Filed 3/27/15 In re S.P. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re S.P., a Person Coming Under the Juvenile Court Law.	B257093 (Los Angeles County Super. Ct. No. CK76077)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RICHARD B., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip L. Soto, Judge. Reversed and remanded with directions.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Richard D. Weiss, Acting county counsel, Dawyn R. Harrison, Assistant County Counsel, and Navid Nakhjavani, Deputy County Counsel, for Petitioner and Respondent.

INTRODUCTION

Father Richard B. appeals from the juvenile court's judgment terminating parental rights and finding his daughter, S.P., to be adoptable. Father argues that the judgment must be reversed because the Department of Children and Family Services (DCFS) failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). Because we find that there was no ICWA notice despite the court having been informed of Father's Indian ancestry, we conditionally reverse the judgment terminating parental rights and remand the matter to ensure compliance with ICWA. If, after receiving proper notice, no tribe indicates that S. is an Indian child within the meaning of ICWA, then the juvenile court shall reinstate the judgment terminating parental rights.

FACTS AND PROCEDURAL BACKGROUND

This is the second dependency proceeding involving S. In 2009, S. was found by the court to be a child described by Welfare and Institutions Code section 300, when her mother left her in the care of an unrelated adult who possessed and used a drug pipe and methamphetamine while caring for S. S. was released to the care of Father, who was subsequently given full custody of S. Mother's parental rights were terminated.

In June 2012, DCFS brought a second dependency petition, alleging Father's failure to protect and support S. At the time of the dependency proceedings, Father was in prison and S. was being cared for by his ex-girlfriend. The ex-girlfriend brought S. to visit Mother, who left drugs within the reach of four-year-old S. Although the detention report and the jurisdiction/disposition report both stated that S.'s Indian child inquiry had been made and that the child had no known Indian ancestry, Father shortly thereafter informed DCFS otherwise. DCFS's June 22, 2012, Jurisdiction/Disposition Report stated that "[Father] is mixed heritage; Irish, French, Native American (no tribal affiliation) and stated that matter was no [*sic*] ICWA at initial Detention Hearing for [S.]."

On February 19, 2014, DCFS informed the court that a social worker had recently asked Father about his American Indian ancestry over the phone. DCFS stated that

"Father reported as far as he knows[,] no one in his family is registered or enrolled in an American Indian Tribe. Furthermore, Father denied being registered or enrolled in an American Indian Tribe." Based on this information, DCFS again recommended that the court find that ICWA does not apply.

At the February 19, 2014 section 366.26 hearing, DCFS requested the court make an ICWA finding as to S. Notably, Father was not present at the hearing due to his incarceration, and instead, appeared by counsel. The court asked mother if she had any American Indian heritage and she indicated that she did not. The court then asked: "Do we have any reason to believe that [Father] has American Indian heritage?" Mother responded, "I have no idea honestly." At this juncture, DCFS did not inform the court of Father's previous statement regarding his Native American heritage. Based on the statements from Mother, the court concluded, "[i]t does not appear to be an ICWA case." On April 28, 2014, the court terminated Father's parental rights, found that S. would likely be adopted and ordered DCFS to make an adoptive placement.

DISCUSSION

Father's appeal raises the sole issue of compliance with the notice requirements of ICWA. ICWA protects the interests of Indian children and promotes the stability and security of Indian children and Indian tribes by establishing minimum standards for, and permitting tribal participation in dependency proceedings. (25 U.S.C. §§ 1902, 1903(1) & 1911(c).) The question in this case is whether this requirement of tribal notice was triggered, such that notice to the tribes should have been given. "We review the trial court's findings . . . whether ICWA applies to the proceedings for substantial evidence." (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.)

