Filed 9/17/12 In re D.K. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 D.K., a Person Coming Under the Juvenile Court Law.	B239415 (Los Angeles County Super. Ct. No. CK72905)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. PATRICIA M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Sherri Sobel, Juvenile Court Referee. Affirmed.

John L. Dodd & Associates and John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Mother, Patricia M., appeals from a dependency court order reinstating the termination of her parental rights to her minor child, D.K. Her sole contention on appeal is that the Department of Children and Family services (DCFS) and the dependency court failed to comply with the Indian Child Welfare Act (the ICWA) (25 U.S.C. § 1901 et seq.) because the notices pertaining to the potential Indian heritage of Father, Virgil K., were inadequate. She contends that the order terminating her parental rights must be reversed and the matter remanded to the dependency court for compliance with the ICWA. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Background

Because this appeal concerns only the adequacy of the ICWA notices, we provide only a brief overview of the facts relating to the dependency. We have taken judicial notice of two earlier appeals in this matter, B223833 and B235344, both of which resulted in stipulated orders of dismissal after the County conceded ICWA error.

The dependency court found D.K. to be a dependent child under Welfare and Institutions Code section 300, subdivision (b),[1] based on Father's failure to provide support and his criminal history, and Mother's failure to make an appropriate plan for the care of D.K., leading to D.K.'s severe health problems. Mother was in custody at the time of the hearing and subsequently began serving a

---

[1] All subsequent undesignated statutory references are to the Welfare and Institutions Code.

sentence for second degree murder of a police officer. Father was also in custody at the time of the initial hearing and later began serving a five-year prison sentence. After being released from the hospital, D.K. was placed in the care of her paternal grandmother but later was removed and placed in foster care. With both the paternal grandmother and the foster parents wishing to adopt D.K., the trial court terminated parental rights on April 6, 2010. As further discussed below, that order was vacated for failure to comply with ICWA, but was later reinstated.

In the current appeal, Mother does not challenge the substance of the dependency court's decision to reinstate the order terminating her parental rights. Rather, she challenges only the court's determination that the ICWA is not applicable in this case, a finding that affects whether the paternal grandmother is afforded adoptive placement preference. (25 U.S.C., § 1915, subd. (a)*; In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1281.)

ICWA Issues

At the outset of this case, both Father and Mother completed ICWA-020 forms indicating that they may have Indian ancestry. At the May 8, 2008 detention hearing, Mother indicated that she had Native American heritage through the Choctaw tribe. The maternal grandmother indicated that her father, who was deceased, was a registered tribe member, but that she and her children were not.

As for Father's potential Native American ancestry, the paternal grandmother informed the court that her great grandmother, the child's great great great grandmother, was "Blackfoot Cherokee from Seminole County in Florida." She indicated that she could provide the name, date of birth, and specific tribe information for this ancestor. The court asked her to collect all information on the family's names, dates of birth, and tribe information, and to give it to DCFS. In

addition, the court directed DCFS to send appropriate notices if the paternal grandmother provided this information.

On June 23, 2008, the court again inquired about the parents' potential Native American ancestry. Father indicated that he did not think he was a registered member of any tribe, but he was not sure if his mother (the paternal grandmother) was a registered tribe member. He indicated that the paternal grandmother had the information about the family's tribal ancestry. After DCFS indicated that no notices had yet been sent, the court instructed DCFS to speak to the paternal grandmother regarding the information needed for ICWA notices. However, subsequently, DCFS followed up only with the maternal grandmother, and noticed only the Choctaw Nation of Oklahoma, which replied that D.K. did not have Indian status. DCFS recommended that the court find that ICWA did not apply, based on the response from the Choctaw tribe.

After the court terminated their parental rights, both Father and Mother appealed, arguing that DCFS had failed to interview the paternal grandmother regarding Father's Indian heritage or to send ICWA notices that included information regarding Father's family, despite the fact that DCFS and the court had reason to know that child might have Cherokee, Blackfoot, and/or Seminole ancestry. The parents and County Counsel stipulated to a limited reversal of the order terminating parental rights and remand of the matter to the dependency court. The appellate court thus remanded the matter with directions that DCFS provide notice to the parents, the tribes potentially at issue, and the Bureau of Indian Affairs (BIA) pursuant to the ICWA.

