Filed 8/2/17 In re Z.G. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re Z.G., a Person Coming Under the Juvenile Court Law.	C083412
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. T.G., Defendant and Appellant.	(Super. Ct. No. JD234931)

T.G. (father) appeals from the juvenile court's order terminating his parental rights to the minor. (Welf. & Inst. Code, §§ 366.26, 395 [statutory section references that follow are to the Welfare and Institutions Code unless otherwise set forth].) Father contends the court failed to determine the applicability of the Indian Child Welfare Act

(ICWA) (25 U.S.C. 1901, et seq.) before terminating his parental rights. We will reverse and remand for limited ICWA proceedings.

FACTS AND PROCEEDINGS

Because the sole challenge on appeal is to the juvenile court's ICWA determination, a detailed recitation of the facts and non-ICWA related procedural history is unnecessary to our resolution of this appeal. Relevant facts will be discussed where pertinent and necessary to our discussion of the issues raised.

On July 11, 2014, the Sacramento County Department of Health and Human Services (Department) filed a juvenile dependency petition pursuant to section 300, subdivisions (a) and (b) alleging the two-year old minor was at substantial risk of serious physical harm due to domestic violence between mother and her boyfriend (the father of one of the minor's half siblings), and a physical altercation between mother and the maternal grandmother in the presence of the children.

On July 17, 2014, mother filed a parental notification of Indian status form attesting that she had no known Indian ancestry.

At the July 21, 2014 detention hearing, the juvenile court found T.G. to be the presumed father of the minor, ordered the minor and her half siblings detained, and found that, as to mother, there was no evidence the minor was an Indian child within the meaning of ICWA.

The jurisdiction/disposition report filed by the Department recommended that the juvenile court find the minor was not an Indian child.

The Department filed a first amended petition on August 13, 2014, alleging the minor came within the provisions of section 300, subdivision (a) due to domestic violence between mother and her boyfriend, and subdivision (b) due to mother's untreated anger management problem.

The addendum report filed September 17, 2014, recommended a finding that the minor was not an Indian child.

On October 29, 2014, the juvenile court sustained the amended petition, ordered the minor removed from mother's custody, and ordered reunification services for both parents.

The prepermanency report filed by the Department on April 13, 2015, stated the ICWA "does not apply." At the prepermanency hearing on April 15, 2015, the court continued reunification services to mother, but terminated reunification services to father. The court made no ICWA-related findings.

The Department filed permanency review reports on September 29, 2015 and October 16, 2015. Both reports stated the ICWA "does not apply."

On December 16, 2015, the Department filed a supplemental dependency petition pursuant to section 387 for more restrictive placement for the minor with a foster caretaker.

The initial hearing and section 387 addendum report filed December 18, 2015, stated the ICWA did not apply and "[t]he biological father or the biological mother or both the biological parents report no Native American heritage."

At the December 21, 2015 initial hearing, all parties submitted on the issue of detention. The court found, among other things, that there was "no new information" regarding the ICWA.

On December 24, 2015, the Department filed a late attachment addendum report recommending that the court make certain findings, including a finding that "[t]he children are not Indian children."

The permanency review report filed December 28, 2015, recommended termination of all remaining reunification services and setting of the matter for a permanency hearing. The report reiterated that the ICWA "does not apply."

The section 387 jurisdiction/disposition hearing report filed by the Department reiterated the court's previous finding, on July 21, 2014, that "the children are not Indian [c]hildren," and again recommended a finding that the ICWA "does not apply."

At the January 13, 2016 jurisdiction/disposition hearing, the court sustained the allegations in the supplemental petition and continued the minor as a dependent child of the juvenile court.

The contested permanency review hearing commenced on February 8, 2016, and continued on March 8, 2016, March 9, 2016, March 10, 2016, March 28, 2016, April 11, 2016, and April 13, 2016. On May 4, 2016, the court set the matter for a selection and implementation hearing (§ 366.26) and a relative placement hearing.

