Filed 4/5/16 In re E.R. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re E.R., et al., Persons Coming Under the Juvenile Court Law.	B267101 (Los Angeles County Super. Ct. No. CK94846)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Denise R., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Stephen Marpet, Referee. Affirmed.

Nancy O. Flores, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, March C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

Denise R. (mother) appeals from orders appointing legal guardians for her children E.R. and W. R. and terminating the dependency case. Mother contends the trial court erred by finding the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. section 1901 et seq., did not apply. We conclude the record is inadequate to review mother's contention, and even if we were to conclude it was adequate, there is substantial evidence to support the dependency court's ICWA findings. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

Mother gave birth to D.R. in April 1999. Cain P. is D.R.'s father. Mother gave birth to E.R. in July 2002, and to W.R. in September 2005. William R. is the father of E.R. and W.R. On August 1, 2012, the Los Angeles Department of Children and Family Services (the Department) initiated dependency proceedings on behalf of D.R.[1], E.R., and W.R. The Department filed a dependency petition pursuant to Welfare and Institutions Code section 300, subdivisions (a), (b), and (j).[2]

A detention report dated August 1, 2012, states that the ICWA does not apply. The children's fathers denied having any Native American ancestry. Mother told the Department that she may have Native American ancestry, but she did not know the name of the tribe. She stated that she was not registered with a tribe, nor were her children.

Mother completed a parental notification of Indian status form on the same day. She marked a box that she may have Indian ancestry. For the name of the tribe, she wrote "Pima – Arizona." Three names are listed on the side of the form: "mgf Cornelio Rubio [R.]," "Lucy [M.]", and "Gloria [P.]"

A hearing was held on August 1, 2012, but mother has not included a reporter's transcript of the hearing in the record on appeal. The minute order reflects that all of the

[1] D.R. is not a subject of this appeal.

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

parents were present. The order states that the court made inquiries of the parents and found the parents were not members of any American Indian tribe. The court ordered the social worker to interview mother's maternal aunts, Lucy M. and Gloria P., about possible ICWA issues, address the interviews in a report, and place the matter on the court's calendar if there are any issues or if the social worker felt ICWA notice was required.

On September 26, 2012, the Department filed an amended petition pursuant to section 300, subdivisions (a), (b), (c), and (j). In a jurisdiction/disposition report filed on September 28, 2012, the social worker provided information about the children's ICWA status pursuant to the court's order. The social worker contacted mother on September 14, 2012, and requested contact information for her maternal aunts. "Mother reported that she had misplaced her phonebook and did not have any contact information for her aunts. Mother further reported 'I don't believe my aunts are registered with a tribe, and I'm not sure how we would get the information about [our] Indian heritage because my grandma was [an] orphan. But I know in that time orphans were usually Indians. Someone told me I could go downtown and have my blood tested to see if I'm Indian. I might do that.'" Mother said she would try to find her aunts' contact information and provide it to the social worker, who would update the court with any new information.

On November 26, 2012, the social worker filed an interim review report stating that as of November 19, 2012, mother had not provided any additional information for her aunts. She had not provided any information to indicate that ICWA applies in this matter. Therefore, the Department requested a finding that ICWA does not apply with respect to the children.

A hearing was held on January 28, 2013. No reporter's transcript of the hearing is included in the record on appeal. All of the parents were present. The minute order reflects the court found ICWA did not apply. It states, "The court has no reason to know that the minor(s) are Indian children as defined by the Indian Child Welfare Act."

At the adjudication hearing on March 1, 2013, the court declared the children dependents of the court under section 300, subdivisions (b) and (j). The court terminated

dependency jurisdiction over D.R. and granted Cain sole legal and physical custody of D.R. The court removed E.R. and W.R. from parental custody and ordered the Department to provide reunification services for their parents. At a hearing on May 5, 2014, the court ordered E.R. and W.R. placed back in the parents' home under the supervision of the Department.

On October 10, 2014, the Department filed a supplemental petition against both parents under section 342 on behalf of E.R. and W.R. for failure to protect the children. The Department checked a box that an inquiry was made about Indian children. The Department checked a box that stated the children may have Indian ancestry. Under the reasons to know the child may be an Indian child, the Department noted, "Mother has [a] belief that her [relatives] may be part of a Tribe in Arizona. Mother is unsure [of] the name of [the] tribe."

A hearing was held on October 10, 2014, but no reporter's transcript has been made part of the record on appeal. There is no reference to ICWA in the minute order from the hearing.

On November 7, 2014, the Department filed an amended petition under section 342. The court authorized a removal order and the Department detained the children from mother's custody, placing them with Cain. The court also ordered the Department to provide reunification services. An adjudication hearing was held on March 6, 2015. The court sustained the amended petition as to two counts. The court terminated the parents' services and referred the matter for a hearing to select and implement a permanent, out-of-home plan for the children. Mother filed a timely notice of intent to file a writ petition. In her writ petition, she challenged the denial of a continuance request and the order terminating reunification services, but she did not refer to any ICWA errors. On June 17, 2015, this appellate court denied mother's petition for extraordinary writ.

