Filed 9/14/17 In re M.C. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re M.C. et al., Persons Coming Under the Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. VICTORIA C., Defendant and Appellant.	B271047 (Los Angeles County Super. Ct. No. CK93698)

APPEAL from an order of the Superior Court of Los Angeles County, Joshua D. Wayser, Judge. Affirmed.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

In this consolidated appeal from an order terminating mother's parental rights, mother contends the juvenile court committed reversible error by failing to provide notifications required by the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and related California statutes (Welf. and Inst. Code § 224 et seq.).[1] Mother maintains her initial assertion that the children might be eligible for membership in the "Cherokee" tribe was sufficient, without more, to mandate ICWA notification, notwithstanding statements she made in response to the juvenile court's later inquiry that indicated she lacked a reasonable factual basis for her assertion. We conclude the court satisfied its affirmative duty to inquire about the children's possible Indian status, and the court's finding that it had no reason to know Indian children were involved was supported by the evidence. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *The Dependency Proceedings Leading to Termination of Mother's Parental Rights*

On May 30, 2012, the Los Angeles County Department of Children and Family Services (the Department) filed a dependency petition on behalf of seven-year-old M.C. and four-year-old K.C. The petition alleged father physically abused the girls, and that mother had mental and emotional issues that rendered her unable to adequately care for the children.

In September 2012, the juvenile court declared the children dependents as described in section 300, subdivisions (a), (b) and (j), removed them from parental custody, and ordered reunification services.

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[1] Further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

In August 2013, the Department initiated dependency proceedings on behalf of newborn V.C., based on the abuse of her siblings and mother's mental health issues. The court permitted V.C. to remain in mother's custody and, three months later, ordered M.C. and K.C. to be returned to mother's custody under the Department's supervision.

In November 2013, mother's mental health destabilized, prompting the Department to file new and supplemental petitions on behalf of the three girls. In June 2014, the court sustained the amended petitions and found the children at risk due to mother's mental health issues and the unsanitary condition of the family home. Ultimately, the court set a section 366.26 hearing to select and implement a permanent plan for all three children.

On July 28, 2016, the juvenile court held a contested section 366.26 hearing. After receiving the Department's reports into evidence, the court concluded the children were adoptable and that no exception to adoption applied. The court terminated parental rights over all three children and freed them for adoption by the paternal grandmother. Mother filed timely notices of appeal.[2]

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[2] Mother filed notices of appeal from three separate orders (1) denying a section 388 petition to renew reunification services (B271047); (2) appointing the children's paternal grandmother as guardian and identifying adoption as the appropriate permanent plan (B277077); and (3) terminating parental rights (B276720). On mother's motion, the court consolidated the three appeals for briefing, oral argument and decision.

2. *The Juvenile Court's Inquiry and ICWA Finding*

Mother's appeal exclusively challenges the juvenile court's finding that ICWA does not apply to these dependency proceedings. Consistent with our standard of review, we state the relevant facts and evidence in the light most favorable to the court's ruling. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467 (*Hunter W.*); *In re H.B.* (2008) 161 Cal.App.4th 115, 119-120 (*H.B.*).)

On May 31, 2012, following the older girls' initial detention, mother filed an ICWA-020 Parental Notification of Indian Status form. The form directed mother to "provide all requested information about the child's Indian status by completing this form," and to "immediately" let her attorney, social worker or the court investigator know if she received new information that would change her answers. Mother checked a box indicating the "child[ren] [are] or may be [members] of, or eligible for membership in, a federally recognized Indian tribe." On a subsequent line requesting the "Name of tribe," mother wrote "Cherokee." On the line provided for the "Name of band," mother wrote "maternal great aunt may have info but she is deceased." Mother did not provide additional information regarding the children's possible Indian ancestry, nor did she check the box indicating "One or more of [her] parents, grandparents, or other lineal ancestors is or was a member of a federally recognized tribe."

At the detention hearing later that day, the juvenile court asked mother about the information she provided in her ICWA-020 form. The following exchange occurred:

"[THE COURT:] [Mother], you had filled out an ICWA 20 form saying that your -- the children are or may be members of the Cherokee tribe. What makes you believe that, ma'am?

"MINORS' MOTHER: My great-great aunt is Indian. You know, my roots is from the south. Really, though, what makes me believe is the fact that I do know that by heart from my -- the pictures that my grandmother has. But other than that, nobody has really ever told me my history.

"THE COURT: Okay. When you say you 'know it by heart,' what do you mean?

"MINORS' MOTHER: When I know it by heart?

"THE COURT: Yes.

"MINORS' MOTHER: The color in the skin, the hair texture. What else am I supposed to know?

"THE COURT: Was there anybody that might have further information in regards to the possible American Indian heritage? Any member of your family, ma'am?