At the July 20, 2016, relative placement hearing, the maternal grandmother informed the court, "All my grandchildren have Indian heritage background, all of them on my side," and provided the court with a November 18, 2015, letter from the Muscogee Creek Nation indicating they received an application for citizenship but were unable to process it without birth and death certificates. The maternal grandmother provided the court with the two requested birth certificates and stated she would complete the Indian Ancestry Questionnaire and provide it to the Department. The court ordered the Department to notice the Muscogee Creek Nation Tribe, continued the relative placement hearing to August 3, 2016, and set an ICWA compliance hearing for that same date.

At the August 3, 2016 hearing, the Department informed the court that the ICWA noticing was incomplete and requested that the matter be continued. The court continued both the ICWA compliance hearing and the relative placement hearing to August 24, 2016.

On August 12, 2016, the Department's ICWA paralegal filed a declaration regarding her ICWA investigation which, as relevant here, stated as follows: ICWA notices were provided to the Muscogee Creek Nation and three Choctaw Tribes based on the maternal grandmother's claim of Indian heritage and "[n]o tribe responded that

[mother] was eligible for enrollment or membership at that time." The paralegal spoke with the maternal grandmother, who updated her family history and indicated she had Blackfeet ancestry on the maternal side of the family but did not know if anyone on that side of the family was enrolled with the tribe. The maternal grandmother did not claim Choctaw heritage. The paralegal spoke with the minor's father, who indicated he had Cherokee ancestry on the maternal side of his family and provided his known family history and his maternal uncle's name (J.F.) and contact information. The paralegal spoke with J.F., who indicated there were family discussions regarding possible Blackfeet and Cherokee ancestry but never confirmed that or enrollment or membership with a tribe. J.F. provided all information available to him regarding his Cherokee and Blackfeet ancestry. Father indicated the paternal grandmother, D.G., was not Native American. The paralegal spoke with the paternal grandmother, A.A., who indicated she had Choctaw and Blackfoot or Blackfeet ancestry on both sides of her family, and her maternal great-grandmother had a roll number with the Blackfeet Tribe which A.A. was not able to provide. A.A. did not claim enrollment or membership with either tribe, but stated her family had a sufficient percentage of Choctaw ancestry to allow them to live on a reservation in Oklahoma. A.A. provided all known information regarding her family and tribal history.

Attached to the ICWA paralegal's declaration was a Notice of Child Custody Proceeding for Indian Child (form ICWA-030) as to the minor, with supporting documents, all of which were sent by certified mail, on August 12, 2016, to the Muscogee Creek Nation, the Blackfeet Tribe of Montana, the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee Indians in Oklahoma, the Bureau of Indian Affairs (BIA), the Department of the Interior, and the minor's parents.

The selection and implementation report filed by the Department prior to the August 24, 2016, hearing stated the ICWA "may apply" and "[t]he Department has

complied with ICWA notice provisions contained in California Rules of Court, [r]ule 1439, [s]ubd. (f)."[1] The report listed the minor's mother and father as potentially eligible members in the Indian child's tribe, and identified mother's tribes as "Muscogee Creek and Blackfoot" and father's tribes as "Cherokee and Blackfeet." The report also stated the minor's Indian tribe was noticed on August 11, 2016, by certified mail, return receipt requested, and noted the Department had not received any response from the minor's tribe as of the date of the report.

The report recommended termination of parental rights. The report also recommended a finding that the parents be advised that, "in the event the [minor] may be an Indian child, Tribal Customary Adoption, may be an appropriate permanent plan."

On August 24, 2016, the Department's ICWA paralegal filed a declaration of receipt of ICWA postal return receipt cards and correspondence. Attached to the declaration was a worksheet stating the Department had filed return receipts from all of the persons and entities to which ICWA notices were sent. Of the tribes to which notices had been sent, the Department received only one response from the Blackfeet Tribe of Montana, which stated the minor was not eligible for enrollment in the tribe. According to the worksheet, the Department received no responses from the remaining tribes. The declaration also attached copies of return receipt cards and United States Postal Service tracking information.

At the August 24, 2016, selection and implementation hearing, the Department stated ICWA noticing was not complete and requested a continuance. The court continued the ICWA compliance hearing to October 13, 2016, and continued the selection and implementation hearing and the relative placement hearing to August 31, 2016.

---

[1] Undesignated rule references are to the California Rules of Court.

