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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re C.B. et al., Persons Coming Under the Juvenile Court Law.	2d Juv. Nos. B242298, B246612 (Super. Ct. No. JV50760) (San Luis Obispo County)
SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. D.B., Defendant and Appellant.	

D.B., the father of C.B. and D.B., Jr., appeals jurisdiction and disposition orders of the juvenile court following the sustaining of a San Luis Obispo County Department of Social Services (DSS) juvenile dependency petition. (Welf. & Inst. Code, § 300, subd. (b).)[1] We conclude, among other things, that the court's finding that DSS gave proper notice to Indian tribes under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) is supported by the record. We affirm.

FACTS

In March 2012, DSS detained C.B., age 11, and D.B., Jr., age 8, because their parents, D.B. and W.B. (the children's mother) were using methamphetamine and

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

D.B. committed an act of domestic violence against W.B. The children told DSS that D.B. "hits them, and has caused injuries." On March 30, 2012, DSS received test results indicating that W.B. and the children tested positive for methamphetamine. The children were placed in "a confidential emergency foster home."

At a contested detention hearing on April 5, 2012, the juvenile court found "[c]ontinued residence in the home of the parent is contrary to the minors' welfare and other detention is required to serve the best interests of the minors . . . ."

At the May 11, 2012, jurisdiction hearing, the trial court found "jurisdiction has been established" and it sustained the juvenile dependency petition. (§ 300, subd. (b).) It found the children tested positive for methamphetamine. It said, "Somebody in this family knows where these kids got exposed to methamphetamine . . . . [B]oth the parents bear the responsibility for that." It noted that D.B. had been "using drugs to the point where he goes to prison and is absent from [the children's] lives [for] half of his son's life and a good portion of his daughter's life . . . ." D.B. recently was arrested for committing a parole violation. The court said, "I hope that [DSS] will be very careful in how they transition the kids back home, but I'm not going to do that today." The court set a disposition hearing.

In a June 29, 2012, "Disposition report," DSS recommended that the children be "returned to [their mother's] care," and that W.B. receive family maintenance services. It noted that W.B. "is currently working with Drug and Alcohol Services and is testing negative for all substances." It said D.B. "is currently incarcerated and is unable to care for the children at this time."

On January 4, 2013, the trial court issued a final judgment granting custody of the two children to their mother. It also terminated the court's jurisdiction over the children.

ICWA

D.B. told DSS that his paternal grandmother had Cherokee ancestry and his paternal grandfather had "Blackfoot" ancestry. W.B. reported that she "does not have American Indian ancestry."

DSS sent a "Notice of Child Custody Proceeding for an Indian Child" (ICWA-030) form to the Blackfeet Tribe of Montana, the Cherokee Nation of Oklahoma, the United Keetoowah Band of Cherokee Indians, the Eastern Band of Cherokee Indians, and the Bureau of Indian Affairs. The trial court found DSS gave proper ICWA notice to the tribes. The tribes determined the children were not eligible for membership.

DISCUSSION

ICWA

Congress enacted ICWA with the intent that the best interests of Indian children are served by retaining their Indian tribal ties and cultural heritage. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) "'ICWA confers on tribes the right to intervene at any point in state court dependency proceedings.'" (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174.) Proper notice to tribes is of critical importance, and courts strictly construe ICWA notice requirements. (*Ibid.*) "Under the ICWA, the tribe determines whether the child is an Indian child and its determination is conclusive." (*Ibid.*)

Here the trial court found: 1) DSS "complied with the ICWA notice requirements," and 2) it gave proper notice to the three Cherokee tribes and the Blackfeet tribe. Each tribe reviewed its tribal records and determined that C.B. and D.B., Jr., were not members or eligible for membership in the tribes and that the tribes would not be intervening in this proceeding.

D.B. contends the notices DSS sent were deficient because: 1) "the ICWA notices do not set forth the dates of birth or places of birth of the paternal great-grandparents," and 2) they do not include "all of their dates of death or their places of death." He claims the information was available to DSS but it neglected to obtain it and include it in the ICWA notices.

DSS contends: 1) D.B. failed to raise these issues in the trial court, 2) he presented no evidence to show DSS breached any duty, and 3) he relies on speculation.

