Filed 7/19/18 In re M.A. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 M.A., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B287181 (Super. Ct. No. 17JV00038) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD WELFARE SERVICES, Plaintiff and Respondent, v. D.A., Defendant and Appellant.	

D.A. (father) appeals an order of the juvenile court terminating his family reunification services. (Welf. & Inst. Code, § 366.21, subd. (e).)[1] The Santa Barbara County Child Welfare Services (CWS) filed a juvenile dependency petition (§ 300, subd. (b)(1)) on behalf of his daughter, M.A., a person

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

coming under the juvenile court law. We conclude, among other things, that CWS complied with the requirements of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) We affirm.

FACTS

On February 2, 2017, CWS filed a juvenile dependency petition alleging M.A., an infant, was at substantial risk to suffer "serious physical harm" because of the conduct of her mother and father. At the time of M.A.'s birth, "mother and baby tested positive for methamphetamine and THC [tetrahydrocannabinol]." Father said he used methamphetamine "a couple days ago." A doctor at the hospital called police after father "behaved in a threatening manner towards her while holding a steak knife." Father made threats to hospital staff. He was "removed" from the hospital by police. The next day hospital staff reported that father was "pacing the front of the hospital, talking to himself and not making sense."

In the petition CWS said mother and father have a "criminal history," which "puts [M.A.] at risk for further abuse and/or neglect."

In its detention report, CWS said M.A. was placed in a "confidential certified foster home." It recommended she remain in "out-of-home care." The juvenile court ordered the child "detained in the custody of [CWS]."

In a jurisdiction/disposition report, CWS recommended that M.A. remain in out-of-home care and family reunification services be ordered for mother. On March 16, 2017, the juvenile court sustained the petition.

On May 4, 2017, the juvenile court issued its findings and orders after dispositional hearing. It found that M.A. is a person described by section 300, subdivision (b) and that she must be

removed from the "physical custody" of the parents. It ordered family reunification services be provided to mother and father.

In a status review report in October 2017, CWS recommended family reunification services for mother and father be terminated. It said, "The parents have failed to successfully address their substance abuse issues and have continued to engage in domestic violence during this review period." In November 2017, the juvenile court found father had not complied with his case plan. It terminated father's family reunification services.

ICWA

At the detention hearing the juvenile court said, "I need to know from [mother] if you have any Native American Indian heritage and, if so, what tribe."

Mother's counsel said, "I have inquired of my client if she's aware of any. She indicates no, but I believe that she's deferring to the maternal grandmother . . . . When I asked [the grandmother], it seems like there may be the possibility that there's Native American Indian heritage on the mother's side."

Father filed an ICWA-020 form indicating that he may have Indian ancestry from the "Yaqui" and "Tewa" tribes. Tewa is not listed as a federally recognized tribe. (83 Fed.Reg. 4235.) Father subsequently told CWS that he has "Kewa Indian affiliation (also known as Pueblo of Santo Domingo-Kewa) through his paternal side and Yaqui Indian affiliation on his maternal side."

CWS sent ICWA-030 notice forms to the Pascua Yaqui Tribal Council and the Pueblo of Santo Domingo tribes. Both tribes determined that M.A. was not eligible for membership. The juvenile court found ICWA "does not apply."

DISCUSSION

ICWA

Father contends CWS did not comply with ICWA because it failed to give notice to "the relevant Tewa tribes."

"ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions." (*In re K.M.* (2009) 172 Cal.App.4th 115, 118.) "The juvenile court and social services agencies have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child." (*Id.* at pp. 118-119.) The social services agency has a duty to give proper notice to relevant tribes. "The object of tribal notice is to enable a review of tribal records to ascertain a child's status under ICWA." (*Id.* at p. 119.)

"The requirements of the ICWA apply only to federally recognized tribes." (*In re A.C.* (2007) 155 Cal.App.4th 282, 286.) Where the social services agency does not know which tribe may be entitled to notice, it must send notice to the Bureau of Indian Affairs (BIA). (§ 224.2, subd. (a)(4).) The social services agency must make a reasonable inquiry. But it "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 K.M.*, *supra*, 172 Cal.App.4th at p. 119.)

In father's ICWA-020 parental notification of Indian status form, he said, "I may have Indian ancestry" from the "Yaqui" and "Tewa" tribes. But later, as shown by the ICWA matrix, father said that he has "*Kewa Indian affiliation (also known as Pueblo of Santo Domingo-Kewa*" as his Indian heritage. (Italics added.)

