Filed 2/23/12 In re K.S. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re K.S. et al., Persons Coming Under the Juvenile Court Law.	B232955 (Los Angeles County Super. Ct. No. CK75404)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JENNIFER S., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Marguerite Downing, Judge. Reversed and remanded.

Lauren K. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Jacklyn K. Louie, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Jennifer S. (Mother) appeals from the termination of her parental rights under Welfare and Institutions Code section 366.26 as to her children K.S. and R.S. Mother contends on appeal that the order terminating her parental rights must be reversed and the matter remanded because the trial court erred by failing to transfer this matter to the State of Illinois. Mother also claims the order terminating her parental rights must be reversed and the matter remanded because the juvenile court failed to make the necessary inquiry and notice findings under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.; ICWA).

We find no basis for reversal other than ICWA, as to which we conclude that the inquiry conducted was not in full compliance with the requisites of the statute. We reverse for the limited purpose of full compliance with ICWA, as explained below.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and her children, K.S. (born in March 2006) and R.S. (born in May 2007), came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) in November 2008 when the family visited the Department of Public Social Services (DPSS) to inquire about the homeless program. A DPSS worker observed Mother angrily slap K.S. "violently across the head." A DCFS social worker with the Los Angeles Skid Row Project reported that Mother and the children had just arrived in Los Angeles from Illinois. Mother disclosed that she suffered from bipolar disorder and was not taking her medication, and that she had been hospitalized in 2006 with suicidal ideation. The children were filthy and had multiple bruises, and the family was homeless. Mother told the social worker she loved the children but did not have the resources to care for them, and told the social worker to "take them."

The children were taken into protective custody, and DCFS filed a petition pursuant to Welfare and Institutions Code section 300 on November 24, 2008.

When first asked, Mother denied that the children had Indian heritage. However, in court in late December 2008, Mother said she might have Indian heritage through the Cherokee/Blackfoot tribes. She said her great-grandfather (the children's great, great-grandfather) was a quarter Cherokee and a quarter Blackfoot. DCFS sent notices to those tribes, and received responses that the children were not Indian children.

The juvenile court sustained the Welfare and Institutions Code section 300 petition on February 5, 2009. At the disposition hearing in March 2009, the court ordered DCFS to provide family reunification services to Mother. Mother was ordered to complete individual counseling to address issues including physical abuse, to attend parenting education, and to have a full mental health assessment performed and thereafter comply with the treatment indicated. Mother requested that the children be placed with her mother in Illinois, and the court ordered DCFS to initiate an investigation pursuant to the Interstate Compact on the Placement of Children (ICPC). The child welfare agency in Illinois prepared a home study regarding the maternal grandmother and gave its approval for the children to be placed with her.

At the six-month review hearing in September 2009 (Welf. & Inst. Code, § 366.21, subd. (e)), DCFS reported that Mother had tested positive for cocaine. The court ordered the children to be placed with the maternal grandmother in Illinois, and permitted Mother to move there and participate in family reunification services under the supervision of the Illinois child welfare agency. Thereafter the State of Illinois provided supervision and monitoring of the case. DCFS continued to administer the case, regularly receiving reports from Illinois and remaining in contact with Mother.

At the time of the 12-month review hearing (Welf. & Inst. Code, § 366.21, subd. (f)), DCFS recommended termination of family reunification services based on Mother's inability to resolve the issues that led to the children becoming dependents of the court. However, at the contested hearing in March 2010, the court ordered DCFS to continue providing Mother with family reunification services.

Mother's behavior continued to be erratic, and her compliance with the case plan was inconsistent. In September 2010, at the 18-month review hearing (Welf. & Inst. Code, § 366.22), the court terminated family reunification services.

At the initial permanency planning hearing (Welf. & Inst. Code, § 366.26) held in January 2011, the court found, without objection, that the children were not Indian children. Mother's counsel had filed on the day of the hearing a petition to modify existing orders (Welf. & Inst. Code, § 388), requesting that DCFS investigate the possibility of transferring jurisdiction of the case to Illinois. The court ordered DCFS to explore doing so.

The court denied Mother's petition shortly thereafter, for failure to show changed circumstances or new evidence, noting that it was not the appropriate vehicle for seeking to transfer the case. Mother filed a second petition (Welf. & Inst. Code, § 388) in early April 2011, asking the court to change its prior order denying a change of venue. The court denied the request, indicating that "this Court does not have the ability to transfer jurisdiction to Illinois. State of Illinois needs to open their own case. Cannot transfer this case."

A contested permanency planning hearing was held in May 2011. Counsel for DCFS and the children urged the court to terminate parental rights. The court found the children to be adoptable, found no applicable exceptions to adoption, and terminated parental rights.

This timely appeal followed.

