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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re GABRIEL S., JR., a Person Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GABRIEL S., SR., Defendant and Appellant.	B241078 (Los Angeles County Super. Ct. No. CK77917)

APPEAL from an order of the Superior Court of Los Angeles County, Marguerite D. Downing, Judge Affirmed.

Daniel G. Rooney for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Gabriel S., Sr. (Father) appeals from an order terminating parental rights to his son Gabriel S., Jr. because notice required by the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) was defective as to the Bureau of Indian Affairs (BIA) and the Secretary of the Interior. We determine that ICWA notice was sent to three Cherokee tribes which responded that Gabriel S., Jr. was not an Indian child. The BIA and the Secretary of the Interior did not respond to ICWA notices, but we presume the official duty was regularly performed and that ICWA notice was sent to them, as the proof of service indicates that notice was sent to them and the record contains no evidence that it was not. Moreover because Cherokee tribes were identified and received notice, it was not necessary to provide notice to the Secretary or to the BIA; even if notice was not sent to those agencies, no error occurred. We affirm the order.

FACTUAL AND PROCEDURAL HISTORY

Detention and Petition: On June 15, 2009, five-month-old Gabriel S. was detained after the DCFS received a referral alleging that Gabriel was a victim of emotional abuse by Chloe J. (Mother) and Gabriel S., Sr. (Father), who was alleged to have engaged in domestic violence against Mother. Father was arrested and incarcerated for spousal abuse. Gabriel was detained and placed in protective custody.

On June 29, 2009, the DCFS filed a section 300 petition alleging that Gabriel was a person described by section 300, subdivisions (a) and (b). The subdivision (a) [substantial risk child would suffer serious physical harm inflicted nonaccidentally by the child's parent] count alleged that in Gabriel's presence Mother and Father engaged in a violent physical altercation on June 12, 2009, in which Father struck and injured Mother and pushed her to the ground, and Father had a criminal history of battery on a non-cohabitant former spouse. The petition alleged three counts pursuant to subdivision (b) [substantial risk child would suffer serious physical harm because of parents' failure to protect the child or because of their inability to provide regular care for the child because of parents' substance abuse]. Count one alleged that the parents engaged in a violent physical altercation on June 12, 2009, as described in the subdivision (a) allegation. Count 2 alleged that Mother had a history of illicit drug and alcohol abuse and currently

abused marijuana and alcohol, which rendered her incapable of providing Gabriel with regular care and supervision; that Mother was under the influence of alcohol on June 12, 2009, while Gabriel was in her care; that Mother used alcohol during her pregnancy with Gabriel; and that Mother had a conviction for driving under the influence of alcohol. Count 3 alleged that Father had a history of illicit drug and alcohol abuse; currently abused alcohol, which rendered him incapable of providing Gabriel with regular care and supervision; was under the influence of alcohol on June 12, 2009, while Gabriel was in his care; and had convictions of possession of marijuana for sale and possession of a narcotic/controlled substance.

At the June 29, 2009, detention hearing, the juvenile court found that a prima facie case for detaining Gabriel as a person described by section 300, subdivisions (a) and (b) was established, and ordered Gabriel detained and placed in DCFS custody. Mother filed a notification of Indian status form stating that she might have Indian ancestry, which she indicated as "Creole-Louisianna." The juvenile court ordered the DCFS to notice the BIA and the Secretary of Interior regarding ICWA issues.

Adjudication and Disposition: Mother reported that maternal grandfather Benjamin J. had possible Indian heritage, but could only provide his date of birth. A notice of child custody proceeding for Indian child identified the tribe or band of Mother and maternal grandfather as Cherokee. On July 8, 2009, notice of the dependency proceeding was given to The United Keetoowah Band of Cherokee Indians, the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, the Sacramento Area Director of the BIA, and to the Secretary of the Interior. The Cherokee Nation of Oklahoma, the United Keetoowah Band of Cherokee Indians in Oklahoma, and the Eastern Band of Cherokee Indians responded that Gabriel S. was not an Indian child in relation to any of those tribal entities.

On September 21, 2009, the juvenile court found that the DCFS complied with all ICWA notice requirements and found that Gabriel was not an Indian child and this was not an ICWA case. The juvenile court adjudicated the matter, sustained all counts alleged in the petition, found Gabriel was a person described by section 300, subdivisions (a) and (b), and declared Gabriel a dependent child of the juvenile court. The juvenile court ordered the DCFS to provide Gabriel, Mother, and Father with family reunification services, ordered a disposition case plan, and ordered monitored visits for Mother and Father at least three times a week. Gabriel was ordered placed with his maternal grandmother.

Six-Month Review Hearing: At the six-month review hearing on March 22, 2010, the juvenile court found Mother was in compliance with the case plan, and Father was in partial compliance with the case plan, and ordered the DCFS to provide Gabriel, Mother, and Father with family reunification services.

Twelve-Month Review Hearing: At the 12-month review hearing on November 3, 2010, the juvenile court found that Mother and Father were not in compliance with the case plan, that Gabriel could not be returned to the parents' physical custody and there existed no substantial probability that Gabriel would be returned within six months, ordered family reunification services terminated for Mother and Father, and set the matter for a section 366.26 permanent plan hearing.