"MINORS' MOTHER: The only one is -- I don't -- actually, it's on my grandfather's side, Orlando [C.]

"THE COURT: So ma'am --

"MINOR'S MOTHER: I don't know. He passed when my daughter was born.

"THE COURT: So does anybody -- any family member have more information regarding that?

"MINORS' MOTHER: Not to my knowledge."

Based on mother's ICWA-020 form and the foregoing exchange, the juvenile court found it had no reason, "[a]t this point," to know the minors were Indian children as defined by ICWA. Under the guidance provided by California law, the court observed it would have " '[r]eason to know' " an Indian child was involved if, "anyone having an interest in the child provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or at least one of the child's biological parents, grandparents, or great-grandparents are or were members of the tribe." In view of that guidance, the court explained it had no reason to know the minors were Indian children because "the mother indicates no one's ever told her that there's any American Indian heritage but that she believes it, based on pictures, skin color, and hair texture, that there may be American Indian heritage." The court concluded those bases were "too vague" to indicate Indian heritage and, therefore, were insufficient to compel notification under ICWA.

Because mother indicated she was unaware of any living relative or other person who might have additional information, the court found no basis existed to order further inquiry. However, the court directed mother to "keep the Department, her attorney, and the court aware of any new information regarding possible Indian heritage."

On August 1, 2013, following V.C.'s birth, mother filed a new ICWA-020 form indicating the newborn had no known Indian ancestry. At the hearing that day, the court asked mother, "Still no American Indian heritage?" Mother replied, "Yes." The court again found ICWA did not apply.

DISCUSSION

1. *Governing Law and Standard of Review*

"Congress adopted ICWA in response to concerns ' "over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." ' [Citations.] ICWA addresses these concerns by establishing 'minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.' (25 U.S.C. § 1902.)" (*In re Abbigail A.* (2016) 1 Cal.5th 83, 90 (*Abbigail A.*).)

In any given case, ICWA applies or not depending on whether the child who is the subject of the custody proceeding is an Indian child. (*Abbigail A., supra,* 1 Cal.5th at p. 90; 25 U.S.C. § 1901(3).) For these purposes, " 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) 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).) A child may be an "Indian child" under ICWA even if neither of the child's parents is enrolled in a tribe. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254.)

The Indian status of a child need not be certain to trigger ICWA's notice requirements. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.) ICWA provides: "[W]here the court knows *or has reason to know* that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify . . . the Indian

child's tribe . . . of the pending proceedings and of their right of intervention. If the identity or location of . . . the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner." (25 U.S.C. § 1912(a), italics added.) When the notice provision is violated, an Indian child, parent, Indian custodian, or the Indian child's tribe may petition to invalidate the proceeding. (25 U.S.C. § 1914.)

The federal ICWA notice provisions are incorporated into California law. (See §§ 224-224.3.) Thus, section 224.2, subdivision (b) provides: "Notice shall be sent whenever it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter . . . unless it is determined that [ICWA] does not apply to the case in accordance with Section 224.3." "The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following: [¶] (1) A person having an interest in the child, including the child . . . 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." (§ 224.3, subd. (b).)

California law also imposes "an affirmative and continuing" duty on the court and the social services agency "to inquire whether a child . . . is or may be an Indian child . . . ." (§ 224.3, subd. (a)(4).) Consistent with this mandate, California Rules of Court, rule 5.481(a)(4) provides that if the Department "knows or has reason to know that an Indian child is or may be involved, [it] must make further inquiry as soon as practicable by[,]" among other things, "[c]ontacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility." (Rule 5.481(a)(4)(C); accord §224.3, subd. (c).) Under rule 5.481, some courts have

found "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); *In re Michael V.* (2016) 3 Cal.App.5th 225, 235; cf. *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520 (*Jeremiah G.*) ["both the federal regulations and the California Welfare and Institutions Code require more than a bare suggestion that a child might be an Indian child" before notice is required].) However, "the obligation is only one of inquiry and not an absolute duty to ascertain or refute Native American ancestry." (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413.)

We review the juvenile court's ICWA findings under the substantial evidence standard, which requires us to determine whether reasonable, credible evidence of solid value supports the court's order. (*Hunter W., supra,* 200 Cal.App.4th at p. 1467; *In re N.M.* (2008) 161 Cal.App.4th 253, 264; *H.B., supra,* 161 Cal.App.4th at pp. 119-120.)

2. *The Evidence Supports the Juvenile Court's Finding that It Had No Reason to Know the Case Involved an Indian Child as Defined by ICWA*

Mother contends the information she provided in her initial ICWA-020 form was sufficient to trigger ICWA's notice requirements. On that form, mother indicated the two older children may be eligible for membership in the "Cherokee" tribe and that the "maternal great aunt may have info but she is deceased." Mother maintains the "specific" reference to "Cherokee heritage," standing alone, required the juvenile court to give notice to the three federally recognized Cherokee tribes before terminating her parental rights.