DSS is correct that D.B. did not raise the specific ICWA notice omissions in the trial court. D.B. claims that at the January 4th hearing, his counsel told the court that DSS "failed to interview the paternal relatives in preparation of the notices." But the

transcript of that hearing reflects that his counsel only said that D.B. "gave ICWA information to [DSS] that his grandmother had Indian ancestry, and it is [D.B.'s] *belief* that was not followed up upon by [DSS]. *I do not have any more information other than that*." (Italics added.) He did not mention the ICWA notices or claim DSS omitted available information regarding dates of birth or death, or the places of birth and death. But, even so, "the forfeiture doctrine does not bar consideration of ICWA notice issues not raised in the juvenile court." (*In re Z.W.* (2011) 194 Cal.App.4th 54, 63.) We proceed to the merits.

Here substantial evidence supports a finding that DSS did not withhold known or available information about the great-grandparents when it gave ICWA notices to the tribes. The DSS worker signed a declaration under penalty of perjury which is part of the ICWA-030 form containing the information for the tribes. The form reflects that DSS provided the full names of the children's paternal great-grandfathers and their dates of death. For one of the great-grandfathers, his tribe is listed as "Blackfeet." The form reflects that DSS listed the full names of the children's paternal great-grandmothers. It indicated that one was deceased, the other was "not deceased," and one was a "Cherokee." On the form the DSS worker said DSS had "no information available" regarding the birth date and place of birth for these paternal great-grandparents. She said one of the paternal great-grandmothers was deceased, but the date and place of death were "unknown." She declared, "[I] have given *all information [I] have about the relatives*" on the ICWA-030 form. (Italics added.)

The DSS has a duty to complete the ICWA notice forms "to the extent such information *is known*" to the agency. (*In re Karla C.*, *supra*, 113 Cal.App.4th at p. 179, italics added.) It has "no duty to conduct an extensive independent investigation for information." (*In re C.Y.* (2012) 208 Cal.App.4th 34, 41.) Whether the missing information was known or available was an issue of fact. The trial court implicitly found against DB. on this issue. D.B. attempts to impeach the DSS worker's declaration to the extent she claimed certain information was not available or unknown. But he made no attempt to do so in the trial court. He speculates that the omitted information could have been obtained. But speculation does not suffice. (*In re D.W.* (2011) 193 Cal.App.4th 413,

417.) D.B. presented no evidence at any hearing that the missing information was available.

D.B. claims DSS could have obtained more complete information about his family history from other relatives. He says, "The record does not reveal who the department interviewed . . . ." But his assumption other relatives might have supplied more information is insufficient. (*In re Gerardo A.* (2004) 119 Cal.App.4th 988, 995.) As stated in *Gerardo A.*, "The fact that the record is silent regarding whether the department spoke with anyone other than the children's mother and maternal aunt does not necessarily mean the department failed to make an adequate inquiry for Indian heritage information." (*Ibid.*) D.B. has not overcome the presumption that DSS regularly performed its duties. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430.)

D.B. suggests the trial court could have asked for more information. But D.B. did not attend the January 4th ICWA hearing and his counsel made no offer of proof about any specific information his relatives possessed. The court "could hardly make inquiries of persons not parties to the proceeding . . . ." (*In re C.Y., supra,* 208 Cal.App.4th at p. 42.)

DSS relied on information D.B. provided regarding his family history. DSS's "initial inquiry . . . need only be made to the parents." (*In re C.Y., supra,* 208 Cal.App.4th at p. 42.) "[A] parent has superior access to this information." (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1160.) DSS claims "neither [D.B.] nor any other family member ever presented additional ICWA information that might alter the tribes' determination." In his reply brief, D.B. makes no adequate showing to contest this claim. D.B. never requested the trial court to correct the ICWA notices. His failure to provide complete information is a factor in determining the reasonableness of DSS's actions. (*In re K.M.* (2009) 172 Cal.App.4th 115, 119.) At the January 4th hearing, D.B.'s counsel said, "I do *not have any more information* . . . ." (Italics added.) "Reversal or remand here would exalt form over substance because it is apparent father cannot provide any more information." (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413.)