CWS sent its ICWA-030 notice forms to the Pascua Yaqui Tribal Council and the Pueblo of Santo Domingo, Pueblo (Kewa)

Indian tribes. Both tribes responded stating that M.A. was not a member or entitled to membership. CWS also sent notice to the BIA. CWS complied with ICWA by giving notice to the two tribes from which father claimed Indian heritage.

Father, apparently relying on his earlier ICWA-020 notice, claims CWS should have given notice to the Tewa tribe. But, as CWS correctly notes, "'Tewa' is not a federally recognized tribe." (83 Fed.Reg. 4235.) CWS is not required to give notice to tribes that are not federally registered. (*In re A.C.*, *supra*, 155 Cal.App.4th at p. 286.) CWS, however, did include its ICWA matrix form with its ICWA-030 notice to the BIA. The ICWA matrix included the name "Tewa" tribe, the name father initially mentioned to CWS. Father has not shown why the juvenile court could not find that father's subsequent reference to the Pueblo of Santo Domingo-*Kewa* tribe was a correction of the information he previously gave to CWS. The court could reasonably infer that father initially mentioned "Tewa" because he did not know the name of the tribe. But he later found out the name, corrected the information he initially provided to CWS, and gave CWS the *specific name* of the relevant "*Kewa*" tribe.

Father suggests CWS may have mistakenly entered the name of this Kewa tribe on its ICWA matrix form. But at the ICWA hearing, father's counsel confirmed that CWS properly gave notice to that tribe, the Yaqui tribe, and she agreed with the juvenile court's finding that ICWA "*does not apply*." (Italics added.) Father has made no showing that his counsel's representations to the trial court were inaccurate.

Father cites to Internet articles and claims they show Tewa is "one of three Kiowa-Tanoan languages" spoken by various tribes. He contends these articles suggest that tribes using that language could be classified as Tewa tribes, even though they

have other federally registered official names. He claims six or seven tribes that use Tewa as one of their languages should have received ICWA notices. But father did not claim ancestry from any of the six or seven tribes mentioned in these articles in the trial court.

CWS objects to these Internet references. It claims they are inadmissible, outside the record, and not judicially noticeable. Father cites these articles for the first time on appeal. They are not part of the record. He does not attach the articles, name the authors, describe their qualifications or explain which hearsay exceptions, if any, apply. Generally "matters not presented to the trial court and hence not a proper part of the record on appeal will not be considered on appeal." (*People v. St. Martin* (1970) 1 Cal.3d 524, 537-538.) But where the record on appeal shows ICWA notice was not given to a tribe entitled to receive it, the social services agency must take corrective action and give notice. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408.)

Father requests a finding that additional tribes should receive ICWA notice. But he must initially present *evidence* in the trial court to prove the facts upon which he bases this claim. He has "cited no authority for the proposition that evidence *based on Internet site information* may be considered *for the first time on appeal*." (*In re K.P.* (2009) 175 Cal.App.4th 1, 5 [an ICWA case], italics added; see also *In re Zeth S.* (2003) 31 Cal.4th 396, 399-400; *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 279, fn. 12.) CWS notes father did not move to augment the record on appeal or add evidence on appeal. Father has not requested judicial notice of official federal records involving Indian tribes. But even where courts may properly take judicial notice of public records, they "do not take judicial notice of the truth of all matters stated therein." (*Love v. Wolf* (1964) 226

Cal.App.2d 378, 403.) Tribes are designated by their official names so they can be federally registered. That is what CWS is generally expected to look to. (*In re A.C.*, *supra*, 155 Cal.App.4th at p. 286; 83 Fed.Reg. 4235.) It is not ordinarily expected to conduct an "extensive independent investigation" of Internet *hearsay* articles about how some authors classify the linguistic roots shared by Indian tribes. (*In re K.M.*, *supra*, 172 Cal.App.4th at p. 119; see also *In re K.P.*, *supra*, 175 Cal.App.4th at p. 5.)