The Department argues this information was too vague to compel ICWA notification and, at most, mother's reference to possible Cherokee ancestry triggered only the "further inquiry" requirement established by California law. (See Cal. Rules of Court, rule 5.481(a)(4); § 224.3, subd. (c).) With respect to inquiry, the Department maintains the juvenile court satisfied its duty by eliciting testimony from mother about the basis for claiming Cherokee ancestry. When mother's testimony demonstrated she had no reasonable basis for her prior assertion, the Department contends no further inquiry was required, absent new information suggesting possible Indian heritage. The law and the record support the Department's position.

In re O.K. (2003) 106 Cal.App.4th 152 (*O.K.*) is instructive. Like mother, the parents in that case argued the juvenile court erred when it conducted a section 366.26 hearing without ensuring compliance with the notice provisions of ICWA. The *O.K.* court recounted the critical exchange as follows: "At the section 366.26 hearing, the juvenile court addressed the application of the ICWA, stating: 'There are references concerning the [ICWA], but [it] doesn't appear that there is a parent who is either enrolled or eligible for enrollment; is that correct?' The paternal grandmother, who was present at the hearing, replied, 'I'm not understanding that too well, but the boy -- the young man may have Indian in him. I don't know my family history that much, but where were [*sic*] from it is that section so I don't know about checking that.' The paternal grandmother said she was not an enrolled member, she did not know whether she or the father was eligible for membership and she was not able to identify a particular tribe or nation." (*O.K.,* at p. 155.) Notwithstanding the grandmother's statements, the juvenile court found "there was no reason to believe the children were Indian children." (*Ibid.*)

On appeal, the parents argued "the information provided by the paternal grandmother was sufficient to give the juvenile court reason to believe that the minors might be Indian children because it came from a 'close relative.' " (*O.K., supra,* 106 Cal.App.4th at p. 157.) The appellate court disagreed, observing the closeness of the familial relationship was largely irrelevant, because the crucial matter was that the grandmother lacked a sufficiently specific factual basis for her assertion. (*Ibid.*) The court explained, "The information provided by the paternal grandmother that the father 'may have Indian in him' was not *based on* any known Indian ancestors but on the *nebulous* assertion that 'where were [*sic*] from is that section . . . .' This information was *too vague and speculative* to give the juvenile court any reason to believe the minors might be Indian children." (*Ibid.*, italics added.) Critically, the *O.K.* court emphasized "it was not the paternal grandmother's failure to specify a tribal affiliation that rendered the information insufficient but her failure to assert any information that would reasonably suggest that the minors had any known Indian heritage." (*Id.* at p. 158.)

In *Jeremiah G.*, a different panel reaffirmed the holding in *O.K.*, stating: "We publish this opinion to emphasize, again, what we thought that our court made clear in [*In re O.K.*]. In a juvenile dependency proceeding, a claim that a parent, and thus the child, 'may' have Native American heritage is insufficient to trigger ICWA notice requirements if the claim is not accompanied by other information that would reasonably suggest the minor has Indian ancestry." (*Jeremiah G., supra,* 172 Cal.App.4th at p. 1516.) Consistent with that principle, the *Jeremiah G.* court observed the father's "assertion that there was a 'possibility' the [paternal] great-grandfather . . . 'was Indian,' without more, was

too vague and speculative to require ICWA notice to the Bureau of Indian Affairs." (*Ibid.*)

Several other appellate courts have affirmed this principle, concluding a " 'general or vague' reference to possible heritage," premised largely on " ' "family lore" ' " and without other facts to substantiate the claim, is insufficient to trigger ICWA's notice requirements. (*In re J.L.* (2017) 10 Cal.App.5th 913, 923; *Hunter W., supra,* 200 Cal.App.4th at p. 1467 [family lore alone is insufficient to give court reason to know a child is an Indian child]; *In re J.D.* (2010) 189 Cal.App.4th 118, 125 (*J.D.*) [paternal grandmother's statement, " 'I was a little kid when my grandmother told me about our Native American ancestry,' " coupled with admission that " 'I don't have any living relatives to provide any additional information' " was "too vague, attenuated and speculative to give the dependency court any reason to believe the children might be Indian children"].)

Mother's claim of error rests entirely upon the reference to possible "Cherokee" ancestry in her original ICWA-020. She argues her specific identification of the Cherokee tribe, as opposed to Native American heritage in general, was alone sufficient to trigger ICWA's notification requirements and meaningfully distinguishes her case from those where the courts found the claims of ancestry too vague and speculative to compel notification. We disagree.