The contested selection and implementation hearing was subsequently continued to September 20, 2016. After hearing oral argument and witness testimony, including the testimony of the maternal grandmother, the court terminated parental rights and placed the minor for adoption. Neither parent raised any ICWA-related claim or presented evidence related to possible heritage in the Cherokee Nation of Oklahoma, nor did the court mention the ICWA in its oral ruling or its written minute order.

On October 12, 2016, the Department's ICWA paralegal filed a second declaration of receipt of ICWA postal return receipt cards and correspondence. The attached worksheet and supporting documents indicated the Department received responses from the noticed tribes, all of which, with the exception of the Cherokee Nation of Oklahoma, stated the minor was not eligible for enrollment in the tribe. In a letter dated October 7, 2016, the Cherokee Nation of Oklahoma stated it required additional information in order to verify Cherokee heritage, namely the middle names and dates of birth of the maternal and paternal great-grandfathers. The declaration stated the ICWA paralegal was attempting to obtain information from the maternal and paternal sides of the minor's family in order to respond to the inquiry from the Cherokee Nation of Oklahoma.

The hearing on ICWA compliance and applicability was continued from October 19, 2016 to November 16, 2016.

On October 17, 2016, the ICWA paralegal filed an informational memorandum with attachments indicating a determination by the Cherokee Nation of Oklahoma of the minor's Indian child eligibility was still pending.

On October 19, 2016, the court conducted a hearing on the applicability of the ICWA. Neither parent was present for the hearing, but mother was represented by counsel. According to the court's minute order (the appellate record does not contain a reporter's transcript of the hearing), the Department informed the court that the Cherokee Nation was requesting additional information for the minor's paternal relatives and

requested a continuance of the hearing. The court continued the hearing as to the minor to November 16, 2016.

On October 31, 2016, father filed a handwritten letter appealing the termination of his parental rights.

DISCUSSION

Father contends the juvenile court erred in terminating his parental rights without first making a determination about the applicability of the ICWA or the sufficiency of the ICWA notices. He asserts the error was prejudicial requiring reversal for further proceedings.

Conceding the juvenile court terminated father's parental rights prior to determining whether ICWA applied, the Department offers several arguments: (1) father's appeal should be dismissed as moot due to the juvenile court's posttermination finding that the minor was not an Indian child; (2) the appeal should be dismissed because father lacks standing and; (3) any error of the juvenile court was harmless and rectified by the court's posttermination finding that the ICWA did not apply. As evidence of the juvenile court's posttermination findings, the Department filed a request for judicial notice (Evid. Code, §§ 452, subd. (d), 459, subd. (a); rules 8.54 & 8.252), or alternatively a motion to augment the record (rules 8.155 & 8.340(c)) or a motion to take additional evidence (Civ. Code, § 909; Cal. Const., art. VI, § 11, subd. (c)) of a declaration of receipt of ICWA tribal correspondence, a response from the Cherokee Nation, return receipts, and other indicia of responses to the ICWA notices from various entities.

In reply, father asserts his appeal is neither moot nor forfeited and he has standing to raise his ICWA claim. In any event, he argues, the juvenile court lacked jurisdiction to consider the Department's postjudgment ICWA efforts pursuant to *In re K.M.* (2015) 242 Cal.App.4th 450 (*K.M.*) and section 366.26, subdivision (i)(1).

As we shall explain, we need not consider the Department's posttermination documentation because, under the circumstances presented here, the juvenile court's failure to make an ICWA determination prior to termination of father's parental rights requires that we reverse the matter for limited ICWA proceedings.

The purpose of ICWA is to protect the interests of Indian children and promote the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195-196.) The juvenile court and the Department have "an affirmative and continuing duty to inquire" whether a child is, or may be, an Indian child. (§ 224.3, subd. (a); rule 5.481(a).) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the BIA if the tribal affiliation is not known. (§ 224.2; see rule 5.481(b); 25 U.S.C. § 1912.)

Notice requirements are construed strictly. (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989.) Where notice has been given, any error in notice is subject to harmless error review. (*Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784 (*Nicole K.*).)

