Filed 10/27/16 In re N.R. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re N.R., a Person Coming Under the Juvenile Court Law.	B269774 (Los Angeles County Super. Ct. No. DK01930)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. N.R., Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Annabelle G. Cortez, Judge. Affirmed.

David A. Hamilton, under appointment by the Court of Appeal, for Objector and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Olivia Raquel Ramirez, Senior Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minor.

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The juvenile court exerted dependency jurisdiction over one-year-old N.R. At the same hearing, the court concluded that there was no reason to know that N.R. was an "Indian child" within the meaning of the federal Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) N.R. (father) does not contest the court's jurisdictional or dispositional rulings regarding N.R; instead, he argues that the court violated its duty to investigate whether N.R. was an Indian child and its duty to notify pertinent Indian tribes of N.R.'s potential ancestry. These arguments lack merit, and we affirm.

FACTS AND PROCEDURAL BACKGROUND

Ashley A. (mother) and father have one child together, N.R.

After Mother cussed out father and hit him on the head with a trophy while N.R. was present, the Los Angeles County Department of Children and Family Services (Department) filed a petition asking the juvenile court to exert dependency jurisdiction over N.R. The operative, First Amended Petition alleges that (1) mother violently assaulted father, which places N.R at "substantial risk" of "suffer[ing] serious physical harm" due to her "nonaccidental" infliction of harm and due to her "inability to adequately . . . protect the child" (as proscribed by Welfare and Institutions Code section 300, subdivisions (a) and (b))[1]; (2) mother has a history of methamphetamine abuse that places N.R. at substantial risk of serious physical harm (as proscribed by section 300, subdivision (b)); and (3) father has a history of marijuana abuse that places N.R. at substantial risk of serious physical harm (as proscribed by section 300, subdivision (b)).

At the outset of the dependency proceedings, mother indicated on a Parental Notification of Indian Status form that she "may have Indian ancestry"; listed "Cherokee"; and listed her mother Debra A. and her grandmother Jackie F. as persons who may have more information. Father filled out a separate form, indicating no Indian ancestry. At the first hearing on the matter (the detention hearing), the juvenile court

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

ordered the Department to investigate mother's claim of Indian ancestry by speaking with mother, with mother's mother and with mother's grandmother and to "send notices [to the pertinent Indian tribes], if appropriate." At the next hearing (the jurisdictional hearing), the Department reported back to the court that mother said she "might have Indian heritage but [had no] further information" and said she knew that "no one in her family is registered to a tribe"; that the Department had called mother's mother, but she had not returned any calls; that the Department spoke to mother's grandmother and to mother's uncle, both of whom stated that there was "no known Indian heritage on [the] maternal side of the family." The Department also noted that the juvenile court, in a separate proceeding involving one of mother's four other children with another man, had concluded that there was no duty to notify any Indian tribe on the basis of mother's heritage. The juvenile court took judicial notice of the finding of ICWA's inapplicability in the other case, and after reciting the Department's information, concluded that there was no basis to believe that N.R. was an Indian child and thus no duty to notify possible Indian tribes.

After the juvenile court went on to sustain the Department's First Amended Petition on all grounds, to remove the child from both parents, and to enter a dispositional order, father filed this timely appeal.

DISCUSSION

I. Background Law

In 1978, Congress became concerned that "abusive child welfare practices" were "separat[ing] large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Miss. Band of Choctaw Indians v. Holyfield* (1983) 490 U.S. 30, 32.) To address that concern, Congress enacted ICWA. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8 (*Isaiah W.*).) California's Legislature codified many of ICWA's requirements as a matter of state law as well. (§§ 224-224.6.)