Both the California and federal ICWA statutes mandate that the social welfare agency notify the child's tribe "[w]hen a dependency court has reason to know the *proceeding* involves an Indian child . . . ." (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 383, italics added.) " '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).) California Rules of Court, rule 5.481(a)(5) states: "The circumstances that may provide reason to know the child is an Indian child include the following: [¶] (A) The child or a person having an interest in the child, including an Indian tribe, an Indian organization, an officer of the court, a public or private agency, or a member of the child's extended family, informs or otherwise provides information suggesting that the child is an Indian child to the court, the county welfare agency, the probation department, the licensed adoption agency or adoption service provider, the investigator, the petitioner, or any appointed guardian or conservator." "Where there is reason to believe a dependent child may be an Indian child, defective ICWA notice is 'usually prejudicial' [Citation], resulting in reversal and remand to the juvenile court so proper notice can be given." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 850.)

Here, the court's finding that ICWA did not apply is not supported by substantial evidence. The finding appears to be based on Mother's assertion that she did not know whether Father had Indian heritage and DCFS's recommendation that ICWA was inapplicable. Yet, DCFS informed the court that Father was part Native American in the June, 22 2012, Jurisdiction/Disposition Report.

DCFS argues that Father's statement that he had mixed heritage of Irish, French, and Native American ancestry with no tribal affiliation was too vague to trigger ICWA notice requirements, citing *In re J.D.* (2010) 189 Cal.App.4th 118 and *In re O.K.* (2003) 106 Cal.App.4th 152. Those cases are plainly distinguishable. In *In re J.D.*, at page 125, "the children's paternal grandmother had told [DCFS] that 'I can't say what tribe it is and I don't have any living relatives to provide any additional information. I was a little kid when my grandmother told me about our Native American ancestry but I just don't know which tribe it was.' " The Court concluded that the statement from the grandmother was "too vague, attenuated and speculative to give the dependency court any reason to believe the children might be Indian children." (*Ibid*.)

Similarly, in *In re O.K., supra,* 106 Cal.App.4th at pages 155, 157, the grandmother's statement that her son (the father of the child at issue) "may have Indian in him" was insufficient to trigger notice requirements. The grandmother's comment was

not based on any known Native American ancestors, but rather on the nebulous assertion that the family was from a particular geographic location. (*Id.* at p. 157.) In finding that ICWA notice was not triggered, the Court explained that the grandmother's statement was "too indefinite to give the court any reason to believe that the minors may have Indian ancestry." (*Id*. at p. 158.)

Both of these cases deal with speculative statements from relatives. In contrast, the present case involves a parent affirmatively asserting that he is Indian. There is no speculation, attenuation, or vagueness about his assertion of Indian ancestry. To the extent that Father cannot identify a tribe in which he or his family is enrolled, enrollment does not determine whether ICWA notices should be sent. " 'Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.' (*Ibid*.) Congress considered and rejected proposed language that would have limited the application of ICWA protections to enrolled members of Indian tribes. [Citation.] Thus enrollment in a tribe is not always required to be a member of a tribe." (*In re Jack C., III* (2011) 192 Cal.App.4th 967, 978.) The fact that enrollment is not determinative is evidenced by the statutory requirement that notice be given to the Secretary of the Interior when the child's tribe cannot be determined. (25 U.S.C. § 1912(a).) Father's lack of enrollment or identification with a particular tribe is thus not decisive here.

We conclude that the juvenile court's ICWA notice determination was not supported by substantial evidence, and the ICWA notice requirements were triggered. The termination order must be reversed for the limited purpose of determining compliance with the notice requirements. (*See In re Brooke C., supra*, 127 Cal.App.4th at p. 385; *In re Karla C.* (2003) 113 Cal.App.4th 166, 180.)

DISPOSITION

The judgment terminating parental rights is conditionally reversed and the case is remanded to the juvenile court with directions to order DCFS to comply with inquiry and notice provisions of ICWA. If, after receiving proper notice, no tribe indicates S. is an Indian child within the meaning of ICWA, the juvenile court shall reinstate the order terminating parental rights.

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KITCHING, J.

We concur:

EDMON, P. J.

LAVIN, J.*

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