Moreover, D.B. has not shown "how the supposed deficiencies [he] notes would have made a difference given the information that was in the notices." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1531.) He does not claim that the names of the great grandparents on the form, the dates of death provided or the notations regarding their alleged tribal affiliations are incorrect. DSS also provided the names of the children's paternal grandparents and information regarding the paternal grandmother's birth date, her place of birth (Alabama) and her tribal affiliation ("Cherokee"). It provided information regarding the paternal grandfather including his date of birth, place of birth (Memphis, Tennessee) and his tribal affiliation ("Blackfeet"). It provided information regarding D.B., W.B., and the children, and listed the four tribes with which D.B. claims an ancestral affiliation. Tribes have made membership determinations with less information. (*In re K.M., supra,* 172 Cal.App.4th 115, 119; see also *In re Gerardo A., supra,* 119 Cal.App.4th at pp. 992, 995 [department's ICWA compliance was not invalid simply because it listed birthplaces and birthdates for relatives as "unknown"].) Here the tribes determined that none of the individuals D.B. listed had any ancestral connection to these tribes.

D.B. suggests the tribes should not have made these determinations because they had insufficient information. But we must defer to their expertise in determining tribal membership. (*In re Karla C., supra*, 113 Cal.App.4th at p. 174.) The tribes know the information needed to make eligibility determinations. Given the information provided on the ICWA forms, we presume that if they needed additional information they would have asked for it (*In re L.B.* (2003) 110 Cal.App.4th 1420, 1426), or that they would have stated they lacked sufficient information to make a determination (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 574-575).

Relying on *In re S.M.* (2004) 118 Cal.App.4th 1108 and *In re Louis S.* (2004) 117 Cal.App.4th 622, D.B. claims the missing information nevertheless requires a remand. But, unlike the present case, in *In re S.M.*, the Cherokee tribe informed the child welfare agency that it could not determine tribal membership because of insufficient family information on the ICWA notice forms. The agency ignored the tribe's letter. A year later, the tribe again requested the agency to provide specific information. The agency did not

respond. The Court of Appeal noted that "[t]he social worker did not say this information is unavailable." (*Id.* at p. 1117.) It said, "The Agency has not provided an explanation for not responding to these requests for information" by the tribe. (*Id.* at. p. 1118.) It also noted the agency breached its duty to the court by not filing the tribe's letters. It said, "Not filing the tribes' responses aids neither the courts nor the parties and does not serve the purpose of the ICWA." (*Ibid.*) Consequently, a remand to provide additional information to the tribes was appropriate. But none of DSS's actions are even remotely comparable to the neglect and breach of duty found in *In re S.M.*

D.B. correctly notes that in *In re Louis S.*, the Court of Appeal reversed and mentioned that birthdates were omitted on ICWA notices. But there serious deficiencies, occasioned by the agency's neglect, impeded the tribe's ability to check tribal records. The agency sent ICWA notices containing "multiple errors." (*In re Louis S., supra*, 117 Cal.App.4th at p. 631.) The names of relatives were misspelled. The agency did not provide the tribe with the complete name of "the person with the alleged Indian heritage." (*Ibid.*) The agency knew the correct full name of that person because the social worker listed it in her report. Certainly tribes cannot check their records where the agency does not provide correct names. But that is not the case here. The finding that ICWA does not apply is supported by the record.

Mootness and Harmless Error

DSS claims the relief D.B. requests of requiring it to issue new ICWA notices is now moot and any error is harmless. We agree. ICWA compliance is required "in all dependency proceedings . . . if the child is at risk of entering foster care or is in foster care." (§ 224.3, subd. (a).) In *In re Alexis H.* (2005) 132 Cal.App.4th 11, 14-16, the court held that ICWA notice deficiencies are harmless where, as here, the child welfare agency does not seek "permanent foster care." It said ICWA "requires notice only when child welfare authorities seek permanent foster care or termination of parental rights; it does not require notice *anytime* a child of possible or actual Native American descent is involved in a dependency proceeding." (*Id.* at p. 14.)

In January of 2013, the juvenile court granted custody of the children to their mother and terminated its jurisdiction over the children in its final judgment. DSS claimed the children were not at risk of entering foster care. It told the juvenile court it complied with ICWA, but ICWA was not "technically" "triggered" by its actions or goals. Its goal was not foster care or "removal" of the children. It selected "family maintenance" and returning the children home to their mother. Moreover, all the tribes said they would not intervene in this proceeding. D.B. has not shown what interest would be served by issuing new ICWA notices for the tribes at this time. Tribes have no interest to intervene when the children are placed back in their home with their mother as a result of the final judgment. (See, e.g., *In re J.B.* (2009) 178 Cal.App.4th 751, 760, fn. 5; § 224.3, subd. (a).) We have reviewed D.B.'s remaining contentions and we conclude he has not shown error.

The orders and judgment are affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Linda D. Hurst, Judge

Superior Court County of San Luis Obispo

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant.

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