Filed 8/8/13 In re Christopher D. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Christopher D., a Person Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Christal D., Defendant and Appellant.	B246595 (Los Angeles County Super. Ct. No. CK51832)

APPEAL from an order of the Superior Court of Los Angeles County, Debra Losnick, Commissioner. Reversed and remanded with directions.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

_____

Christal D. (mother) appeals from the order terminating parental rights to her children Christopher and Brianna. She argues there was a lack of compliance with the notice requirements of the Indian Child Welfare Act, 25 U.S.C. section 1901 et seq. (ICWA) and the state-imposed inquiry requirements. (Welf. & Inst. Code, § 224.3; Cal. Rules of Court, rule 5.481(a)(2).) We agree that the juvenile court failed to make sufficient inquiry before ruling ICWA did not apply. The error cannot be deemed harmless in light of the maternal uncle's suggestion that he and mother may have American Indian heritage. We remand for the limited purpose of making a proper inquiry.

FACTUAL AND PROCEDURAL SUMMARY

Mother lost her parental rights to her five older children due to chronic substance abuse. In April 2011, the Department of Children and Family Services (DCFS) filed a Welfare and Institutions Code section 300 petition on behalf of mother's youngest children, Christopher (born in 2007) and Brianna (born in 2011). The two children were detained and placed with their maternal uncle and his wife, who wished to adopt them. Mother herself had been adopted by her maternal grandmother. Mother's maternal uncle, with whom the children were placed, was thus her brother by adoption.

At the jurisdictional/dispositional hearing in August 2011, the court did not order reunification services and set the case for a permanency hearing. In November 2011, DCFS reported that the maternal uncle claimed he and mother "may have American Indian heritage," but he did not know what tribal affiliation may exist. In March 2012, the court found it had no reason to know this was an ICWA case. After several continuances, the court held a permanency hearing in December 2012, at which it terminated mother's parental rights.

This appeal followed.

DISCUSSION

We review the court's ICWA findings for substantial evidence and view the record in the light most favorable to the judgment, but the judgment cannot be based on speculation. (*In re H.B.* (2008) 161 Cal.App.4th 115, 119–120.)

ICWA provides that '"where the court knows *or has reason to know* that an Indian child is involved,"' the child's tribe must be notified of any pending proceedings to terminate parental rights. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406, quoting 25 U.S.C. § 1912(a).) The ICWA notice requirements are interpreted broadly, and they are triggered by information suggesting that the child may be an Indian child. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 256–258; see also Welf. & Inst. Code, § 224.3, subd. (b)(1) [reason to know exists where "a member of the child's extended family provides information suggesting the child is . . . 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"].)

ICWA does not impose a duty to inquire whether the child is an Indian child, but the Bureau of Indian Affairs's nonbinding ICWA guidelines direct the state courts to do so. (*In re H.B.*, *supra*, 161 Cal.App.4th at pp. 120–121, citing 44 Fed.Reg. 67584, 67588 (Nov. 26, 1979).) ICWA allows the states to set "a higher standard of protection." (25 U.S.C. § 1921.) Under California law, dependency courts and county welfare departments have an "affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child . . . ." (Welf. & Inst. Code, § 224.3, subd. (a).) Courts are required to order that parents be informed about and complete the Parental Notification of Indian Status form when they first appear in the proceedings. (Cal. Rules of Court, rule 5.481(a)(2) & (3).) Once the court or social worker knows or has reason to know that an Indian child is involved, the social worker must inquire further into the child's possible Indian status, by interviewing the parents and extended family, as well as contacting the BIA, the tribes, and any other person who may have relevant information. (Welf. & Inst. Code, § 224.3, subd. (c).)

The record in this case does not show that mother was ever asked any ICWA-related questions or directed to complete the ICWA Parental Notification of Indian Status form, even though she appeared early on in the case, was interviewed by the social worker, and kept in touch with DCFS, albeit sporadically. Respondent concedes the lack of compliance with the inquiry requirement as to mother, but argues that the error is harmless since mother makes no offer of proof on appeal that she has any American Indian heritage.

The lack of compliance with the higher state inquiry standard has been held harmless in cases where there is no suggestion—in the juvenile court and on appeal—that ICWA may apply. (See *In re H.B.*, *supra*, 161 Cal.App.4th at pp. 119, 122 [finding harmless error where mother was not ordered to complete ICWA form but had told social worker she did not have Indian heritage]; *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431 [finding harmless error where no suggestion in record that ICWA may apply and no offer of proof on appeal that father had any ICWA-related information]; but see *In re J.N.* (2006) 138 Cal.App.4th 450, 461 [refusing to speculate what mother's response would have been had she been asked about possible Indian heritage].)

