Filed 6/11/18 In re K.R. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.R., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B286653 (Super. Ct. No. 16JD-00120) (San Luis Obispo County)
SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. L.R., Defendant and Appellant.	

L.R. (father) appeals the juvenile court's order terminating his reunification services as to his minor daughter K.R., continuing K.R. in the custody of her mother S.F. (mother) with family maintenance services, and reducing father's visitation

with K.R. to once a month. (Welf. & Inst. Code,[1] § 364). Father contends the court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1912; § 224 et seq.) and lacked the authority to terminate his reunification services. We affirm.

FACTS AND PROCEDURAL HISTORY

K.R. was born in September 2012. In April 2016, the San Luis Obispo County Department of Social Services (DSS) filed a section 300 petition as to K.R. after her mother S.F. (mother)[2] was arrested for stabbing her boyfriend. The petition alleged that father was currently homeless and had a history of domestic violence, criminal activity, and substance abuse. Father was also subject to a three-year emergency protective order (EPO) prohibiting him from having any contact with K.R. or her mother due to domestic violence he inflicted upon mother while K.R. was present.

K.R. was ordered detained and was placed in a foster care home. Father and mother were granted weekly one-hour supervised visits with K.R.

At the detention hearing, father indicated that he may have Native American ancestry through one of his maternal grandparents but had no information about a tribe. Mother did not claim any Native American ancestry. When K.R.'s paternal grandmother was subsequently interviewed by DSS, she said that she may have Native American ancestry through an unknown tribe. In June 2016, DSS sent an ICWA-030 notice to

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

[2] Mother is not a party to this appeal.

the Bureau of Indian Affairs (BIA) based on the information provided by the paternal grandmother. The notice stated that the paternal grandmother and grandfather may have Native American ancestry through a "North California Tribe" and an "Oklahoma Tribe," respectively. The BIA did not respond.

At the conclusion of the June 2016 combined jurisdiction and disposition hearing, the court sustained the section 300 petition with certain modifications and granted both parents reunification services. Visitation remained as previously ordered. Beginning in July 2016, father began receiving monthly letters from DSS informing him that he was not complying with the requirements of his case plan and detailing the issues he needed to immediately resolve.

At the conclusion of the November 2016 six-month review hearing, the court ordered that reunification services be continued for both parents and increased father's weekly supervised visitation with K.R. to two hours. The court further found that ICWA notice had been properly given and that ICWA did not apply.

In December 2016, father was arrested and charged with possessing a controlled substance. He pled guilty to the charge and was required to complete a Proposition 36 substance abuse treatment program. On December 20, 2016, he tested positive for methamphetamine, THC, and benzodiazepine. He subsequently tested positive for alcohol on two different occasions and failed to report for a test. In the meantime, mother had fully complied with her case plan and entered a sober living facility in Los Osos after her release from jail.

In its report for the May 2017 twelve-month review hearing, DSS recommended that mother and father each be given

an additional six months of reunification services. DSS also stated that there was new information indicating that ICWA did or may apply. Specifically, K.R.'s paternal great-grandfather had told the social worker he has Cherokee ancestry but was unable to provide information regarding any relatives who were enrolled or eligible for enrollment in a Cherokee tribe. After further inquiry, the maternal great-great-grandmother and one of mother's maternal cousins reported no known Native American ancestry.

At the conclusion of the twelve-month review hearing, the court found that father had been minimally compliant with his case plan and granted another six months of reunification services for both parents with two hours weekly supervised visitation. In June 2017, DSS filed a section 388 petition (JV-180 request to change court order) requesting the discretion to approve unsupervised visitation for mother and overnight visits leading to a 30-day trial visit. The parties agreed to the request and the court granted the petition.

In September 2017, DSS filed another section 388 petition requesting that K.R. be returned to mother's custody with family maintenance services and that the eighteen-month review hearing set for November 2017 be alternatively calendared as a family maintenance review hearing (§ 364). DSS also recommended that the case plan be updated to provide "family maintenance services as to [mother] and Family Reunification Services as to [father]." In granting the petition, the court indicated that DSS would provide services "as stated in the family's case plan."

In its status review report for the section 364 hearing, DSS recommended that K.R. remain in family maintenance with

mother for an additional six months and that reunification services as to father be terminated. DSS reported among other things that father had "struck out" of Family Treatment Court in July, had missed several of his scheduled supervised visits with K.R., and had repeatedly refused to comply with several requirements of his case plan. The report stated: "At the last hearing, [DSS] considered recommending termination of services for [father] due to his inconsistent progress with his case plan. [Father] appears to not fully understand the gravity of his failure to fully comply with his case plan and the need for a deeper commitment on his part to addressing the safety concerns that brought [K.R.] into protective custody. [DSS] was hopeful that [father] would take the previous report and feedback from the undersigned seriously and apply himself with [the] full focus on addressing his case plan requirements and the behavioral changes they are intended to create. [Father] has not progressed in his case plan objectives during this reporting period. [Father] appears to have continued on a path of inconsistent case plan participation and lack of behavior change. [DSS] feels that his reunification with [K.R.] is extremely unlikely."

Based on DSS's recommendation, father set the matter of the termination of his reunification services for a contested hearing on November 29, 2017. Father, however, failed to personally appear at the hearing. Counsel was "surprised" by father's absence "because . . . it was he who set this . . . contested." Although counsel requested a continuance to "mak[e] a record," she conceded "I don't have any basis for it . . . ." The court found it had no legal basis to continue the matter and denied counsel's request.

At the conclusion of the hearing, the court found it was appropriate to follow DSS's recommendation and terminated reunification services as to father. The court also reduced father's supervised visits with K.R. to once a month. A six-month family maintenance review hearing was set for May 23, 2018.

DISCUSSION

I.