DISCUSSION

I. Failure to Transfer Case to Illinois

Family Code section 3421, part of the Uniform Child Custody Jurisdiction and Enforcement Act (the Act), confers jurisdiction on California courts to make child custody determinations by initial or modification decrees if California "is the home state of the child on the date of the commencement of the proceeding." (Fam. Code, § 3421,

subd. (a)(1).)[1] The Act defines "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." (§ 3402, subd. (g).) In this case, Mother and the children arrived in California only days before the children were taken into protective custody.

However, section 3424 provides that "(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and . . . it is necessary in an emergency to protect the child because the child . . . is subjected to, or threatened with, mistreatment or abuse. [¶] (b) If there is no previous child custody determination that is entitled to be enforced under this part and a child custody proceeding has not been commenced in a court of a state having jurisdiction under Sections 3421 to 3423, inclusive, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 3421 to 3423, inclusive. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 3421 to 3423, inclusive, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child."

DCFS became involved with Mother and the children when a mandatory reporter witnessed Mother forcefully slapping one of the children on the head, both children were observed to be filthy and bruised, and Mother admitted to a history of bipolar disorder and hospitalization for suicidal ideation. Mother and the children were homeless, Mother admitted she was not taking medication to control her mental illness, and she felt so overwhelmed that she told the social worker that she could not take care of her children. DCFS immediately detained the children and filed a Welfare and Institutions Code section 300 petition on November 24, 2008. The children were placed in foster care. In March 2009, Mother stated she wanted the children to be placed with her mother in Illinois, and said that she intended to also relocate there. DCFS contacted the social

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[1] All further undesignated statutory references are to the Family Code.

services agency in Illinois, and initiated proceedings pursuant to the ICPC. The agency in Illinois prepared a home study regarding the maternal grandmother and gave its approval for the children to be placed with her. They were placed in her care in September 2009.

Mother contends that the court should have transferred the case to Illinois after the children and Mother moved there. In a Welfare and Institutions Code section 388 petition filed in January 2011—after reunification services were terminated in September 2010, a Welfare and Institutions Code section 366.26 hearing had been scheduled for May 2011, and 16 months after Mother and the children relocated to Illinois—Mother requested that the juvenile court transfer the case to Illinois. The court denied that petition, as well as Mother's April 2011 petition under the same code section seeking the same relief. The court ruled that it did not have the ability to transfer jurisdiction to Illinois.

The Act does not provide for the transfer of cases. Rather, it contemplates that once the court of one state properly exercises jurisdiction over the proceedings, that court will continue to exercise jurisdiction over the matter, although its orders may be enforced by an out-of-state court if the minor moves to the other state. (See generally §§ 3421, 3443.) The Act does allow a court to decline to exercise jurisdiction *in the first instance* on the grounds of inconvenient forum if it determines that a court of some other state is a more appropriate forum. (§ 3427.) Here, the children and Mother were present in this state when the proceedings were initiated, on an emergency basis, and all the relevant evidence was in this state. The children were declared dependents of the juvenile court, and family reunification services were provided to Mother and the children for several months before Mother indicated she would like DCFS to consider the maternal grandmother in Illinois for placement of the children. By that point, the California court was the appropriate forum, California having become the home state of the children for purposes of the court's exercising jurisdiction. Illinois evaluated the maternal grandmother's home and thereafter supervised the case, obviously acquiescing in the ICPC and in the California juvenile court's exercise of jurisdiction.

As relevant here, section 7901, part of the ICPC, addresses the situation where a child is sent from one state to another for purposes of placement in foster care or as a preliminary to a possible adoption. As relevant, article 5 of that section provides: "(a) The sending agency [defined in article 2 as the "party state, or officer or employee thereof"] shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment, and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in the receiving state." The ICPC therefore effectively requires California courts to retain jurisdiction over out-of-state placements until the child no longer is a dependent of the court or the receiving state concurs in the discharge of the sending state's responsibility for the health and welfare of the child. There is no evidence here that Illinois had shown any interest in discharging California's responsibility for the children's health and welfare. The social services agency in Illinois cooperated extensively with DCFS in placing the children with the maternal grandmother and in supervising the case, fully acquiescing at all times in the California juvenile court's exercise of jurisdiction.

In conclusion, the juvenile court was correct in concluding that it was not entitled unilaterally to transfer the case to Illinois when Mother requested it. It follows that the court's failure to honor Mother's belated request for a transfer was neither error nor an abuse of discretion.

II. ICWA Notice

Mother initially denied that the children had Indian ancestry, but at the first hearing, Mother said she might have Indian ancestry through the Cherokee/Blackfoot tribes; she completed an ICWA-020 form. She later said that her maternal great-grandfather was a quarter Cherokee and a quarter Blackfoot.

DCFS sent notice to the tribes, which listed Mother's great-grandfather's name and place of birth, but not his date of birth. The tribes responded that, based on the

information provided, the children were not Indian children. At the initial Welfare and Institutions Code section 366.26 hearing in January 2011, the court found that the ICWA did not apply.