A review hearing was held on June 29, 2015. On August 14, 2015, the dependency court granted legal guardianship of E.R. and W.R. to Cain and his wife,

ordered monitored visits for mother, and closed the case. Mother filed a timely appeal from the order appointing legal guardians and terminating jurisdiction.

DISCUSSION

Applicable Statutory Law and Standard of Review

The ICWA "protect[s] the best interests of Indian children and [ ] promote[s] 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 general, the ICWA applies to any state court proceeding involving the foster care or adoptive placement of, or the termination of parental rights to, an Indian child. (25 U.S.C. §§ 1903(1), 1911(a)-(c), 1912–1921.)" (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 338.) An "Indian child" is defined as a child who 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. § 1903(4).)

The ICWA provides that "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 right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner . . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . ." (25 U.S.C. § 1912(a).)

"[O]ne of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child involved in the proceedings is an Indian child. [Citation.]"

(*In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.) "The Indian status of the child need not be certain to invoke the notice requirement. [Citation.] Because the question of membership rests with each Indian tribe, when the juvenile court knows or has reason to believe the child may be an Indian child, notice must be given to the particular tribe in question or the Secretary [of the Interior]. [Citations.]" (*Id.* at p. 471.)

"We review the trial court's findings whether proper notice was given under ICWA and whether ICWA applies to the proceedings for substantial evidence. [Citation.]" (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.) "A notice violation under ICWA is subject to harmless error analysis. [Citation.] 'An appellant seeking reversal for lack of proper ICWA notice must show a reasonable probability that he or she would have obtained a more favorable result in the absence of the error.' [Citation.]" (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 715.)

Adequacy of the Record

Mother contends the dependency court had reason to know that her children were Indian children and should have ordered the Department to comply with ICWA's notice requirements by sending notice to the Pima tribe or the Bureau of Indian Affairs. Also, she contends the court had an affirmative duty to make ICWA inquires and resolve the discrepancies again when the section 342 petition raised a conflict with her prior information about their Indian ancestry.

This contention relates to the court's dispositional orders on January 28, 2013, and October 10, 2014, which is when all of the information provided by mother about her possible American Indian heritage was before the dependency court and the court considered the Department's report on its investigation into mother's heritage. We need not consider whether the court's ICWA findings may be challenged several years after the orders became final, an issue currently under consideration by the California Supreme Court. (*In re Isaiah W.* (2014) 228 Cal.App.4th 981, review granted Oct. 29, 2014, No. S221263.) Even assuming the ICWA findings are appealable, the record in this case

is inadequate to review mother's contentions, and the dependency court's findings are supported by substantial evidence.

After the dependency court reviewed the information in the August 1, 2012 detention report and the parental notification of Indian status form, the court ordered additional inquiries relevant to the notice provisions of ICWA. Mother has failed to provide a sufficient record to determine the information provided and discussed at the hearings. Her possible Indian heritage was through her maternal grandmother. She may have provided information at the August 1, 2012 hearing which clarified that her maternal grandfather has no information about her grandmother's Indian heritage, or is not capable of providing information, or she may have provided information that withdrew or clarified the Pima notation on the form. The minute order clearly reflects the ICWA issue was discussed and the court ordered the Department to make inquiries of her maternal aunts. The information about the aunts was on the same form with the notation "Pima – Arizona" and the name of the maternal grandfather. In the absence of a reporter's transcript or suitable substitute such as a settled statement under California Rules of Court, rule 8.137, we must assume the information on the form was discussed and the court ordered further inquiry consistent with the information provided at the hearing. It is certainly possible that, in response to inquiry from the court, additional information showed the notice provisions of ICWA were not implicated. It is mother's responsibility to provide a record that is adequate for appellate review of her claims (see *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574). Since she has failed to do so, we are unable to fully evaluate what measures the dependency court may have taken in regard to the claimed errors.

Even if the record were adequate for review, we would affirm the trial court's finding. The evidence reflected that the children's great-grandmother was an orphan and her parentage was unknown and untraceable as far as mother knew. Mother stated that her grandmother may have been Native American Indian, because orphans in the area where her grandmother lived were often Indians. Mother's statements are no more than speculation. No family members are registered members of a tribe. Mother noted the

Pima tribe on the parental notification of Indian status form, but after discussion of the issue at the August 1, 2012 hearing, the court did not order notice to the Pima tribe and mother later stated on October 10, 2014 that if she had Indian ancestry, she did not know the name of the tribe. The court had no reason to know that Indian children were involved in this dependency matter and the finding that ICWA did not apply was supported by substantial evidence. (See *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1468 [mother's statement that she may have Indian heritage through her father and deceased paternal grandmother, with no further information, insufficient to trigger ICWA notice obligation]; *In re J.D.* (2010) 189 Cal.App.4th 118, 125 [paternal grandmother's statement that when she "'was a little kid when my grandmother told me about our Native American ancestry but I just don't know which tribe it was'" was "too vague, attenuated and speculative to give the dependency court any reason to believe the children might be Indian children"].)

DISPOSITION

The orders of the dependency court are affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J. KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.