Father contends the order terminating his reunification services must be reversed because the court failed to comply with ICWA's notice requirements. We disagree.[3]

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. (25 U.S.C.S. §§ 1901, 1902, 1903(1), 1911(c), 1912.) ICWA defines an "'Indian child'" as "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.S. § 1903(4).) ICWA provides that "[i]n any involuntary proceeding in a State court, where 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 parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their

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[3] We reject DSS's assertion that father forfeited this contention by failing to raise it below. (*In re D.W.* (2011) 193 Cal.App.4th 413, 417 ["a parent's failure to raise an ICWA notice issue in the juvenile court does not bar consideration of the issue on appeal"].)

right of intervention." (25 U.S.C.S. § 1912(a).) This notice requirement enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the proceeding. No foster care placement or termination of parental rights proceeding may be held until at least 10 days after the tribe receives the required notice. (*Ibid*; see § 224.2, subd. (d).)

"If adequate and proper notice has been given, and if neither the BIA nor any tribe provides a determinative response within 60 days, then the court may determine that ICWA does not apply to the proceedings. (§ 224.3(e)(3).) At that point, the court is relieved of its duties of inquiry and notice (§ 224.2, subd. (b)), unless the BIA or a tribe subsequently confirms that the child is an Indian child (§ 224.3(e)(3))." (*In re Isaiah W.* (2016) 1 Cal.5th 1, 14-15.) The social services agency, however, has an ongoing duty to interview the minor's parents and extended family, if known, concerning the child's membership status or eligibility. (§ 224.3, subds. (a) & (c); Cal. Rules of Court, rule 5.481(a)(4).) We review the juvenile court's ICWA findings under the substantial evidence standard. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467.)

Father effectively concedes that the initial ICWA notice, which was sent in anticipation of the six-month review hearing, was sufficient at the time it was made. He claims, however, that DSS had a duty to send additional notices after it received additional information from the maternal great-grandfather regarding K.S.'s possible Native American ancestry. Although the court's order following the twelve-month review hearing indicates that "[ICWA] notice . . . was provided as required by

law" and that "[p]roof of such notice was filed with this court," we are unable to find such proof in the record.

Any error, however, in failing to provide further notice is harmless. Shortly after the twelve-month review hearing, DSS petitioned to have K.S. returned to mother's custody with family maintenance services. The court subsequently granted the petition and K.S. has been in mother's custody ever since. After K.S. was returned to mother's custody, ICWA's notice provisions no longer applied. (See *In re J.B.* (2009) 178 Cal.App.4th 751, 759.) Moreover, because this case does not involve the termination of parental rights, any failure to give proper ICWA notice would not compel reversal. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 385-386.)

In any event, during the pendency of the appeal DSS sent new ICWA notices based on the additional information the social worker received from the maternal great-grandfather after the court had ruled that ICWA did not apply. Moreover, a new ICWA hearing was set. Under the circumstances, no remand for further ICWA compliance is necessary.[4]

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[4] We grant DSS's request for judicial notice of the juvenile court documents reflecting DSS's ongoing efforts to comply with ICWA's notice provisions. (Evid. Code, §§ 453, 459.) *In re K.M.* (2015) 242 Cal.App.4th 450, which father cites in opposing the request for judicial notice, is inapposite because it involved the termination of parental rights. After the order terminating parental rights became final, the juvenile court lacked jurisdiction to rule on any collateral dispute related to that order, which included the social service agency's postjudgment attempts to correct ICWA noticing errors. (*Id.* at p. 457.) No such order is at issue here.

II.

Father also contends the juvenile court erred in terminating his reunification services. He claims the court exceeded its jurisdiction by issuing the order following a family maintenance review hearing under section 364.

We agree with DSS that father forfeited this contention by failing to raise it below. "'Whereas a lack of fundamental jurisdiction may be raised at any time, a challenge to a ruling in excess of jurisdiction is subject to forfeiture if not timely asserted. [Citation.]' [Citation.]" (*People v. Brewer* (2015) 235 Cal.App.4th 122, 137.)

In any event, the claim lacks merit. It is clear from the record that although mother successfully progressed from reunification services to family maintenance services, father never did. The order granting DSS's second section 388 petition states that K.R. was to be "return[ed]" to "the care and custody of the parents," but K.R. was not in father's custody at the time of her removal. Moreover, the court's order effectively incorporates the updated case plan, which unequivocally provides that father would continue to be offered reunification services while mother was in family maintenance.

Father also fails to establish that the court lacked the authority to terminate his reunification services in the context it did. He notes that section 364 hearings focus on whether continued supervision is necessary, while section 388 hearings focus on whether an existing order should be modified. (See *In re Natasha A.* (1996) 42 Cal.App.4th 28, 36.) He further offers that "[w]here . . . the noncustodial parent seeks modification of an existing order, he must comply with the specific requirements of

section 388" and that "[t]hese requirements may not be avoided by making the motion in a section 364 hearing." (*Ibid.*)

Assuming that this rationale applies here, DSS effectively did comply with the requirements of section 388. Its recommendation that father's reunification services be terminated arose in its report regarding the section 364 hearing, which was filed well in advance of the hearing. Moreover, father set the matter for a contested hearing after being advised of DSS's recommendation. Because he had adequate prior notice of the requested change and had a full and fair opportunity to challenge it, any error in DSS's failure to seek the change through a 388 petition is harmless.[5]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

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[5] We also note that because father's parental rights have not been terminated, he may petition the court at any time to reinstate his reunification services upon a showing of changed circumstances and/or new evidence under section 388.

Linda D. Hurst, Judge

Superior Court County of San Luis Obispo

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Rita L. Neal, County Counsel, Leslie H. Kraut, Deputy County Counsel, for Plaintiff and Respondent.