Mother contends on appeal that the notices sent by DCFS were inadequate because DCFS failed to inquire of the maternal grandmother, with whom the children were placed, whether she had additional information about the maternal great-grandfather, namely his birthdate. We must determine whether substantial evidence supports the juvenile court's finding that ICWA notice was adequate. (*In re H.B.* (2008) 161 Cal.App.4th 115, 119-120.) "The purpose of ICWA is to '"protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."'" (*Id.* at p. 120.)

Notice given by DCFS pursuant to the ICWA must contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership. "[B]oth the federal ICWA regulations (25 C.F.R. § 23.11(d)(3) (2008)) and [Welfare and Institutions Code] section 224.2, subdivision (a) require the agency to provide all known information concerning the child's parents, grandparents and great-grandparents." (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576.) If known, names (maiden, married, former, and aliases), current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other information are to be provided. (*Id.* at p. 575, fn. 3.) Where, as here, notice has been received by the tribe, errors or omissions in the notice are reviewed under the harmless error standard. (*Id*. at p. 576.) "Deficiencies in an ICWA notice are generally prejudicial, but may be deemed harmless under some circumstances. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162; [*In re*] *Antoinette S.* [(2002)] 104 Cal.App.4th [1401,] 1411-1413.)" (*In re Cheyanne F.*, *supra*, at p. 577.)

On appeal, Mother does not contend that she has additional information regarding her maternal relatives that would be useful to the tribes in determining the eligibility of the children for membership. Instead, she contends that DCFS had a duty to inquire whether the maternal grandmother knew Mother's great-grandfather's birthdate. DCFS

responds that any deficiency in the notice was the result of omissions by Mother, and should have been raised and rectified in the juvenile court. In addition, it points out that Mother has not indicated that the maternal grandmother does in fact have the missing information that might change the tribes' determinations regarding the eligibility of the children for membership.

DCFS cites *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 for the proposition that the knowledge of any Indian connection was wholly within Mother's control. That case is distinguishable, however, because the 2005 amendment to the California Rules of Court, rule 1439(d), which imposed an affirmative and continuing duty to inquire into a child's Indian ancestry, was not in effect when the relevant events in *Rebecca R.* occurred.[2] (*Id.* at pp. 1429-1430.)

DCFS's reports do not indicate that it made any inquiry of maternal grandmother regarding her knowledge of the children's possible Indian ancestry. The agency's duty is to inquire into the possibility of Indian ancestry and to act upon the information the family provides. The agency is not required to conduct an extensive independent investigation or to "cast about, attempting to learn the names of possible tribal units to which to send notices." (*In re Levi U.* (2000) 78 Cal.App.4th 191, 199.) DCFS has not demonstrated that it conducted even a cursory investigation by asking the maternal grandmother for information regarding her grandfather. Although we are sympathetic to DCFS's contention that Mother's objection will likely result in nothing other than regrettable delay in the proceedings, we cannot say that the failure to investigate the maternal grandmother's knowledge about her grandfather constitutes harmless error. In contrast to the circumstances in *In re H.B., supra,* 161 Cal.App.4th 115, also relied upon

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[2] As noted in *In re H.B., supra,* 161 Cal.App.4th 115: "Effective January 1, 2007, the California Rules of Court were renumbered and [former] rule 1439 became [rule] 5.664. Effective January 1, 2008, former rule 5.664 was repealed and replaced, in part, with current rule 5.481." (*Id.* at p. 121, fn. 5.)

Applicable here, rule 5.481(a) provides that the court and any party seeking termination of parental rights "have an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all proceedings identified in rule 5.480."

by DCFS to argue that the error here was harmless, the information which is sought pertains directly to the ancestor Mother affirmatively claimed was Indian. (See *id*. at pp. 121-122 [no affirmative representation of Indian ancestry, Mother specifically denied such ancestry]; *In re Antoinette S., supra*, 104 Cal.App.4th 1401 [omission of information concerning non-Indian relatives is harmless error if the notice included all known information about the Indian parent and relatives].)

Because DCFS has not demonstrated that it made any inquiry of the maternal grandmother regarding information about relatives with possible Indian ancestry, we will reverse and remand the matter with directions to the court to order DCFS to further investigate the matter. If no additional information is provided, the order terminating parental rights shall be reinstated. If additional information comes to light, the court shall order DCFS to provide notice to the proper tribes, and act accordingly given the tribes' responses.

DISPOSITION

The order terminating parental rights is reversed. The case is remanded to the juvenile court with directions to order DCFS to conduct additional investigation to determine whether it is possible to provide more complete notice to the tribes in accordance with ICWA. If additional notice is warranted and, after proper notice, the court finds the children are Indian children, the court shall proceed in conformity with ICWA. If, after proper inquiry and notice, the court finds the children are not Indian children, the order terminating parental rights and selecting adoption as the permanent plan shall be reinstated.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J. WILLHITE, J.