"Aside from its notice provisions, the ICWA applies only to Indian Children. [Citations.] Only when information before the juvenile court is sufficient to show that the child is a member of a tribe, or is eligible for membership and is the child of a member, does [rule 5.482(c)(2)] require compliance with all of the provisions of the ICWA." (*In re L.B.* (2003) 110 Cal.App.4th 1420, 1427, superseded by rule on other grounds.) It is up to the tribe to determine whether a child is, or is not, a member and thus an Indian child. (§ 224, subd. (c); *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 255.)

Here, as of August 24, 2016, the original date of the selection and implementation hearing, the Department and the juvenile court had information provided by the maternal

grandmother (indicating possible Muscogee Creek Nation or Blackfoot ancestry), the father (indicating possible Cherokee ancestry), the father's maternal uncle J.F. (indicating possible Blackfeet and Cherokee ancestry), and the paternal grandmother A.A. (indicating possible Choctaw and Blackfoot or Blackfeet ancestry) that the minor had possible Indian heritage, thus triggering the duty to notice. According to the Department's ICWA paralegal, ICWA notices had already been sent (on August 12, 2016) to all appropriate tribes and entities and the Department was awaiting responses from all of the noticed tribes with one exception, the Blackfeet Tribe of Montana, which had already confirmed the minor's ineligibility. In light of that information, the juvenile court continued the ICWA compliance hearing for 60 days to October 13, 2016. At that time, the court also continued the selection and implementation hearing to August 31, 2016.

The selection and implementation hearing was ultimately continued to September 20, 2016, at which time the juvenile court terminated parental rights without having received any additional information or update on the status of the ICWA compliance, and without making any final ICWA determination.

"If 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." (Rule 5.482(c)(1).) Lack of timely response allows the court to infer the ICWA does not apply with respect to the nonresponding tribe. (*Ibid.*)

At the time of the court's termination of parental rights, the 60-day response period required by rule 5.482(c)(1) had not yet elapsed. It was not until October 12, 2016, that the Department provided the court with information that all of the tribes had responded, and all but one confirmed that the minor was not eligible for enrollment in the tribe. The sole remaining tribe, the Cherokee Nation of Oklahoma responded and

requested additional information. That is, as of October 17, 2016, the minor's ICWA eligibility as to the Cherokee Nation of Oklahoma was still pending.

While there is no requirement under the ICWA for the court to wait 60 days from notice to the tribes to hold a section 366.26 hearing, there are good reasons to do so. Since the Cherokee Nation of Oklahoma had yet to respond as of September 20, 2016, the court could not definitively rule the ICWA did not apply to the minor at the section 366.26 hearing, which was held less than 60 days after the tribe was notified. Under the ICWA, when the court has reason to believe the minor is an Indian child, in addition to notifying the relevant tribes within 10 days of any hearing, termination of parental rights is not allowed "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(f).) Until the juvenile court could determine the ICWA did not apply to the minor, these provisions applied to the termination proceedings. The court plainly could not have made that determination on September 20, 2016, when it terminated parental rights.

We note that, while we agree with the court in *K.M.* that a juvenile court lacks jurisdiction to consider belated remedial ICWA efforts which seek to attack the termination order (*K.M., supra,* 242 Cal.App.4th at pp. 458-459; § 366.26, subd. (i)), we do not find the efforts here were a collateral attack on the termination order, the purpose of which was to substantiate the order, not modify or revoke it. In any event, we need not comment further on the issue of the juvenile court's jurisdiction in that regard, as we reverse and remand due to the court's failure to comply with the ICWA *before* terminating parental rights. (See *K.M., supra,* 242 Cal.App.4th at p. 458 [compliance with ICWA required before terminating parental rights]; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424 [same].)

The Department argues father did not have standing to raise the ICWA compliance issue, which pertain to the tribe's interest and not his own "merely speculative" interests. Thus his only recourse was to file a petition pursuant to section 388 to modify the termination order. His failure to do so, the Department argues, forfeited his ICWA compliance challenge on appeal.

We reject the forfeiture claim, as the juvenile court made no ICWA finding, either orally or in its written order following the selection and implementation hearing and father therefore had no basis for a section 388 petition.

