in the proceeding is or may be an Indian child. But the burden of developing that information does not rest primarily with the parents or other members of the child's family. Juvenile courts and child protective agencies 'have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings . . . .' [Citations.] And once the agency or its social worker has reason to know an Indian child may be involved, 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. [Citations.] '[T]he duty to inquire is triggered by a lesser standard of certainty regarding the minor's Indian child status . . . than is the duty to send formal notice to the Indian tribes.'" (*Elizabeth M.*, *supra*, 19 Cal.App.5th at p. 785.)

Finally, "[t]he juvenile court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings." (*In re E.W.* (2009) 170 Cal.App.4th 396, 403; accord, *In re M.R.* (2017) 7 Cal.App.5th 886, 904.) "'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.*, at p. 404; see *In re Asia L.* (2003) 107 Cal.App.4th 498, 506.)

B. *Any Error in Complying with ICWA Was Harmless*

Susie contends, and the Department concedes, the juvenile court and the Department did not comply with the inquiry and notice requirements because they failed to obtain from Susie a form ICWA-020 or otherwise inquire about her possible Indian ancestry. Susie also contends the juvenile court erred in terminating her parental rights without making a finding, express or implied, that ICWA did not apply.[3] But even assuming these contentions are true, Susie has not demonstrated the requisite prejudice. (See *In re N.E.* (2008) 160 Cal.App.4th 766, 769 ["[e]ven if the juvenile court and [the social services agency] failed in their inquiry responsibilities, we cannot disturb the juvenile court's order without a showing [appellant] was prejudiced by the claimed error"]; *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430-1431 ["a miscarriage of justice . . . is the fundamental requisite before an appellate court will reverse a trial court's judgment"]; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413-1414 [juvenile court's error in failing to make a determination whether ICWA applied was harmless].)

In fact, Susie does not suggest anywhere in her briefs on appeal, or cite anything in the record suggesting, she or the

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[3] The Department argues the juvenile court made an implied finding. We do not resolve that issue because any error in failing to make a finding was harmless. (See *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413-1414.)

children may have Indian ancestry. And all indications in the record are they do not. With its petition the Department filed an Indian Child Inquiry Attachment form in which both Ray Sr. and his mother reported the children were Hispanic and had no known Indian ancestry. The Department's detention report stated that ICWA did not apply and that, when interviewed in connection with this case, Ray Sr. asserted that "his family is Spanish with no American Indian ancestry."[4] And at the detention hearing Ray Sr. submitted a form ICWA-20 indicating he had no Indian ancestry.

In addition, minute orders from proceedings on three earlier petitions concerning these same children and parents (and bearing the same case number as the case from which this appeal arises) show that, on those occasions, the juvenile court asked Susie whether she had Indian ancestry. An August 28, 2009 minute order notes that, "after interviewing [Susie], the court finds that the court has no reason to know that any of these children are American Indian children as defined by the Indian Child Welfare Act."[5] A July 19, 2011 minute order notes that Parental Notification of Indian status "form(s)" were "signed and filed" and that "[t]he court has no reason to know that the minor(s) are Indian children as defined by the Indian Child

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[4] The Department could not interview Susie at that time because her whereabouts were unknown until well after the jurisdiction and disposition hearing in July 2015. Susie first appeared before the juvenile court in connection with this petition at the six-month review hearing in January 2016.

[5] In its report for the section 366.26 selection and implementation hearing, the Department quoted this language and attributed it to a minute order dated August 29, 2009.

Welfare Act." And a November 27, 2012 minute order notes that "the court makes inquiries of [Susie and Ray Sr.] and finds [they] are not members of any American Indian tribe," that Parental Notification of Indian status "form(s)" were "signed and filed," and that "[t]he court has no reason to know that the minor(s) are Indian children as defined by the Indian Child Welfare Act." All three minute orders also include express findings that ICWA did not apply.

Because Susie does not assert on appeal that she or her children have Indian ancestry, and the only evidence in the record is that they do not, Susie has not shown any prejudice requiring reversal of the juvenile court's order terminating her parental rights. (See *In re A.B.* (2008) 164 Cal.App.4th 832, 842 [failure to discharge the duty of inquiry under ICWA was harmless error given the appealing parent's denial of Indian heritage in another dependency matter]; *In re H.B.* (2008) 161 Cal.App.4th 115, 122 ["[a]bsent any affirmative representation of Indian ancestry, either in the dependency court or on appeal, [mother's] statement to the social worker denying such ancestry and her failure to indicate any of her children may have Indian ancestry throughout the Department's lengthy involvement with this family fully support the conclusion any error by the juvenile court was harmless"]; *In re N.E.*, *supra*, 160 Cal.App.4th at pp. 770-771 [parent contending the juvenile court and social services agency did not comply with ICWA inquiry requirements "failed in his burden to demonstrate prejudice" because he did not suggest he had any Indian heritage]; *In re Rebecca R.*, *supra*, 143 Cal.App.4th at p. 1431 ["[t]he burden on an appealing parent to make an affirmative representation of Indian heritage is de minimis," and "[i]n the

absence of such a representation, there can be no prejudice and no miscarriage of justice requiring reversal"]; *In re Antoinette S.*, *supra*, 104 Cal.App.4th at pp. 1413-1414 [juvenile court's error in failing to determine whether ICWA applied was harmless because the record showed it did not apply]; but see *In re J.N.* (2006) 138 Cal.App.4th 450, 461 [ICWA error was not harmless where the mother was never asked whether she had Indian ancestry and the court would not speculate about what her response might be].)

DISPOSITION

The juvenile court's order terminating parental rights is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.