Filed 1/15/15 In re J.B. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.B., a Person Coming Under the Juvenile Court Law.	B256887 (Los Angeles County Super. Ct. No. CK74297)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.B., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, D. Zeke Zeidler, Judge. Conditionally reversed and remanded.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

Richard D. Weiss, Acting County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Jacklyn K. Louie, Deputy County Counsel, for Plaintiff and Respondent.

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J.B. (father) appeals from the juvenile court's judgment terminating his parental rights over J.B. (J.B.). Father contends we should conditionally reverse the judgment because the Los Angeles County Department of Children and Family Services (DCFS) and the court failed to comply with the notice provisions of the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901, et. seq.). We agree a conditional reversal is required.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2012, J.B. was referred to DCFS on the basis of alleged domestic violence by father against A.S. (mother). The original petition under Welfare and Institutions Code section 300 alleged mother and father had a history of engaging in violent altercations in front of J.B., who was then approximately one month old; J.B.'s half sibling (V.S., who shares the same mother with J.B.) was receiving permanent placement services because of mother's violent conduct toward maternal grandmother; father had a history of illicit drug use and currently used methamphetamine, including while J.B. was under his care and supervision; mother was currently using methamphetamine; and mother had bipolar disorder and suicidal ideations.

The "Indian Child Inquiry Attachment" to the petition indicated J.B. might be a member of the Shoshone, Cherokee, and Choctaw tribes. Mother completed a "Parental Notification of Indian Status" indicating one or more of her lineal ancestors was a member of a federally recognized tribe. Under the section requesting the name of the tribe, she listed "Cherokee and ?" Father completed the same form and indicated he did not have any Indian ancestry as far as he knew.[1]

The detention report stated mother had previously indicated she had Shoshone, Cherokee, and Choctaw heritage, and ICWA notices were mailed to these tribes in April 2012. This was done as part of the half sibling's case. The report also stated return receipts were received from all the noticed tribes and the Bureau of Indian Affairs. Response letters from the tribes indicated half sibling V.S. was not enrolled in and was not eligible for membership in the tribes.

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[1] Even a parent who does not claim Indian heritage has standing to raise the issue of ICWA compliance. (*In re B.R.* (2009) 176 Cal.App.4th 773, 779.)

The court detained J.B. in October 2012. At the detention hearing, mother indicated maternal grandmother would have more information about the family's Indian heritage. The court questioned maternal grandmother, who was present and indicated the family had Cherokee and "Sakawaka" heritage. DCFS then stated: "Your Honor, if you recall, we were just here for 26 hearing for a sibling on September 11th, and the court did inquire of maternal great grandmother and determined mother did not have American Indian heritage. It's also addressed on page two [of the detention report]." The court asked mother if she was an enrolled member of a tribe; mother responded she did not know and said, "[i]t's my great, great grandmother that was." The court ordered DCFS to conduct a further investigation regarding the claim of Indian heritage, but ruled that as of that date, it had no reason to know or believe J.B. was an American Indian child.

In the jurisdiction and disposition report, DCFS indicated ICWA might apply. DCFS explained mother had instructed the dependency investigator to contact maternal grandmother and maternal great-grandmother for more information about the family's Indian heritage. The investigator spoke with maternal great-grandmother, who "confirmed the family history previously provided for the child [V.S.] in regards to ICWA." All of the information provided in V.S.'s case was correct according to maternal great-grandmother, *except* maternal great-grandmother's birth date.

At the jurisdiction and disposition hearing in March 2013, the court found J.B. was a minor described by Welfare and Institutions Code section 300, subdivisions (a) and (b). The court sustained counts in a second amended petition alleging the same conduct described in the original petition, plus two more counts alleging father had a history of mental health hospitalizations and diagnoses and failed to seek treatment or take psychotropic medications as prescribed, and mother had left J.B. in the care of known drug users on several occasions.

At the six-month review hearing in September 2013, the court terminated family reunification services and set the matter for a permanency planning hearing. The court found J.B. to be adoptable and terminated parental rights at the permanency planning hearing in April 2014.

In both the six-month review report and the report for the permanency planning hearing, DCFS indicated ICWA did not apply to the case. There is no evidence in the record that DCFS sent separate notices to the relevant tribes for J.B. Rather, it appears the court relied on the notices sent to the tribes regarding half sibling V.S. in her separate case. The notices sent in V.S.'s case do not appear in the record of J.B.'s case before us.

Father timely appealed from the judgment terminating parental rights.

DISCUSSION

". . . Congress enacted ICWA to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' (25 U.S.C. § 1902.) ICWA allows a tribe to intervene in dependency proceedings involving an Indian child because the law presumes it is in the child's best interests to retain tribal ties and heritage and that it is in the tribe's interest to preserve future generations." (*In re Robert A.* (2007) 147 Cal.App.4th 982, 988.)

ICWA sets forth a duty to provide notice to Indian tribes when "the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a).) An "Indian child" is one who is either a "member of an Indian tribe or . . . 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).) The mere suggestion of Indian ancestry triggers the notice requirement. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.)