First, as the *O.K.* court emphasized, the mere identification or failure to identify a specific tribe is not dispositive; rather, it is the *factual basis* for the claim of ancestry and whether that basis is sufficiently specific to "reasonably suggest" the child may have Indian heritage that determines whether notification must be sent. (*O.K., supra,* 106 Cal.App.4th at p. 158 ["it was *not* the paternal grandmother's *failure to specify a tribal affiliation that rendered the information insufficient* but her failure to assert any

information that would *reasonably suggest* that the minors had any known Indian heritage," italics added].) That reasoning is consistent with ICWA's notification provision, which acknowledges there will be circumstances where the available evidence meets this threshold, even though the interested person is unable to identify a specific tribe. (25 U.S.C. § 1912(a) ["If the identity or location of . . . the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior]"]; see also § 224.2, subd. (a)(4).) As this provision underscores, identification of a specific tribe may facilitate notification *where such notification is warranted*, but it is not *alone* dispositive of whether ICWA notification must be sent.

Second, as the juvenile court's inquiry revealed, mother had no reasonable factual basis for writing "Cherokee" on her ICWA-020 form. When asked what made her believe the children may be members of the Cherokee tribe, mother responded: "My great-great aunt is Indian. You know, my roots is from the south. Really, though, what makes me believe is the fact that I do know that by heart from my -- the pictures that my grandmother has. But other than that, nobody has really ever told me my history." When the court asked mother to elaborate on what she meant by "know it by heart," she explained: "The color in the skin, the hair texture. What else am I supposed to know?"

The court's inquiry revealed that mother's claim was not based on a specific factual account of her Cherokee lineage, but rather on vague inferences from her family's geographic roots and the physical characteristics of relatives she had seen in her grandmother's family pictures. Far from "reasonably suggest[ing]" the children might have Indian ancestry (*O.K., supra,* 106 Cal.App.4th at p. 158), mother's explanation was based on the sort of family lore that courts have found "too vague, attenuated and speculative to give the dependency court any

reason to believe the children might be Indian children." (*J.D., supra,* 189 Cal.App.4th at p. 125; see also *Hunter W., supra,* 200 Cal.App.4th at p. 1467.)

Mother argues we should disregard her responses to the juvenile court's inquiry. She contends her responses merely created "a conflict with the sworn statement [she made] regarding Cherokee heritage," which the court was obliged to resolve by making "further inquiry." We disagree. The court made the requisite inquiry. Contrary to mother's characterization, that inquiry did not establish a conflict in her accounts. Rather, it exposed that her original unsubstantiated claim of Cherokee ancestry had been made without a basis in facts reasonably suggesting the children were eligible for membership in the Cherokee or any other federally recognized Indian tribe. As such, the inquiry *reliably rebutted* mother's initial claim that the children had possible Indian heritage. (Cf. *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167, 1168 [where agency received "conflicting information" from the father about whether he had Cherokee ancestry, but its "report did not provide any specifics regarding the inquiry [it] made of father as to his Indian heritage," ICWA notice was required "[i]n the absence of further inquiry or information that *reliably rebutted* father's representation that [the child] ha[d] specific Cherokee heritage," italics added].)

Finally, we agree with the Department that no further inquiry was required, absent additional information indicating the children might have Indian heritage. As discussed, when the court or Department has "reason to know" an Indian child may be involved, the Department must make "further inquiry" by "[i]nterviewing the parents, Indian custodian, and 'extended family members' " and "[c]ontacting the tribes and any other person that *reasonably can be expected* to have information

regarding the child's membership status or eligibility." (Cal. Rules of Court, rule 5.481(a)(4)(A) & rule 5.481(a)(4)(C), italics added; accord §224.3, subd. (c).)[3] Here, the court's inquiry reliably negated any reason the court or Department may previously have had to believe the children had Indian ancestry, and mother's responses confirmed there were no other people to contact who reasonably could be expected to have information regarding mother's unsubstantiated claims.

In her ICWA-020 form, mother listed her maternal great aunt, who was deceased, as the only person who "may have info" about the children's claimed Cherokee heritage.~ At the hearing she identified another family member on her "grandfather's side," but said he also had "passed." The court then asked mother, "So does anybody -- any family member have more information regarding [the children's claimed heritage]?" Mother responded, "Not to my knowledge." Absent new information, which the court stressed it would consider, there was no one from whom to further inquire and no evidentiary basis upon which to order the Department to make further inquiry. We find no error in the court's ruling.

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[3] In certain circumstances not applicable here, the duty of further inquiry also requires the Department to contact the "Bureau of Indian Affairs and the California Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership." (Cal. Rules of Court, rule 5.481(a)(4)(B).)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON (MICHAEL), J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.