Filed 10/18/16 In re Elias G. CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re ELIAS G., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B271925 (Super. Ct. No. 15JD-00087) (San Luis Obispo County)
SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. ALBERTO G., Defendant and Appellant.	

Alberto G. appeals from the juvenile court's order denying his petition to reinstate services (Welf. & Inst. Code, § 388)[1] and the April 29, 2016 order terminating parental rights to his son, Elias G. (§ 366.26). Appellant contends that San Luis Obispo County Department of Social Services (DSS) did not comply with the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C.S. § 1901 et seq.) after it was advised that an ancestry.com DNA test indicated that appellant may have Indian heritage. DSS mailed an ICWA notice to the Bureau of Indian Affairs (BIA) a week *after* the trial court revoked appellant's parental rights. Statutory and case law require that we reverse and remand with directions to comply with ICWA. (§ 224.2, subds. (a) & (d); 25 U.S.C.S.

[1] Unless otherwise noted all statutory references are to the Welfare and Institutions Code.

§ 1912(a); *In re Isaiah W.* (2016) 1 Cal.5th 1, 5.)

Facts and Procedural History

On March 21, 2015, DSS detained Elias after his biological mother, Dominique R., and appellant fought over two-month-old Elias who was strapped in a car seat. Appellant claimed that Dominique bit and hit him with a closed fist three or four times in the head. Family members reported that appellant and Dominique "fight all the time."

After DSS filed a petition for failure to protect (§ 300, subd. (b)) and no provision for support (§ 300, subd. (g)), Elias was placed with the maternal grandparents where his half-siblings (Deeana and Kallie) were living.

Dominique denied that she had Indian ancestry at the March 25, 2015 detention hearing. At the April 15, 2015 jurisdiction hearing, appellant's trial counsel advised the trial court that appellant "may --and this is a big maybe -- have some American Indian ancestry and the cousin with whom he's staying would have that information if -- if that's true." The minute order stated that appellant was a "Maybe" for possible Indian heritage and "DSS to investigate." (See § 224.3, subd. (c) [duty to make further inquiry regarding possible Indian status of the child].)

On June 2, 2015, Dominique and appellant entered into a Juvenile Dependency Mediation Agreement, and submitted on the second amended petition. The trial court sustained the petition and ordered services and supervised visits.

Services were terminated at the six month review hearing based on appellant's failure to submit to drug testing or follow the case plan. The supervised visits were positive but appellant displayed a lack of honesty and minimal participation in the case plan. Appellant told the social worker that he and Dominique have "been together since the beginning." Appellant repeatedly showed up at Dominique's work place and had verbal altercations on the phone. After the maternal grandparents voiced concerns about their safety and the safety of Elias, there were new reports of domestic violence.

DSS filed a section 388 petition to terminate appellant's visitation when appellant told a social worker "go to hell, asshole," revved his car engine, and screeched out of the parking lot in the presence of Elias and the visitation supervisor.
Two days before the contested 366.26 hearing, appellant filed a section 388 petition for reinstatement of services. Both petitions were heard on April 29, 2016 at the permanent placement hearing.

Section 366.26 Hearing

The morning of the hearing, appellant's trial counsel advised the court that the paternal grandmother, "who is present today, has discovered that they have American Indian heritage in their family." Deputy County Counsel Cherie Vallelunga stated that appellant learned he might have American Indian heritage through a ancestry.com DNA test but "there is no known tribe." "And my understanding is that most frequently those DNA tests have numerous drop-down boxes of what you may be, with a pretty high rate of error, that indicates they are not to be used for legal purposes. [¶] We would definitely at this point . . . [give] notice [to] the Bureau of Indian Affairs and we will do that because we don't have another tribe. If there were a copy of that ancestry [test], particularly as it pertains to what the father believes, or the grandmother believes, may be Indian ancestry, I do believe it would be very helpful because, typically, I believe those tests talk about what section of the United States or other countries that the heritage may come from."