The juvenile court in *In re Rebecca R.*, *supra*, 143 Cal.App.4th 1426, affirmatively ordered DCFS to make an inquiry and the social worker's reports consistently indicated ICWA did not apply. (*Id*. at p. 1430.) On that record, the appellate court presumed DCFS properly carried out its duties. (*Ibid*.) The court distinguished *In re J.N.*, *supra*, 138 Cal.App.4th 450, because the record in that case affirmatively showed an inquiry was made as to one parent, thus supporting an inference it was not made as to the other. (*In re Rebecca R.*, at p. 1431.)

Unlike *In re Rebecca R.*, on which respondent principally relies, the record in this case contains an actual suggestion of possible American Indian ancestry. In November 2011, DCFS reported the maternal uncle's statement that he and mother may have such ancestry. DCFS's January 2012 report stated ICWA may apply. While the uncle's reported claim is vague and unspecific, the DCFS report does not show the social worker inquired into the basis for his claim. Nor did the juvenile court order any inquiry of the

uncle or mother regarding the claim. Absent such an order, we cannot presume DCFS satisfied its duty of inquiry. Although in November 2011, DCFS began reporting that mother's whereabouts were unknown, the uncle, with whom the children were placed, was available. Absent an inquiry into the uncle's basis for his claim, it would be speculative to infer that the claim was baseless, or that inquiry of mother and further inquiry of the uncle would have been futile.[1]

Mother argues that the uncle's statement was sufficient to trigger the ICWA notice requirements. She cites *In re Antoinette S.*, *supra*, 104 Cal.App.4th 1401, where a father's suggestion that his child might be an Indian child because the paternal great-grandparents had unspecified Native American ancestry was deemed sufficient to trigger those requirements. (*Id.* at p. 1408.)

Respondent argues that the uncle's statement was too vague to give the court reason to know that ICWA applied, citing *In re Hunter W.* (2011) 200 Cal.App.4th 1454. There, we found ICWA was not triggered by the mother's claim she may have Indian heritage through her father and deceased paternal grandmother where mother could not identify any particular tribe, had no contact information for her father, and identified no other relative who could provide more information. (*Id*. at pp. 1468–1469.) Similarly, in *In re J.D.* (2010) 189 Cal.App.4th 118, a claim by the child's grandmother that she had Indian ancestry because her own grandmother had told her so was deemed insufficient where no tribe was identified and no other living relatives could provide more information. (*Id*. at p. 123.) In *In re O.K.* (2003) 106 Cal.App.4th 152, the claim that the minor's father "'may have Indian in him'" was deemed insufficient because it "was not based on any known Indian ancestors but on the nebulous assertion that 'where were [*sic*] from is that section . . . .'" (*Id*. at p. 157.)

That the children's uncle could not identify a particular tribe does not automatically invalidate his claim since where no tribe is identified, notice must be given

---

[1] Agency reports from mother's prior dependency cases were filed in this case. They stated that ICWA did not apply, but provided no basis for that conclusion, or a court finding to that effect. Respondent does not rely on them.

to the BIA. (*In re Antoinette S.*, *supra*, 104 Cal.App.4th at p. 1406.) But the uncle's claim of possible American Indian heritage is less specific than that in *In re Antoinette S.*, in that it does not identify any ancestors through whom the uncle claimed that heritage or any explanation for his belief that he and mother may have such heritage. The record does not show the uncle was asked any follow-up questions that would justify an inference that his claim was baseless, or that an inquiry of mother would have been futile. Here, as in *In re J.N.*, *supra*, 138 Cal.App.4th 450, there was a lack of compliance with the state-imposed inquiry requirements. (*Id*. at p. 461, fn. 6.) Because of the incomplete inquiry, it is impossible to determine on the record before us whether ICWA would apply to the case.

DISPOSITION

The order terminating mother's parental rights is conditionally reversed. The matter is remanded to the juvenile court with directions to order that DCFS comply with the state inquiry requirements. (Welf. & Inst. Code, § 224.3; Cal. Rules of Court, rule 5.481(a)(2).) After proper inquiry, if the court determines there is a reason to know the children may be Indian children, it shall proceed in accordance with ICWA; if the court determines that ICWA does not apply, the order shall be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.