On remand, the court again instructed DCFS to interview the paternal grandmother to get familial information. On August 26, 2010, the paternal grandmother told the court that she had some of that information, and she had

already given it "to Rashawn," a person unidentified in the record. Her counsel indicated that earlier that morning the grandmother indicated that "the Indian heritage goes closer to both grandparents." The court then instructed counsel to provide every bit of information the grandmother gave her to DCFS so they could include it in their notice to the Cherokee, Blackfeet, and Seminole tribes. Counsel indicated that she would meet with the social worker immediately after the hearing. A status review report filed on September 29, 2010, indicates that the paternal grandmother provided information regarding possible Native American heritage to DCFS on August 26, 2010, and that DCFS prepared notices based on the information she reported.

DCFS sent the ICWA notices on September 9, 2010 via certified mail to various Cherokee, Blackfeet, and Seminole tribes as well as to the BIA. The notice included the child's first and last name, birth date and place, and stated that she may be eligible for membership in the Cherokee Nation, Choctaw, Seminole, and Blackfeet tribes. The form listed Father's first and last name, his current address, date of birth, and state where he was born.[2] The notice also provided the paternal grandmother's first and last name, her current and former address, and her birth date, but listed her place of birth as unknown. It indicated that Father's father was "unknown" and the boxes requesting information as to Father's grandparents also were marked "unknown." In another section entitled "other relative information," the notice listed the names of 11 other paternal ancestors, including a number of great great aunts and uncles, as well as a great great grandfather and great great great grandmother. A birth place was provided for the great great great

---

[2] Because D.K.'s possible ancestry in the Choctaw tribe through Mother's side is not at issue on this appeal, we only discuss the contents of the ICWA notice that pertain to the paternal ancestry.

grandmother, who was listed as a member of the Cherokee Nation; her birth date was listed as unknown. A birth place and date of birth was provided for the great great grandfather.

Responses were received from the Cherokee Nation of Oklahoma, the United Keetoowah Band of Cherokee Indians in Oklahoma, the Blackfeet tribe, the Seminole Tribe of Florida, and the Mississippi Band of Choctaw Indians, all stating that the child was not enrolled or eligible for tribal enrollment.

On March 30, 2011, the court found that the ICWA did not apply, and reinstated the order terminating parental rights. On October 28, 2011, however, the trial court determined that it had not appointed counsel for the parents to be present at the March 30, 2011 hearing. Thus, the court appointed counsel for the parents for the sole purpose of appearing at a hearing to review the ICWA notices that had been sent and to determine whether they had been proper.

On January 5, 2012, that hearing was held, with appointed counsel for each parent present. After being afforded a brief opportunity to review the ICWA notices that previously had been sent, Father's counsel objected that the packet of notices had been sent in 2010, but it was his understanding that the grandmother had come forward with familial information since then. He further objected that the information included in the notices was "very vague" as to the paternal grandmother. Mother's counsel joined in the objections. However, the court found that notice was proper, again reinstated the termination of parental rights, and ordered that the adoption by the foster parents go forward.

Mother timely appealed. Father is not a party to the appeal.

DISCUSSION

Mother argues that the ICWA requires remand so that the tribes in which D.K. may have ancestry on Father's side can be re-noticed with more specific information. We disagree.

"In 1978, Congress passed the [ICWA], which is designed to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and 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 services programs.' [Citations.]" (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 734.) "The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.)

"The ICWA confers on tribes the right to intervene at any point in state court dependency proceedings. [Citations.] 'Of course, the tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending.'" (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253.) The ICWA thus sets forth specific notice requirements that apply when DCFS and the court have reason to know the proceeding involves an Indian child, requiring that the tribe in which the child may have ancestry be notified of the pending proceedings, and of the tribe's right to intervene. (25 U.S.C. § 1912, subd. (a); *In re Marinna J.*, *supra*, 90 Cal.App.4th at pp. 739-740, fn. 4.) Circumstances that may provide reason to know the child is an Indian child include where "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)(1).)