The trial court asked, "Do you have that information, sir?" Appellant responded, "We are still waiting." The trial court asked, "What are we waiting for?" Appellant, with the help of the paternal grandmother, filled out an ICWA-020 form stating that it was "unknown as yet" what tribe appellant may belong to.

Following the ICWA discussion, the trial court received evidence on the section 388 petitions and DSS recommendation to terminate parental rights. The trial court denied the section 388 petitions, found that Elias was adoptable, and terminated parental rights. (§ 366.26.)

ICWA

Appellant argues that the trial court erred in not continuing the section 366.26 hearing until an ICWA notice was served on the BIA. We have granted DSS's request for judicial notice that the ICWA-030 notice was mailed to the BIA a week after parental rights were terminated. The notice, which is directed to "Sacramento Area Director, BIA," indicates that a section 366.3 post permanent plan review hearing is set for October 27, 2016. It states that the child's birth certificate is attached to the notice, but there is no birth certificate as required by state law. (§ 224.2, subd. (a)(5)(E).) The notice also states that it is "Unknown" whether the biological birth father is named on the birth certificate and that a copy of the dependency petition is attached, but there is no copy as required by state law. (§ 224.2, subd. (a)(5)(D).)

In *In re Isaiah W., supra*, 1 Cal.5th 1, our Supreme Court recently held that ICWA imposes a continuing duty on the juvenile court to inquire whether a child in a dependency proceeding is or may be an Indian child. (*Id.*, at p. 6.) Whenever the trial court knows or has reason to know that an Indian child is involved, notice of the proceedings must be given to the relevant tribe or tribes. (25 U.S.C.S. § 1912(a); Welf. & Inst. Code, § 224.2, subd. (a); Cal. Rules of Court, rule 5.481(b)(1).) "No foster care placement or termination of parental rights proceeding may be held until at least 10 days after the tribe receives the required notice. [Citations.]" (*In re Isaiah W., supra*, 1 Cal.5th at p. 5.)

In the instant case, DSS acknowledged that the ancestry.com information was significant enough to serve ICWA notice. The ICWA notice, however, was mailed to the BIA a week after the 366.26 hearing.

DSS contends that the ICWA error is harmless. We disagree. (See *In re Desiree F.* (2000) 83 Cal.App.4th 460, 474 [state courts have no jurisdiction to proceed with dependency proceedings involving a possible Indian child until a period of at least 10 days after appropriate individuals and entities have received notice]; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111 [failure to require compliance with ICWA notice requirements is prejudicial error]; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1411

[defective ICWA notice "usually prejudicial"]; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 855 [ICWA error warrants reversal of section 366.26 order and limited remand for compliance with ICWA notice requirements].) "'[[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.' [Citation.]" (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 15.) "In accordance with the ICWA (25 U.S.C.S. § 1912(a)), all proceedings should have been suspended until a minimum of 10 days after the [BIA] received the notice. This the court did not do." (*In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 471; see § 224.2, subd. (d).)[2]

Disposition

The order denying the section 388 petitions and order terminating parental rights are reversed and the case is remanded to the trial court with directions to order DSS to provide ICWA notices containing updated information to the BIA and any appropriate Indian tribes. If, following such notice, the BIA or any tribe determines that Elias is an Indian child as defined by the ICWA, the trial court shall hold a new section 366.26 hearing in conformance with ICWA. If, on the other hand, Elias is not determined to be an Indian child, or if no response is received indicating that he is an Indian child, the trial court shall reinstate the order terminating parental rights and the order denying the section 388 petitions.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

[2] Section 224.2, subdivision (d) provides in pertinent part: "No proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs, except for the detention hearing . . . . Nothing herein shall be construed as limiting the rights of the parent, Indian custodian, or tribe to more than 10 days notice when a lengthier notice period is required by statute."

Linda D. Hurst, Judge

Superior Court County of San Luis Obispo

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Rita L. Neal, County Counsel, Leslie H. Kraut, Deputy County Counsel, for Petitioner and Respondent.