Filed 12/3/19 In re G.L. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re G.L., a Person Coming Under the Juvenile Court Law.	B297236 (Los Angeles County Super. Ct. No. CK82246A)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. PEDRO L., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Affirmed.

Johanna R. Shargel, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

Pedro L. (father) appeals a judgment terminating his parental rights under Welfare and Institutions Code section 366.26.[1] Father's sole claim on appeal is that both the juvenile court and respondent Los Angeles County Department of Children and Family Services (Department) failed to adequately investigate whether his daughter G.L. (minor) was an Indian child under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA), related federal regulations, and state law. The Department contends there was no ICWA error, or that any error was harmless. Although we agree with father that the failure to inquire was error, father has not shown any prejudice stemming from the court's finding and the Department's failure to ask him about possible Indian ancestry, and so we affirm.

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[1] Statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Prior Case

Minor was the subject of prior dependency proceedings from 2010 through 2013.[3] In that case, both mother and father separately signed and filed Judicial Council forms denying any Indian ancestry, and the juvenile court found ICWA did not apply.[4] The prior case ended in 2013 when the juvenile court granted mother sole legal and physical custody of minor, and father had monthly monitored visits.

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[2] Because the only issue on appeal concerns ICWA compliance, we limit our discussion to facts relevant to that issue.

[3] On August 28, 2019, this court granted the Department's motion to augment the record with ICWA forms and orders from the prior proceedings.

[4] The form, entitled ICWA-020 Parental Notification of Indian Status, states that the parent must "provide all the requested information about the child's Indian status by completing th[e] form. If you get new information that would change your answers, you must let your attorney, all the attorneys on the case, and the social worker or probation officer, or the court investigator know immediately and an updated form must be filed with the court." Mother and father checked the box that stated "I have no Indian ancestry as far as I know."

Current case

The current case began in August 2016, when the Department filed a new dependency petition and sought to detain minor based on mother's drug use and her DUI arrest. Father was not present at the detention hearing, but the court found father to be an alleged biological father. Mother told the court father was deported to El Salvador.

Indian ancestry information

Mother denied any Indian ancestry, and denied that father had any Indian ancestry. A maternal aunt also told the Department that to her knowledge, minor had no Indian ancestry. The court made a finding that ICWA was not applicable. Minor was in occasional contact with father's family, and the court directed the Department to try to determine father's whereabouts.

Contacts with father and paternal relatives

In September 2016, the Department learned father was in a federal detention center in San Diego. A Department investigator spoke with father by phone about contacts with minor and case issues. An attorney specially appeared on behalf of father and requested a continuance of the adjudication hearing, which the court granted twice. A case plan dated November 16, 2016, shows that the court ordered

monitored visitation for father upon release and contact with the Department, but that under section 361.5, subdivision (a), the court ordered no reunification services for father.

A May 15, 2017 letter from father appears in the appellate record. It is addressed to "Dear Honorable judge" and discusses father's unsuccessful attempts to contact the social worker or the attorney regarding minor's dependency case. Father claimed his mother was denied visitation with minor, and ends by stating that father wanted to fight for custody of minor, he was willing and ready to take classes, and his mother was willing to bring minor to visit him at the federal facility.

The Department's June 7, 2017 last minute information report lists several efforts to reach father in custody. Father spoke to the social worker on March 28, 2017. The social worker told father she would work on clearing paternal aunt and paternal grandmother for visits. The social worker met paternal grandmother on May 9, 2017, to begin visitation arrangements, and spoke to her again on June 5, 2017.

On November 27, 2017, father called the Department from Mexico to ask for visitation. A Department social worker met with father twice in custody, on March 10, 2018, and May 10, 2018. Father said it was likely he would be deported to El Salvador.

Father made his only court appearance in the current proceeding at a section 366.26 hearing on July 5, 2018, appearing by phone. The court did not inquire about his

Indian ancestry, but it reiterated its earlier finding that "this matter is not an ICWA matter."

On February 6, 2019, the juvenile court ordered parental rights terminated under section 366.26.

DISCUSSION

Father contends the court and the Department did not carry out their duty to investigate the possibility that minor was an Indian child, because neither the court nor the Department ever asked father whether he had possible Indian ancestry. We agree that the failure to ask father about potential Indian ancestry during the most recent dependency proceeding was error. However, the error was harmless because father had denied Indian ancestry during earlier proceedings, and makes no assertion on appeal that his response would have been any different if he had been asked in 2016 or later.