Both the court and DCFS have "an affirmative duty to inquire whether a dependent child is or may be an Indian child." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; see § 224.3, subd. (a) [court and DCFS have "affirmative and continuing duty to inquire" whether minor may be an Indian child]; Cal. Rules of Court, rule 5.481(a).) DCFS is obligated both to inquire into the possibility of Indian ancestry and to act upon the information the family provides, but "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.) ICWA notices must include, if known, the name, birthplace, and birth date of the Indian child; the name of the tribe in which the Indian child may be eligible for enrollment; and the names and addresses of the child's parents, grandparents, great-grandparents, as well as maiden and former names, birthdates, place of birth and death, current and former addresses, tribal enrollment numbers; and other identifying data. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1529-1530.) Information about great great grandparents or more remote ancestors is not required. (*In re J.M.* (2012) 206 Cal.App.4th 375, 380.)

Mother Did Not Forfeit ICWA Objections

DCFS contends that Mother has forfeited any objections to the ICWA notices because she lodged only general objections to the vagueness of the notices and failed to identify any missing information in the trial court. We disagree.

Generally, "ICWA notice issues cannot be forfeited for appeal by a parent's failure to raise them in the juvenile court, because it is the tribes' interests, not the parents', that is at stake in dependency proceedings that implicate ICWA." (*In re*

A.G. (2012) 204 Cal.App.4th 1390, 1400.) However, as we have previously held, "counsel for the parents bear a responsibility to raise prompt objection in the juvenile court to any deficiency in notice so that it can be corrected in a timely fashion." (*In re. S.B.* (2009) 174 Cal.App.4th 808, 813.) Thus, the forfeiture doctrine has been applied in the ICWA context where a case had previously been remanded for the sole purpose of correcting defective ICWA notice, and on remand the parents, represented by counsel, had ample opportunity to point out errors in the notice documents. (E.g., *In re Amber F.* (2007) 150 Cal.App.4th 1152, 1156 [applying forfeiture rule where mother had multiple opportunities to examine ICWA notice documents and bring claims of error to juvenile court]; *In re X.V.* (2005) 132 Cal.App.4th 794, 803-804 [holding that parents forfeited a second appeal to challenge ICWA notice defects where neither parent raised any objection to the adequacy of the ICWA notices at the special hearing on remand for the specific purpose of assessing the adequacy of notice].) In those cases the parents were present and/or represented by counsel at the initial hearing in which the ICWA notices were found to be sufficient. Here, neither parent was represented at the March 30, 2011 hearing where the court made the finding that the ICWA did not apply, and neither previously had the opportunity to object to the ICWA notices. Moreover, unlike in *Amber F.* and *X.V.*, where the parents did not object on remand to the sufficiency of the ICWA notices, in this case the parents *did* object to the ICWA notices at the first opportunity. We conclude that their objections that the notice did not include the most recent information and were vague, were adequate to preserve for appeal the issue of the sufficiency of the ICWA notice.

Sufficiency of ICWA Notices

Although the issue was not forfeited, Mother's numerous challenges to the ICWA notice fail on the merits.

Alleged errors or omissions in ICWA notices generally are subject to harmless error review. (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576; *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784.) "As the appellant, [Mother] has the duty to present error affirmatively by an adequate record; error is never presumed." (*In re D.W.* (2011) 193 Cal.App.4th 413, 417.)

Mother first complains that the ICWA notice failed to include information regarding Father's biological grandparents, the child's great grandparents, noting that this information was listed as "unknown."[3] She points out that DCFS was in regular contact with the paternal grandmother and thus should have been able to obtain this information about the grandmother's parents and included it in the notice. We agree that DCFS should have gathered this information from the paternal grandmother and included it on the form. However, its omission in this case was harmless. The paternal grandmother made it clear that the alleged Indian ancestry came from the child's great great great grandmother, whose birth place and alleged connection to the Cherokee Nation were listed on the notice. She did not allege that her own parents, the child's great grandparents, were members of a tribe or eligible for enrollment in a tribe. Because there is no reason to believe that providing the information relating to the child's great grandparents would have led to a different response from the Indian tribes who were noticed, the error in

---

[3] Mother also takes issue with the lack of information provided with respect to her own ancestors, but because this appeal concerns only the adequacy of the notices with respect to *Father's* potential Indian heritage, alleged gaps with respect to Mother's familial information are irrelevant. Similarly, the alleged errors in noticing two Choctaw tribes is not an issue that is relevant to the instant appeal, given that it was Mother, not Father, who alleged that she had Choctaw ancestors.

omitting the information was not prejudicial. (See *In re D.W., supra,* 193 Cal.App.4th at pp. 417-418 [where ICWA notice included information on ancestors alleged to have tribal membership, omission of information as to next generation was not prejudicial because information provided was sufficient to enable the tribes to determine tribal membership]; *Nicole K. v. Superior Court, supra,* 146 Cal.App.4th at p. 784.)

