Filed 11/21/17 In re M.B. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re M.B., a Person Coming Under the Juvenile Court Law.	B282825 (Los Angeles County Super. Ct. No. CK97094)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.J. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County, Joshua D. Wayser, Judge. Affirmed.

Lori N. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant C.J.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant K.M.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

C.J. (mother) and Kevin M. (father) appeal from the findings and order terminating their parental rights over their son, M.B., under Welfare and Institutions Code section 366.26.[1] In separately filed briefs, mother and father contend the court erred in finding inapplicable the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Overview of M.B.'s dependency case

The Los Angeles County Department of Children and Family Services (Department) filed a petition and later an amended petition to have M.B. declared a dependent child under Welfare and Institutions Code section 300, subdivisions (b) and (j), based on a number of allegations,

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

including mother's failure to obtain medical care for M.B., alcohol and drug abuse, and physical abuse of M.B.'s older sibling. The court detained M.B. from the custody of mother and her boyfriend on December 28, 2012, and sustained the amended petition allegations on March 19, 2013. Mother's reunification services were terminated on April 4, 2014. The court did not declare Kevin M. to be M.B.'s presumed father until February 3, 2015. Father's reunification services were terminated on September 30, 2015. The court ordered parental rights terminated under section 366.26 on March 29, 2017.

ICWA facts and procedure

At the detention hearing on December 28, 2012, mother filed Judicial Council form ICWA-020 entitled "Parental Notification of Indian Status," claiming she may have Indian ancestry through the Blackfeet Tribe. The court questioned mother and determined none of mother's relatives were registered Tribe members, but directed the Department to investigate the possibility of Indian heritage.

The Department summarized the results of its inquiry in a February 14, 2013 jurisdiction and disposition report and a March 18, 2013 last minute information report. Mother believed she had Indian heritage, specifically Blackfeet Tribe, through M.B.'s maternal grandmother N.S. N.S. did not identify or claim any Indian heritage, but M.B.'s maternal great-grandmother L.A. claimed the family had

Blackfeet Indian heritage through her father. L.A. stated she had no knowledge as to whether any family member was registered with the Blackfeet Tribe, but that the family had Blackfeet heritage through M.B.'s maternal great-great-grandfather J.R. and M.B.'s maternal great-great-great-grandmother L.S., both of whom were deceased.

The Department sent ICWA-030, entitled "Notice of Child Custody Proceeding for Indian Child" to the Blackfeet Tribe, the Bureau of Indian Affairs, and the U.S. Department of the Interior in accordance with ICWA notice provisions. The ICWA notice contained the names, as well as places and dates of birth, for M.B., mother C.J., D.A. (identified as M.B.'s biological father), maternal grandmother N.S., maternal great-grandmother L.A., and maternal great-great-grandfather J.R. The notice also included the name of maternal great-great-great-grandmother L.S., indicating that her place and date of birth were unknown.

In a response dated March 4, 2013, a representative of the Blackfeet Tribe wrote, "In researching the Blackfeet Tribal Enrollment records, I was not able to find [M.B., her mother, C.J., the identified father, D.A., or the maternal grandmother, N.S.] on the tribal rolls . . . . Therefore, the above named child is not an 'Indian Child' as defined by the Indian Child Welfare Act of 1978 . . . . If you are able to gather more information on the ancestry of the parents, please contact me again and I will review the tribal rolls." At the March 19, 2013, jurisdictional hearing, the juvenile

court found ICWA did not apply. Again on October 15, 2013, the court found ICWA inapplicable.

The Department's section 366.26 report noted that ICWA was inapplicable. When the court terminated mother and father's parental rights with respect to M.B. at the section 366.26 hearing on March 29, 2017, it did not make any ICWA findings.

DISCUSSION

ICWA's enactment in 1978 was Congress's response to "rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 32.) ICWA was enacted "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.) "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].)" (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 649, fn. 5 (*Breanna S.*).)

ICWA requires notice to an Indian child's parent or Indian custodian and the tribe in state court proceedings seeking foster care placement or termination of parental rights "where the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a).) Similarly, California law requires notice to the parent, legal guardian or Indian custodian and the Indian child's tribe, if the Department or court "knows or has reason to know that an Indian child is involved" in the proceedings. (§ 224.3, subd. (d); see also Cal. Rules of Court, rule 5.481(b)(1).)

"Importantly, '[t]he relevant question is not whether the evidence . . . supports a finding that the minor[] [is an] Indian child[]; it is whether the evidence triggers the notice requirement of ICWA so that the tribes themselves may make that determination.' [Citation.] After proper notice has been given, if the tribes respond that the minor is not a member or not eligible for membership, or if neither the BIA nor any tribe provides a determinative response within 60 days, then the court may find that ICWA does not apply to the proceedings. At that point, the court is relieved of its duties of inquiry and notice unless the BIA or a tribe subsequently confirms that the child is an Indian child." (*In re Isaiah W.* (2016) 1 Cal.5th 1, 15 (*Isaiah W.*).)