As pertinent here, ICWA and California law place two distinct, but interrelated burdens on a juvenile dependency court. First, if a juvenile court knows or has reason to

know that a child subject to dependency jurisdiction "*is or may be* an Indian child," it must conduct an investigation designed to confirm or dispel its suspicion. (§ 224.3, subd. (a), italics added; see also *id.*, subd. (c) [requiring "social worker . . . to make further inquiry regarding the possible Indian status of the child" "[i]f" he or she "knows or has reason to know that an Indian child is involved"]; Cal. Rules of Court, rule 5.481(a); *Isaiah W.*, *supra*, 1 Cal.5th at p. 14 ["a juvenile court has an affirmative and continuing duty in all dependency proceedings to inquire into a child's Indian status"].) A child is an "Indian child" if he or she is either (1) "a member of an Indian tribe," or (2) "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); § 224.1, subd. (a).) Second, if after any investigation "the court knows or has reason to know that an Indian child *is* involved," the court must "notify" (1) "the parent or Indian custodian," and (2) either (a) "the Indian child's tribe," if it is known, or (b) the Secretary of the Interior and the Bureau of Indian Affairs, if the tribe is unknown. (25 U.S.C. § 1912(a), italics added; see also 25 U.S.C. § 1903(11); §§ 224.2, subd. (a)(4) & 224.3, subd. (d).) Notice to the tribe enables the tribe to decide whether the child is in fact an Indian child, and the tribe's determination is conclusive. (§ 224.3, subd. (e)(1); *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165 (*Gabriel G.*).)

The duty to investigate and the duty to notify are interrelated because they look to the same factors to assess whether "[t]he circumstances . . . provide reason to know that the child is an Indian child"—namely, (1) whether "[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"; (2) whether the child's or the child's parent's "residence or domicile" "is in a predominantly Indian community"; and (3) whether "[t]he child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government." (§ 224.3, subd. (b).) The two duties are

nevertheless distinct because the quantum of information required to trigger them is different: The "duty to inquire is triggered by a lesser standard of certainty regarding the minor's Indian child status ('is or may be involved') than is the duty to send formal notice to the Indian tribes ('is involved')." (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200.)

If the juvenile court breaches either duty, the remedy is a conditional remand to investigate further or to notify the pertinent tribe(s) while leaving all remaining orders intact until and unless any notified tribes determine that the child is an "Indian child" and are therefore invited to participate in the proceedings. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467 (*Hunter W.*).)

II. Analysis

Father argues that the juvenile court in this case violated both its duty to investigate N.R.'s status as an Indian child and its duty to notify Indian tribes. Father is still allowed to raise these ICWA-based claims, even though N.R.'s Indian status flows, if at all, from mother. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339.) We review a juvenile court's ICWA findings for substantial evidence. (*Hunter W., supra*, 200 Cal.App.4th at p. 1467.)

A. Duty to investigate

There is substantial evidence to support the juvenile court's implicit finding that it discharged its duty to investigate N.R.'s possible status as an Indian child. Mother reported that she "may" have Indian ancestry, and listed two people who could confirm or deny her belief—namely, her mother and her grandmother. At the court's insistence, the Department reached out to both individuals as well as mother's uncle. Mother's mother never responded to the Department's inquiry, but mother's grandmother and mother's uncle both confirmed, in no uncertain terms, that there was "no known Indian heritage on the maternal side of the family." What is more, the juvenile court had come to the same conclusion with respect to one of mother's other children in a prior dependency case.

Father argues the court's investigation was inadequate, and cites *Gabriel G.*, *supra*, 206 Cal.App.4th 1160. *Gabriel G.* is distinguishable. There, the Court of Appeal held that the juvenile court breached its duty to investigate when it conducted no investigation despite the biological father's written notice to the court that he "'is or was a member' of a 'Cherokee' tribe." (*Id.* at pp. 1166-1168.) The juvenile court in this case not only ordered that an investigation be conducted, but went on to reasonably rely upon the results of that investigation, which disproved mother's uncertain belief about that status.

B. Duty to notify

There is also substantial evidence to support the juvenile court's express finding that it had no duty to provide notice to any Indian tribes regarding N.R.