Order Terminating Parental Rights: After a contested hearing on April 30, 2012, the juvenile court found Gabriel was likely to be adopted, that it would be detrimental to return him to his parents and that no exception to adoption applied, and ordered parental rights to Gabriel terminated. The juvenile court ordered custody and care of Gabriel transferred to the DCFS for adoptive planning.

Father filed a timely notice of appeal.

ISSUE

Father claims that the juvenile court erred when it failed to insure compliance with notice requirements of the ICWA.

DISCUSSION

1. *ICWA Notice Requirements and Determinations*

When the juvenile court has reason to know that an Indian child[1] is the subject of the proceeding, the child services agency must notify the Indian child's tribe, or, if the tribe's identity or location cannot be determined, the BIA, of the pending proceedings and of the tribe's right to intervene. (25 U.S.C. § 1912, subd. (a).) Even a suggestion of Indian ancestry triggers the notice requirement. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 702.)

Notice must be sent to all tribes of which a child may be a member or eligible for membership, and must include the names of the child's ancestors and other identifying information, if known, and sent registered mail with return receipt requested. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 384.)

The Indian tribe's determination whether the child is an Indian child is conclusive. (*In re Francisco W., supra,* 139 Cal.App.4th at p. 702.) The juvenile court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings. Its finding may be either express or implied. (*In re E. W.* (2009) 170 Cal.App.4th 396, 403-404.)

The juvenile court must wait at least 60 days after the sending of notice to determine that the ICWA does not apply based on the lack of a determinative response to the notice. (*In re Francisco W., supra,* 139 Cal.App.4th at p. 703.) If, however, "after notice has been provided as required by federal and state law and neither the tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, then the court may determine that the Indian Child Welfare Act does not apply to the proceedings." (Cal. Rules of Court, rule 5.482(d)(1).) "The court is not required to delay proceedings until a response to notice is received." (*Id.*, (d)(3).)

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[1] An "Indian child" means "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. § 1903(4).)

2. *There Was No Failure to Provide ICWA Notice to the Bureau of Indian Affairs and the Secretary of the Interior*

Father claims that the DCFS failed to give notice to the BIA and the Secretary of the Interior, because boxes for those entities were not checked on the ICWA-030 "notice of child custody proceeding for Indian child" form.

The certificate of mailing, completed by the social worker, however, stated that a copy of the notice of child custody proceeding for Indian child, with a copy of the petition, were mailed "as follows." The following page indicates the names and addresses of all persons, tribes, or agencies to whom notice was mailed. It gives the names and addresses of Mother and Father, of three Cherokee tribes (United Keetoowah Band of Cherokee Indians in Tahlequah, Oklahoma; Eastern Band of Cherokee Indians in Cherokee, North Carolina; and Cherokee Nation of Oklahoma in Tahlequah, Oklahoma), and of the Sacramento Area Director of the BIA in Sacramento, California and the Secretary of the Interior in Washington, D.C. Thus the proof of service shows that notices were sent to all five tribes, persons, and agencies.

It is true that there is a disparity between the first page of the ICWA-030 notice of child custody proceedings for Indian child (which checks only the "tribes" box as having received notice and does not check boxes for the parents, the Sacramento Area Director of the BIA, and the Secretary of the Interior) and pages nine and ten (which checks the boxes showing that ICWA notice was sent to the parents, and also, despite a lack of a check in the box, shows that ICWA notice was sent to three Cherokee tribal entities, the Sacramento Area Director of the BIA, and the Secretary of the Interior). Where the tribes received notice, as they did in this case, errors or omissions in the notice are reviewed under the harmless error standard. (*In re E. W., supra,* 170 Cal.App.4th at pp. 402-403.)

The Sacramento Area Director of the BIA and the Secretary of the Interior did not respond. Nothing in the record indicates that the DCFS social worker would have sent the ICWA notice to the three tribal entities (whose responses show that they did receive ICWA notices) but failed to send ICWA notices to the two other federal agencies who did not respond. We rely on the presumption in section 664 of the Evidence Code that

official duty has been regularly performed. Absent any contradictory evidence—and this record contains no such contradictory evidence—we necessarily conclude that ICWA notice was given to the Sacramento Area Director of the BIA and the Secretary of the Interior, as well as to all necessary and appropriate tribal entities. (*In re S.B.* (2009) 174 Cal.App.4th 808, 812-813.)

After 60 days passed without a response from the Sacramento Area Director of the BIA and the Secretary of the Interior, the trial court was free to make the determination that ICWA did not apply. (*In re Francisco W.*, *supra*, 139 Cal.App.4th at p. 703; Cal. Rules of Court, rule 5.482(d)(1).)

Additionally, where Indian tribes are identified, it is not necessary to provide notice to the Secretary of the Interior or the BIA. Notice to the Secretary of Interior and the BIA need only be given if the identity or location of the tribe cannot be determined. (25 U.S.C. § 1912, subd. (a); *In re E. W.*, *supra*, 170 Cal.App.4th at p. 403.) Because Cherokee tribes were identified and notice was given to them, it was not necessary to provide notice to the Secretary or to the BIA. Even if notice was not sent to those agencies, no error occurred. (*In re E. W.*, at p. 403.)

DISPOSITION

The order is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.