We further reject the claim that father lacks standing. "Not every party has standing to appeal every appealable order. Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal. [Citation; cf. Code Civ. Proc., § 902 ['Any party aggrieved may appeal . . .'].] An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision. [Citations.] These rules apply with full force to appeals from dependency proceedings. [Citation.]" (*In re K.C.* (2011) 52 Cal.4th 231, 236.) "A parent is permitted to litigate the ICWA notice issue to protect the tribe's interest in the proceedings and because it is in the best interest of the child that is the subject of the dependency." (*In re Justin S.* (2007) 150 Cal.App.4th 1426, 1435.) Here, because the resolution of the ICWA compliance issue has the potential to alter the juvenile court's decision to terminate father's parental rights, father has standing. (*In re K.C.*, at pp. 238-239.)

Finally, the Department argues any ICWA error was harmless because the error was cured posttermination and, in any event, father does not claim the new evidence submitted by the Department is in any way false or misleading, or that reversal and remand would have any effect on the order terminating his parental rights. The Department further claims our refusal to consider the new evidence would be

counterproductive to the state's strong interest in expeditiousness and the finality of juvenile court dependency proceedings, and no purpose would be served by remanding for further proceedings.

ICWA noncompliance is not automatically harmless when posttermination evidence demonstrates the child at issue is not eligible for membership. As father asserts, both parents were prevented from attending and participating in the final ICWA compliance hearing. In particular, the parents were prevented from addressing the issue raised by the Cherokee Nation regarding missing information, an issue not yet known to the parties or the juvenile court at the time parental rights were terminated.

We reject the Department's assertion that father failed to make an offer of proof regarding the proffered new evidence. None of the cases cited by the Department require him to do so under these circumstances. (See *In re Earl L.* (2004) 121 Cal.App.4th 1050, 1052-1053 [request for offer of proof as condition precedent to a contested hearing on the sibling exception was "within the court's discretion"]; *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122 [court can require offer of proof of evidence of significant probative value "to insure that before limited judicial and attorney resources are committed to a hearing" on applicability of exception to termination of parental rights]; *In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817 [trial court may properly request offer of proof if line of cross-examination appears to be irrelevant to issue at hand].)

Conceding that the "better practice would have been to allow [father] to examine the evidence presented to the juvenile court at the post-termination ICWA compliance hearing," the Department argues this court's refusal to consider the proffered new evidence " 'would be counterproductive to "the state's strong interest in the expeditiousness and finality of juvenile court dependency proceedings." ' (*Alicia B.*[*v. Superior Court* (2004)] 116 Cal.App.4th [856,] 867; [*In re S.M.* (2004)] 118 Cal.App.4th [1108,] 1117, fn. 5.)" If that were the case, all posttermination presentation of ICWA

compliance evidence would be harmless so long as that evidence confirmed the minor's ICWA ineligibility. As stated earlier, we decline to reach such a conclusion.

Finally, the Department argues father failed to show a limited remand would affect the order terminating parental rights. In particular, the Department notes the Cherokee Nation requested additional information regarding the maternal great grandfather, yet there was no claim of Indian ancestry on the maternal side of the minor's family and no claim of Cherokee ancestry by the maternal grandmother. Hence, the Department argues, even if that information had been provided by the ICWA paralegal the result would still have been the same. The argument ignores the fact that the Cherokee Nation also requested additional information regarding the *paternal* great grandfather. In any event, this kind of posttermination speculation whether or not additional information would have resulted in a different outcome for a parent whose parental rights have been terminated demonstrates precisely why compliance with the ICWA at the outset is imperative. While we do not intend that our holding here be interpreted to mean that posttermination evidence of ICWA compliance can never result in a finding of harmless error, here, where the error could easily have been avoided by setting the section 366.26 hearing *after* the 60-day ICWA notice period to allow the tribes to respond to information provided by various family members, the juvenile court's failure to make an ICWA determination prior to terminating parental rights was not harmless.

DISPOSITION

The juvenile court's judgment terminating parental rights is reversed and the matter is remanded for limited proceedings to determine ICWA compliance. If, at the conclusion of those proceedings, no tribe indicates the minor is an Indian child within the meaning of the ICWA, then the juvenile court shall reinstate the order terminating parental rights. In all other respects, the judgment is affirmed. The Department's request

for judicial notice, motion to augment the record, or motion to take additional evidence is denied.

HULL, J.

We concur:

BLEASE, Acting P. J.

MAURO, J.