As noted above, a juvenile court's duty to notify a tribe hinges on whether "the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a); § 224.3, subd. (d).) This is a "'very low'" "'bar.'" (*In re D.C.* (2015) 243 Cal.App.4th 41, 60 (*D.C.*).) A court need not be "'certain'" of a child's Indian status before notice is required. (*In re B.H.* (2015) 241 Cal.App.4th 603, 606.) Something less is required, although the courts do not speak with one voice in defining that standard: Some insist that """only a suggestion of Indian ancestry""" """trigger[s]""" the duty to notify (*D.C.*, at p. 60), while others "require more than a bare suggestion that a child might be an Indian child" (*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520 (*Jeremiah G.*)). We need not delve into whether the differences in the way in which courts articulate the triggering threshold actually equate to a different threshold because the information before the juvenile court did not surmount the very low bar triggering the duty to notify no matter how it is articulated. That is because, as noted above, the Department's investigation dispelled any possibility that N.R. had any Indian ancestry by confirming with people who had a better reason to know than mother—namely, mother's grandmother and mother's uncle—whether there was any truth to mother's unsure suspicion that her family might have Indian ancestry.

Father raises two objections. First, he argues that the juvenile court erred in relying on the prior finding of the juvenile court that N.R.'s half sibling did not have any Indian ancestry from mother's side of the family. For support, father relies on *In re Robert A.* (2007) 147 Cal.App.4th 982, 989-990. However, the issue in *Robert A.* was whether it was proper for the *Court of Appeal* to take judicial notice of ICWA notice in a half sibling's dependency proceeding in order to evaluate the correctness of what the juvenile court did in the case under review. *Robert A.* held that was improper because the record in the half sibling's proceeding had not been before the juvenile court. (*Ibid.*) Subsequent courts have parted ways with *Robert A.* on this point. (*In re Z.N.* (2009) 181 Cal.App.4th 282, 298-301.) We need not weigh in on that dispute because the juvenile court in this case took judicial notice of the fact that no ICWA notice was required in N.R.'s half sibling's dependency case, so the record in the half sibling's case was properly before the juvenile court. And even if it were not, the information provided by mother's grandmother and uncle was sufficient by itself to disprove mother's suspicions that her family might have Indian ancestry.

Second, father contends that courts have required ICWA notice to be given in cases involving similar evidence to the evidence mother provided in this case. For support, he cites *In re Antoinette S.* (2002) 104 Cal.App.4th 1401; *D.C.*, *supra*, 243 Cal.App.4th 41; *In re B.R.* (2009) 176 Cal.App.4th 773 (*B.R.*); and *In re M.C.P.* (Vt. 1989) 571 A.2d 627 (*M.C.P.*). These cases are all distinguishable. In *Antoinette S.*, the court held that notice was required where a social services agency informed the court that the child "may be of Indian ancestry" and the father later "claimed his grandparents were of Native American ancestry." (*Antoinette S.*, at pp. 1404, 1407-1408.) However, the court in that case did no further investigation and did not give ICWA notice. Other courts have seemingly come to contrary conclusions on similar facts. (E.g., *Hunter W.*, *supra*, 200 Cal.App.4th at pp. 1467-1468 [a parent's indication that she "may have Indian heritage" is insufficient to trigger duty to notify]; *Jeremiah G.*, *supra*, 172 Cal.App.4th at p. 1521 [same].) We need not confront any inconsistency, however, because the juvenile court in this case *did* conduct a further investigation and that investigation dispelled the

mother's report that she "may" have Indian ancestry in her family. The remaining cases father cites—*D.C.*, *B.R.*, and *M.C.P.*—all address whether ICWA notice may be required on the basis of an *adoptive* parent's claim of Indian heritage that was not subject to any further investigation. (*D.C.*, at pp. 60-61; *B.R.*, at pp. 783-785; *M.C.P.*, at p. 632.) These cases are distinguishable for the reasons already explained above.

DISPOSITION

The judgment is affirmed.

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_____, J.

HOFFSTADT

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.

CHAVEZ