Courts strictly construe the ICWA notice requirements. (*In re Francisco W.*, *supra*, 139 Cal.App.4th at p. 703.) The notice "must contain enough information to be meaningful." (*Ibid.*) Among other things, the notice must include, if known, (1) the Indian child's name, birthplace, and birthdate; (2) the name of the tribe in which the Indian child is member or may be eligible for membership; (3) names and addresses of the child's parents, grandparents, great-grandparents, as well the current and former addresses of these individuals, their birthdates, places of birth and death, and other identifying information; and (4) a copy of the dependency petition. (25 C.F.R. § 23.11(d); Welf. & Inst. Code, § 224.2, subd. (a)(5).) "It is essential to provide the Indian tribe with all available information about the child's ancestors, especially the ones with the alleged Indian

heritage." (*In re Francisco W., supra*, at p. 703.) The tribe then determines whether the child is an Indian child, and its determination is conclusive. (*In re Robert A., supra*, 147 Cal.App.4th at p. 988.) To enable the court to review whether DCFS supplied sufficient information to the tribes, DCFS must file with the court the ICWA notice, return receipts, and responses received from the tribes. (*Id.* at p. 989.)

We apply a harmless error analysis to deficiencies in ICWA notice. (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1414.) Courts have held deficiencies in ICWA notices to be harmless when they can infer that nondeficient notice "would not have led to a different determination." (*Id.* at p. 1415; see *In re D.W.* (2011) 193 Cal.App.4th 413, 418; *In re E.W.* (2009) 170 Cal.App.4th 396, 400.)

Here, there is no dispute ICWA notice was required and DCFS did not send ICWA notices to the relevant tribes. Still, DCFS argues the lack of ICWA notice as to J.B. was harmless error because DCFS sent ICWA notices in V.S.'s case, and the tribes responded that she was not eligible for membership. J.B. and V.S. share the same mother, and they both claim possible Indian heritage through mother's lineage. Thus, contends DCFS, we can infer notice as to J.B. would not have led to a different result. We disagree.

This might have been harmless error if we knew the notices sent in V.S.'s case were correct in all significant aspects. But we know they were not. Maternal great-grandmother indicated her birthdate used in the notice for V.S.'s case was incorrect. This was the relative through whom mother apparently claimed Indian heritage. It was especially essential to provide the tribes with all available—and correct—information about maternal great-grandmother. (*In re Francisco W., supra*, 139 Cal.App.4th at p. 703.) We cannot say whether the other information provided about maternal great-grandmother would have sufficed because we have no idea what information about her was included in the notices. It appears DCFS never made V.S.'s ICWA notices part of the record in this case. (*In re Robert A., supra*, 147 Cal.App.4th at p. 989 [government agency is responsible for filing the ICWA notices sent, so the court may review whether sufficient information was supplied].) Thus, we cannot infer an ICWA notice with the corrected information would have led to the same result as in V.S.'s case.

The case on which DCFS relies, *In re E.W., supra*, 170 Cal.App.4th 396, is factually distinguishable. There, the court found harmless the failure to provide ICWA notice as to one sibling when notice was properly sent as to a second sibling detained in the same case. (*Id.* at pp. 400-402.) For some reason, the ICWA notices omitted the name of one sibling. (*Id.* at p. 399.) The tribes determined the sibling as to whom they received notice was not an Indian child. (*Id.* at p. 400.) The court held that providing separate notice as to the omitted sibling would not produce a different result. (*Id.* at pp. 400, 402.) But there was no evidence in *In re E.W.* that the information provided to the tribes was incorrect. The information for the omitted sibling would have been exactly the same as the information already sent. It follows that providing additional notice as to the omitted child would merely generate the same response. Not so here.

For this same reason, our opinion in *In re J.M.* (2012) 206 Cal.App.4th 375 is factually distinguishable. In a case involving two siblings, ICWA notices were sent containing the name of one sibling but not the other. (*Id.* at p. 379.) They claimed Indian heritage through the same parent. (*Id.* at p. 383.) But there was no indication that notice as to the omitted sibling would have contained different information. We concluded the inclusion of the omitted sibling in the ICWA notices could not possibly have produced different results. (*Ibid.*)

Only proper notice—and the concomitant opportunity to meaningfully participate in a dependency action—can protect a tribe's rights under ICWA. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) To conduct a meaningful search of its records, a tribe must be given as much correct information as possible from everyone in the ancestral line. We cannot say the failure to do so here was harmless. Accordingly, a conditional reversal and limited remand to provide proper ICWA notice is required. (*In re Francisco W., supra*, 139 Cal.App.4th at p. 704.) This disposition unfortunately results in delay in implementing J.B.'s permanent plan, but a conditional reversal is necessary to protect and advance the

goals underlying ICWA. "Compliance with . . . ICWA is not a mere technicality . . . ." (*In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 908.)[2]

DISPOSITION

The judgment terminating parental rights is conditionally reversed and the case is remanded to the juvenile court with directions to order DCFS to comply with the notice provisions of ICWA, consistent with this opinion. If, after proper notice, a tribe claims J.B. is an Indian child, the juvenile court shall proceed in conformity with all provisions of ICWA. If no tribe claims J.B. is an Indian child after receiving proper notice, the judgment terminating parental rights shall be immediately reinstated.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.

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[2] In its October 1, 2014 respondent's brief, DCFS argued father forfeited the ICWA issue because he did not raise it in an appeal from the court's jurisdiction and disposition orders; he waited until after the court had terminated his parental rights to appeal the issue. DCFS also filed a motion to dismiss the appeal on this basis. It relied primarily on *In re Isaiah W.* (2014) 228 Cal.App.4th 981, review granted October 29, 2014, S221263, in both the motion to dismiss and the pertinent portion of its brief. In November 2014, DCFS filed a motion to strike its motion to dismiss and the portion of its brief relating to the forfeiture argument. The motion to strike explained that *In re Isaiah W.* is no longer citable authority because the California Supreme Court recently granted review of the case. We grant DCFS's motion to strike.