"ICWA's notice requirements serve two purposes. First, they facilitate a determination of whether the child is

an Indian child under ICWA. (25 U.S.C. § 1903(4) [defining 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'].)" (*Isaiah W., supra*, 1 Cal.5th at p. 8.) "Second, ICWA notice ensures that an Indian tribe is aware of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving an Indian child." (*Ibid.*)

The regulations implementing ICWA specify that the notice must include the names, birthdates and birthplaces (if known) of the child, the parents, and "other direct lineal ancestors of the child, such as grandparents," along with Tribal enrollment numbers or information. (25 C.F.R. §§ 23.11(a), 23.111(d)(1)–(3) (2017).) California law requires the ICWA notice to include substantially similar information. (§ 224.2, subd. (a)(5).)

The federal Bureau of Indian Affairs (BIA) guidelines in effect in 2012 at the time M.B. was initially placed in foster care, made clear that the Tribe—not the court—determines whether a child is an Indian child under ICWA. (See *Isaiah W., supra*, 1 Cal.5th at p. 8, citing U.S. Dept. of the Interior, BIA, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584, 67586 (Nov. 26, 1979).) The regulations and guidelines in effect at the time of the section 366.26 hearing on March 29, 2017, also unequivocally give the Tribe, not the court, authority to determine whether a child is an Indian child under ICWA:

"Tribes, as sovereign governments, have the exclusive authority to determine their political citizenship and their eligibility requirements. A Tribe is, therefore, the authoritative and best source of information regarding who is a citizen (or member) of that Tribe and who is eligible for citizenship of that Tribe. Thus, the rule defers to Tribes in making such determinations and makes clear that a court may not substitute its own determination for that of a Tribe regarding a child's citizenship or eligibility for citizenship in a Tribe." (U.S. Dept. of the Interior, BIA, Guidelines for Implementing the Indian Child Welfare Act (Dec. 2016); see 25 C.F.R. § 23.108(b) (2017).)

A parent's failure to appeal an earlier finding that ICWA does not apply does not preclude raising the issue in a later appeal. Compliance with ICWA's notice and inquiry requirements may 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.)

Mother and father do not contend that the notice sent to the Blackfeet Tribe was inadequate. They contend the order terminating their parental rights should be reversed because the court failed to order further inquiry into whether the Blackfeet Tribe had inadvertently failed to check their tribal rolls for the names of M.B.'s maternal great-great-grand father and maternal great-great-great-grandmother. They argue that because the Tribe's response

to the Department only referenced M.B.'s parents and her maternal grandmother, the court was under a duty to ensure the Tribe checked its rolls for M.B.'s other lineal ancestors. Neither mother nor father cites to a statute, case, regulation, or guideline establishing such a duty, and we conclude there is nothing in ICWA that would impose such a duty on the court. In fact, the regulations and guidelines implementing ICWA emphasize that the determination of whether a child is an Indian child is left to the Tribe, not the court. The notice sent to the Blackfeet Tribe included all the information known to the Department and the court, and neither mother nor father has pointed to any new evidence that would require any additional inquiry into whether M.B. is an Indian child. Because the initial notice to the Blackfeet Tribe was proper, and the record includes a response from the Tribe stating that M.B. is not an Indian child within the meaning of ICWA, the court correctly concluded that ICWA did not apply.

Mother and father's arguments on appeal also fail because they have not shown prejudicial error. (See *Breanna S., supra,* 8 Cal.App.5th at p. 652–653 [error based on violation of the duty to inquire is harmless if the appellant cannot show a reasonable probability of a more favorable result absent the error].) ICWA defines an Indian child as 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).) The response from the Blackfeet Tribe affirmed

that the names of M.B.'s mother and maternal grandmother did not appear on the tribal rolls. Nothing in the record suggests the Tribe would have come to a different conclusion if the court had asked the Tribe to clarify its response.[2]

Because the notice sent to the Blackfeet Tribe was sufficient under ICWA and California law, and the Tribe responded that M.B.'s mother and her maternal grandmother were not listed on the tribal rolls and therefore M.B. was not an Indian child as defined by the ICWA, the court did not err in finding ICWA inapplicable. The law does not require the court to order further inquiry after the tribe has affirmed that the child is not an Indian child, unless there is new evidence that warrants further notice to the tribe.

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[2] The Department requested judicial notice of the Constitution and By-Laws for the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana. Neither mother nor father opposed the request for judicial notice. We grant the motion. (See *In re J.M.* (2012) 206 Cal.App.4th 375, 382 ["[c]ourts routinely take evidence of tribes' membership criteria in ICWA proceedings"].)

DISPOSITION

The court's order terminating parental rights under section 366.26 is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAPHAEL, J.*

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