CWS suggests that because father did not raise this issue in the trial court, the issue of whether further ICWA notice is required is waived, and CWS has no further ICWA duties. Under ICWA, a parent's neglect does not excuse a social services agency's *continuing duty* to investigate and provide notice. (*In re Antoinette S.*, *supra*, 104 Cal.App.4th at p. 1408.) Father is correct that CWS would have a duty to provide additional tribal notice if he can prove, or make a *proper showing*, that other tribes are entitled to notice, or if CWS discovers an ICWA notice omission. (*Ibid.*; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 471-472; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424 ["Notice is mandatory, regardless of how late in the proceedings a child's possible Indian heritage is uncovered"].)

Father may raise his contention that the record shows CWS "failed to meaningfully inquire about" his Indian ancestry or mother's Indian ancestry. "We review factual findings" on the agency's ICWA compliance "in the light most favorable to the trial court's order." (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430.)

CWS made sufficient inquiry about father's side of the family as shown in its ICWA matrix. That document shows CWS obtained 1) the names, birth dates and places of birth of the

paternal grandmother and the paternal grandfather; 2) the name and place of birth of the paternal great grandfather; 3) the name, date and place of birth of the paternal great grandmother; 4) father's and the paternal great grandmother's claimed tribal affiliation (Kewa); 5) the claimed tribal affiliation of the paternal grandmother (Yaqui); and 6) the names of the paternal great great grandmother and great great grandfather. CWS sent the ICWA-030 notice to the *specific* tribes father mentioned as his claimed Indian heritage. Father's counsel confirmed that to be the case in the trial court.

Father contends there was no valid inquiry regarding Indian ancestry on the mother's side of the family. He notes mother's counsel told the court, "[I]t seems like there *may be the possibility* that there's Native American Indian heritage on the mother's side." (Italics added.) But she did not specify any tribe, and her statement was speculation.

"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." (*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1516.) A claim that a parent may have Indian ancestry, by itself, is "too vague and speculative to give the juvenile court any reason to believe the minors might be Indian children." (*In re O.K.* (2003) 106 Cal.App.4th 152, 157.) ""[F]amily lore"'. . . of possible American Indian heritage does not trigger a social worker's duty to conduct a 'further inquiry' . . . into a child's possible Indian ancestry." (*In re J.L.* (2017) 10 Cal.App.5th 913, 923, citations omitted; see also *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467-1468; *In re J.D.* (2010) 189

Cal.App.4th 118, 125; *In re Aaron R.* (2005) 130 Cal.App.4th 697, 708.)

Moreover, as CWS notes, mother's counsel at that hearing also said, "I have inquired of my client if she's aware of any" Indian ancestry. Counsel said mother "indicates no." Mother also submitted a parental notification of Indian status, form ICWA-020, where she said, "I *have no Indian ancestry* as far as I know." (Italics added.) But the juvenile court did not ignore counsel's claim. It said, "[W]e have to make an inquiry."

CWS conducted an ICWA investigation. It completed its ICWA matrix. On April 27, 2017, CWS representative Janet Parat declared under penalty of perjury on the ICWA-030 form that there was "no information available" regarding any "tribal membership" for 1) mother, 2) the maternal grandmother, 3) the maternal grandfather, 4) the maternal great grandmother or 5) the maternal great grandfather. Father challenges CWS's ICWA-030 form and suggests there was available information. But he has not shown Parat's declaration was untrue. Nor has he met his burden to overcome the presumption that CWS's duty was "regularly performed." (*In re Rebecca R.*, *supra*, 143 Cal.App.4th at p. 1430.)

Father has not shown that mother belonged to or was eligible for membership in any tribe. Mother denied having Indian ancestry. (*In re O.K.*, *supra*, 106 Cal.App.4th at p. 157.) If father "had additional information suggesting the minor was a member of a particular tribe," he "should have tendered that information to the court." (*In re Levi U.* (2000) 78 Cal.App.4th 191, 198-199.) Father may not rely on speculation. (*In re Jeremiah G.*, *supra*, 172 Cal.App.4th at p. 1516.) The trial court could reasonably infer mother's ICWA-020 form, CWS's investigation, and Parat's declaration constituted evidence

refuting the initial speculation by mother's counsel about Indian ancestry on mother's side of the family. Moreover, mother's counsel *subsequently agreed* with the court's finding that ICWA did not apply. Father's counsel *also agreed* with that finding.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Arthur A. Garcia, Judge

Superior Court County of Santa Barbara

Andre F.F. Toscano, under appointment by the Court of Appeal, for Defendant and Appellant.

Michael C. Ghizzoni, County Counsel, Christopher E. Dawood, Deputy Counsel, for Plaintiff and Respondent.