Mother also contends that DCFS listed the great great great grandmother who allegedly was a member of the Cherokee Nation, and her son, the child's great great grandfather, in an incorrect portion of the form, in a space designated for "other relative information." It should be noted that DCFS generally has no obligation to include any information about ancestors as remote as great great and great great great grandparents (*In re J.M., supra,* 206 Cal.App.4th at pp. 380-381) and thus there is no designated space on the form for such remote ancestors. Therefore, it was not erroneous for DCFS to include these distant ancestors in the "other relative" area. Moreover, given that the response from the Cherokee Nation of Oklahoma expressly referenced the paternal great great great grandmother and great great grandfather, the placement of this information on the ICWA notice does not appear to have hindered that tribe's review.

Mother's argument that the notice failed to include the middle names of D.K. and her parents also is not well-taken. Since there is no allegation that either the minor or her parents be enrolled tribal members, the omission of their middle names could not have caused any tribe to misidentify them. (*In re D.W., supra,* 193 Cal.App.4th at p. 418.)

Nor do we find prejudicial error based on Mother's contention that DCFS mailed the ICWA notices to the wrong tribal agents in violation of the statutory requirement that they be addressed "to the tribal chairperson, unless the tribe has

designated another agent for service." (§ 224.2, subd. (a)(2).) Relying on the May 19, 2010 updated list of agents published by the BIA for service of process under the ICWA (75 Fed.Reg. 28104 et seq. (May 19, 2010)), Mother alleges that in September 2010 DCFS sent the notices to the wrong agents of the United Keetoowah Band of Cherokee Indians, the Cherokee Nation of Oklahoma, and the Blackfeet Tribe of Montana. We have taken judicial notice of this updated list published in the Federal Register, and our review of the roster demonstrates that although DCFS addressed the notices to incorrect agents, they mailed them to the correct addresses. Moreover, as the DCFS correctly points out, all three of these tribes affirmatively responded to the ICWA notices, demonstrating that they received actual notice. Therefore, the error in addressing the notices to the wrong agent was harmless. (*In re J.T.* (2007) 154 Cal.App.4th 986, 994 [failure to address ICWA notice to particular agent was harmless where tribe sent response back, indicating it received notice]; cf. *Nicole K. v. Superior Court, supra,* 146 Cal.App.4th at pp. 783-784 [remanding for compliance with ICWA where DCFS sent ICWA notice to wrong address for tribe and there was no evidence that tribe received actual notice of the proceedings].)

Mother further contends that DCFS failed to notice two alleged branches of the Seminole tribe, namely the Miccosukee Tribe of Indians of Florida and the Seminole Nation of Oklahoma. The failure to notice a tribe when DCFS or the court has reason to know a child may be eligible for membership in that tribe constitutes prejudicial error requiring remand unless the tribe has participated in the proceedings or expressly indicated they have no interest in the proceedings. (*In re Marinna J., supra,* 90 Cal.App.4th at pp. 735-739; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424.) However, Mother provides no support for her contention that the Miccosukee tribe is affiliated with the Seminole tribe. Moreover, the

Tribal Government list compiled by the California State Department of Social Services, of which we have taken judicial notice, does not make any such connection between the Miccosukee and Seminole tribes. Therefore, DCFS cannot be faulted for failing to notice the Miccosukee tribe.

We similarly conclude that DCFS did not err in failing to notice the Seminole Nation of Oklahoma. The Seminole Tribe of Florida was noticed purely out of an abundance of caution, after the paternal grandmother told the court that the child's great great great grandmother was "Blackfoot Cherokee from Seminole County in Florida." At no time did anyone in Father's family assert any connection to the Seminole tribe. Thus, there was no error in failing to notice the Seminole Tribe of Oklahoma.

In sum, we affirm the trial court's finding that ICWA notice was proper and that the ICWA does not apply in this case. Given this holding, any failure by DCFS to continue to notice all potential tribes of all hearings until it was determined that the ICWA did not apply was harmless error. (§ 224.2, subd. (b); *In re Marinna J., supra*, 90 Cal.App.4th at p. 736.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.