Overview of ICWA

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 by the establishment of 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, . . ." (25 U.S.C. § 1902; *In re Isaiah W.* (2016)

1 Cal.5th 1, 7–8 (*Isaiah W.*).) "In California, . . . persistent noncompliance with ICWA led the Legislature in 2006 to 'incorporate[ ] ICWA's requirements into California statutory law.' [Citations.]" (*In re Abbigail A.* (2016) 1 Cal.5th 83, 91; see also *In re Breanna S.* (2017) 8 Cal.App.5th 636, 650 (*Breanna S.)* [California law "incorporates and enhances ICWA's requirements"].) "For purposes of ICWA, an 'Indian child' is a child who is either a member of an Indian tribe or 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); see § 224.1, subd. (a) [adopting federal definitions].)" *(Breanna S.*, *supra*, 8 Cal.App.5th at p. 649, fn. 5.)

Compliance with inquiry and notice requirements under ICWA and California law may be raised on appeal from any order that makes an implicit ICWA finding, based on the court's continuing duty to inquire whether a child is an Indian child. (*Isaiah W.*, *supra*, 1 Cal.5th at p. 6; *In re Michael V.* (2016) 3 Cal.App.5th 225, 234.) "Deficiencies in ICWA inquiry and notice may be deemed harmless error when, even if proper notice had been given, the child would not have been found to be an Indian child." (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251; see also *Breanna S.*, *supra*, 8 Cal.App.5th at p. 653.)

ICWA Inquiry

Federal regulations and California law both create an affirmative and continuing duty to inquire whether a child who is the subject of a dependency proceeding is or may be an Indian child. The scope of that duty is defined in regulations promulgated under ICWA (see 25 C.F.R. § 23.107 et seq. (2019)) and both the current and former versions of section 224.2 and 224.3. (Former §§ 224.2, 224.3, added by Stats. 2006, ch. 838, §§ 31, 32, pp. 6565–6569 and repealed and replaced by Stats. 2018, ch. 833, §§ 4–7, pp. 5348–5352, eff. Jan. 1, 2019.)[5]

Under state law, both the court and the Department have an ongoing duty of inquiry. (§ 224.2, subd (a); *In re Isaiah W.* (2018) 1 Cal.5th 1, 14–15 [affirmative and continuing duty of inquiry and notice not relieved until no response is received within 60 days after proper notice to the BIA and any relevant tribe].) "Inquiry includes, but is not limited to, asking the child, parents, [and others], whether the child is, or may be, and Indian child . . . ." (§ 224.2, subd. (b).) The court is supposed to ask each participant in a juvenile case whether the participant knows or has reason to know the minor is an Indian child, and to instruct the

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[5] The current dependency proceeding took place over a period when both the former and then current versions of sections 224.2 and 224.3 were in effect. All subsequent references will be to the current versions of both code sections.

parties to inform the court if any additional information on a child's status is received. (§ 224.2, subd. (c).) If the court or a social worker has reason to believe that an Indian child is involved in a proceeding, section 224.2, subdivision (e) describes what further inquiry is necessary. (See also *In re K.R.* (2018) 20 Cal.App.5th 701, 709 (*In re K.R.*) [the Department "has the obligation to make a meaningful effort to locate and interview . . . family members to obtain whatever information they may have as to the child's possible Indian status"].)

Current federal regulations governing ICWA that were adopted in December 2016 require an ICWA inquiry to be made at the inception of dependency proceedings, as well as at subsequent proceedings, including termination of parental rights. (25 C.F.R. §§ 23.2, 23.107, 23.143 (2019); *In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 784–785.) This is a significant change from prior federal law, which did not impose an express duty to inquire into a child's possible Indian ancestry. (See, e.g., *In re H.B.* (2008) 161 Cal.App.4th 115, 120 [ICWA itself does not expressly impose any duty to inquire as to American Indian ancestry; nor do the controlling federal regulations].)

In the current proceedings, both the Department and the court failed to ask father if he had any Indian ancestry. The Department was in contact with father at least five different times, but never inquired whether he had any Indian ancestry. The Department also never asked paternal grandmother about possible Indian heritage. The court also

never asked father about possible Indian ancestry when father appeared telephonically on July 5, 2018. The court's failure to ensure adequate inquiry under section 224.2 was error.

Harmless error

Father contends that reversal is required when the record lacks any evidence of inquiry. The Department contends that father has not shown prejudicial error, and relies on *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 to argue that the termination of parental rights should be affirmed. Ultimately, we find father's argument unconvincing, primarily because the appellate record includes evidence that father previously denied having any Indian ancestry, and father makes no assertion to the contrary on appeal.

