Filed 12/20/12 In re K.K. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re K.K., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B240767 (Super. Ct. No. J068484) (Ventura County)
VENTURA COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. SARAH K., Defendant and Appellant.	

Sarah K. (mother) appeals from the order of the juvenile court terminating her parental rights with respect to daughter K.K. (Welf. & Inst. Code, § 366.26.)[1] Mother contends the order must be reversed because the Ventura County Human Services Agency (HSA) failed to comply with the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We affirm.

FACTS AND PROCEDURAL HISTORY

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

On September 21, 2011, HSA filed a petition under section 300 alleging that K.K. was at risk of serious physical harm as a result of mother's history of substance abuse, criminal record, and failure to reunify with a half-sibling. Mother was incarcerated at the time and unable to provide care and support for the child. The juvenile court found K.K. to be a dependent of the court.

Initially, mother stated that she was uncertain of any Indian ancestry, but later indicated that K.K. might have Indian ancestry through her maternal grandfather. The HSA investigated and in November 2011 sent a "Notice of Child Custody Proceeding for Indian Child" (form ICWA-030) to the Bureau of Indian Affairs (BIA) and seven Iroquois Indian tribes associated with the Iroquois League located in New York State. On December 8, 2011, HSA sent revised notices to the BIA and the seven New York Iroquois tribes. The BIA and each of the tribes acknowledged receipt of the notice. Two of the tribes stated that K.K. was not eligible for membership. The notices were sent via certified mail, return receipt requested. On February 27, 2012, after no further responses were received from the other five tribes, the juvenile court found that ICWA did not apply to K.K.

Because other facts concerning K.K.'s dependency are not raised as issues on appeal, we do not discuss them in detail. The record shows that mother had a history of drug abuse and, during the dependency proceeding, failed to participate in a rehabilitation program or submit to drug tests. Reunification services were bypassed and, on March 28, 2012, the juvenile court conducted a section 366.26 hearing at which the court found K.K. adoptable and terminated mother's parental rights.

DISCUSSION

Mother contends HSA did not comply with ICWA because it failed to send notices to two tribes associated with the Iroquois League which were not located in New York State, the Oneida Tribe of Indians of Wisconsin, and the Seneca-Cayuga Tribe of Oklahoma. Mother claims the judgment terminating her parental rights must be reversed as a result of this omission. We disagree. Any error in giving the required ICWA notice

was harmless because it was cured by further HSA action which was considered by the juvenile court after the initial judgment was entered.

Congress enacted the ICWA to protect and preserve the tribal ties and cultural heritage of Indian children. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) Under ICWA, tribes have the right to intervene at any point in state dependency proceedings. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174; 25 U.S.C. § 1911(c).) When the court knows or has reason to believe an Indian child is involved, the local agency must notify the child's tribe and the BIA, as agent for the Secretary of the Interior. (25 U.S.C. § 1912(a).) The notice must include the names of the child's biological parents, maternal and paternal grandparents and great-grandparents. (*In re X.V.* (2005) 132 Cal.App.4th 794, 802.) Proper notice to tribes is of critical importance, and courts strictly construe the ICWA notice requirements. (*Karla C.,* at p. 174.) The Indian tribe determines whether the child is an Indian child, and the tribe's determination that the child is eligible for membership in the tribe is conclusive. (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 865.)

Mother raised the notice defect for the first time in her opening brief on appeal. She contended that HSA failed to give notice to the Wisconsin and Oklahoma tribes which were associated with the Iroquois League. Thereafter, HSA gave notice to those tribes with an ICWA-030 form, and filed a motion to augment the appellate record with records of the service, responses thereto, and subsequent juvenile court proceedings. We have granted the motion to augment. (*In re C.D.* (2003) 110 Cal.App.4th 214, 226 [where the agency did not initially comply with the ICWA, the record may be augmented to show subsequent ICWA compliance while the appeal is pending].)

The augmented record reflects that HSA gave notice to the Wisconsin and Oklahoma tribes and renoticed the seven New York tribes and BIA. At hearings in July and August 2012, HSA filed evidence that the Wisconsin and Oklahoma tribes and all seven of the New York tribes received the notice and, in most cases, indicated that K.K. was not a member of or eligible for membership in their tribes. At an August 28, 2012, hearing, the trial court determined that the tribes had been given the required notice and

that ICWA did not apply to K.K. Mother appeared at that hearing but presented no oral or written opposition.

There are several cases that have concluded that an agency's failure to show compliance with the ICWA notice requirements may be cured by making the necessary showing in the juvenile court while an appeal is pending. (See *Alicia B. v. Superior Court, supra,* 116 Cal.App.4th at pp. 866–867; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1117; *In re C.D., supra*, 110 Cal.App.4th at p. 226; see also *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1432.) Here, HSA acted promptly to cure the defect after mother raised the problem in her appellate brief.

Where adequate notice is given and neither a tribe nor the BIA provides a determinative response within 60 days, the court may determine that ICWA does not apply. (§ 224.3, subd. (e)(3).) We review the juvenile court's factual findings in the light most favorable to its order, and will affirm the findings if supported by substantial evidence in the augmented record. (*In re H.B.* (2008) 161 Cal.App.4th 115, 119-120.) Here, the juvenile court's findings are supported by substantial evidence.

The judgment (order terminating parental rights) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Ellen Gay Conroy, Judge

Superior Court County of Ventura

Lee Gulliver, under appointment by the Court of Appeal, for Defendant and Appellant.

Leroy Smith, County Counsel, Oliver G. Hess, Assistant County Counsel, for Plaintiff and Respondent.