In support of his argument that reversal is required, father relies on *In re N.G.* (2018) 27 Cal.App.5th 474, 482–483 and *In re J.N.* (2006) 138 Cal.App.4th 450, 460–462. In *In re N.G.*, the appellate court reversed an order terminating parental rights and remanded the case for compliance with ICWA. In that case, mother successfully challenged the juvenile court's determination that ICWA did not apply. Father had filed an ICWA-20 form indicating he might have Blackfeet or Navajo ancestry, ICWA notices were sent out early in the proceedings, and after reviewing responses from the tribes, the court found ICWA did not apply. Later in the

proceedings, father told a social worker he had been in contact with paternal cousins who were registered members of the Cherokee tribe. Father died shortly thereafter, and there was no evidence the agency attempted to identify or interview paternal lineal ancestors. The agency was only in contact with mother twice, and there was no evidence the agency asked mother to complete the ICWA-020 form or asked mother or any maternal relatives whether N.G. may have any maternal Indian ancestry. (*In re N.G.*, *supra*, 27 Cal.App.5th at pp. 478–479.) On appeal, mother only claimed error based on the court's failure to ensure adequate investigation of the child's paternal lineal ancestry for possible Cherokee ancestry. (*Id.* at p. 479.) Nevertheless, in addition to finding error based on the lack of inquiry and notice with respect to the child's possible paternal Cherokee ancestry, the appellate court also found error in the Department's and the court's failure to ask mother or maternal relatives whether the child had any maternal Indian ancestry. (*Id.* at p. 482.) The instructions on remand directed the juvenile court to ensure not just inquiry and notice based on paternal Cherokee ancestry, but also "reasonable steps to ascertain whether [minor] may also have maternal Indian ancestry, and if he does, that [the agency] fully investigates [minor's] maternal lineal ancestry and gives additional ICWA notices, as appropriate." (*Ibid.*)

In *In re J.N.*, *supra*, 138 Cal.App.4th at pages 460–461, the father had completed an outdated Judicial Council form stating "I have no Indian ancestry as far as I know" but

there was no form on record for mother, nor was there any evidence mother was ever asked if she had any Indian ancestry. Mother appealed an order finding ICWA inapplicable and denying her reunification services. (*Id.* at p. 456.) The Department conceded ICWA inquiry error, but—just as in the current case—it asked the appellate court "to find any error harmless since there is nothing in the record to indicate mother has any Indian ancestry." (*Id.* at p. 461.) The appellate court rejected the Department's request, stating that it "refuse[d] to speculate about what mother's response to any inquiry would be," instead remanding the matter with directions to conduct the required inquiry and notice, if appropriate. (*Id.* at pp. 461–462.)

Compared to both cases relied upon by father, the case before us differs in one important respect. Here, the appellate record is not silent on the question of whether father has any Indian ancestry. Father denied any Indian ancestry in 2010. At the August 17, 2016 detention hearing, the court asked mother whether father had any Indian ancestry, and she responded no. Maternal aunt also denied knowing of any Indian ancestry for minor. Unlike in *In re J.N.*, *supra*, 138 Cal.App.4th at pages 460–461, we are not in a position of having to speculate about how father would answer a question about his Indian ancestry if asked.

Father argues that the form he completed in 2010 is insufficient evidence to support the court's finding that ICWA does not apply. As discussed above, we agree that the

court's finding was in error, because ICWA's inquiry requirements had not been met. The question now is whether father has shown the error to be prejudicial.

Father also argues that because the court asked mother to complete an ICWA-20 form at the outset of the 2016 proceedings, but never made the same request of father, we must reverse the termination of parental rights and order the Department to conduct the required inquiry into minor's possible status as an Indian child. Again, the question is whether the error was prejudicial.

In evaluating the question of prejudice, we agree with court's reasoning in *In re Rebecca R.*, *supra*, 143 Cal.App.4th at page 1431: "Father complains that he was not asked below whether the child had any Indian heritage. Fair enough. But, there can be no prejudice unless, *if* he had been asked, father *would have* indicated that the child did (or may) have such ancestry. [¶] Father is here, now, before this court. There is nothing whatever which prevented him, in his briefing or otherwise, from removing any doubt or speculation. He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA. He did not. [¶] In the absence of such a representation, the matter amounts to nothing more than trifling with the courts. [Citation.] The knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge and disclosure is a matter entirely within the parent's present control. The ICWA is not a 'get

out of jail free' card dealt to parents of non-Indian children, allowing them to avoid a termination order by withholding secret knowledge, keeping an extra ace up their sleeves. Parents cannot spring the matter for the first time on appeal without at least showing their hands. Parents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship, without any showing whatsoever that the interests protected by the ICWA are implicated in any way. [¶] The burden on an appealing parent to make an affirmative representation of Indian heritage is de minimis. In the absence of such a representation, there can be no prejudice and no miscarriage of justice requiring reversal."

Throughout the entire dependency proceeding and the current appeal, father has never asserted he has any Indian ancestry, nor has he claimed that any relative is aware of any potential Indian ancestry, nor has he provided any reason to cast doubt on the accuracy of his denial of Indian ancestry in the prior proceeding, including that he has obtained new information relevant to such ancestry. On the current state of the record, without any such assertion by father on appeal, we conclude that any ICWA inquiry error was harmless.

DISPOSITION

The court's findings and orders terminating Pedro L.'s parental rights are affirmed.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.