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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.B. et al., Persons Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

C.M. et al.,

Defendants and Appellants.

E054512

(Super.Ct.No. RIJ118323)

OPINION

APPEAL from the Superior Court of Riverside County. Gary Vincent, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed with directions.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant C.M.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and Appellant, J.R.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

C.M. (mother) is the mother of D.B. and G.R., who are under the jurisdiction of the juvenile court. J.R. (father) is the father of G.R. only. In this appeal, mother argues the court failed to comply with the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) requirements, and father argues the court erred when it denied him a hearing on his Welfare and Institutions Code section 388¹ petition. Each parent joins in the other parent's arguments on appeal. As discussed *post*, we agree that all requirements of ICWA were not satisfied, and we therefore conditionally reverse and remand for further proceedings in compliance with ICWA. In all other respects, we affirm.

FACTS AND PROCEDURE

D.B. Removal and Detention—June/July 2009

Riverside County Department of Public Social Services (DPSS) received a referral regarding D.B. for general neglect. During a hospital stay in June 2009 for breathing problems, it was reported that mother was inattentive to the child's medical needs and acted inappropriately toward him. Mother's three other children were in the care of a maternal aunt, and mother told hospital workers that she would place D.B. with the maternal aunt when he was released from the hospital. On July 9, 2009, DPSS filed a section 300 juvenile dependency petition regarding D.B., who was 14 months old. The petition alleged mother abused drugs, suffered from mental health issues, and lived a

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

transient lifestyle. Mother was four months pregnant.² DPSS placed D.B. in a foster home, and on July 10, 2009, the juvenile court formally detained D.B.

D.B. Jurisdiction and Disposition—September 15, 2009

At the jurisdiction hearing held on September 15, 2009, the juvenile court found the allegations in the dependency petition to be true, took jurisdiction over D.B., and offered mother reunification services.

G.R. Removal and Detention—December 2009

G.R. was born in December 2009. DPSS placed G.R. in the foster home where D.B. was placed. On December 23, 2009, DPSS filed a dependency petition regarding G.R., in which it alleged the child was at risk of harm because his half sibling, D.B., had been abused or neglected, mother was not complying with her case plan regarding D.B., and G.R.'s father abused marijuana and engaged in criminal activity. Father had requested placement of G.R., but DPSS denied the request because father lived next door to mother and father's mother, with whom he lived, had some child welfare history through her ex-husband. At the detention hearing held on December 24, the juvenile court ordered G.R. detained.

D.B. Status Review and G.R. Jurisdiction and Disposition—April 29, 2010

The juvenile court continued mother's services as to D.B. and set D.B.'s 12-month review hearing for November 1, 2010. The court took jurisdiction over G.R. and offered reunification services to both father and mother, despite father's statements that he did

² D.B.'s father was incarcerated at that time and was later denied reunification services. He is not a party to this appeal.

not need reunification services and his failure to consistently visit with G.R. The court set G.R.'s six-month review hearing for November 1, 2010.

Combined Status Review Hearing—February 17, 2011

At the status review hearing eventually held on February 17, 2011, the juvenile court terminated reunification services as to both children and identified the foster parents as prospective adoptive parents. The court set the section 366.26 permanency planning hearing for June 13, 2011.

Section 388 Petition and Section 366.26 Hearing—August 30, 2011

On August 30, 2011, father filed a form JV-180, request to change court order, pursuant to section 388 regarding G.R.. In the petition, father asked the court to vacate its order setting the section 366.26 hearing, to reinstate family reunification services, and to authorize G.R. to have unsupervised overnight and weekend visits with father. Father stated the circumstances that had changed since the challenged order were: 1) he had continuously visited with G.R. and created a father/son bond; 2) he had completed a parenting class and 24 sessions of individual counseling; and 3) he had obtained a suitable residence. Father also asserted the requested changes would be better for G.R. because G.R. recognizes father and because the paternal aunt could provide G.R. with a stable and secure life. On that same date, the juvenile court allowed counsel to present argument regarding the petition, but ultimately denied the petition without a hearing. After hearing testimony from father and mother during the section 366.26 hearing, the juvenile court terminated parental rights to the children. This appeal followed.

DISCUSSION

1. ICWA

Mother argues the juvenile court and DPSS failed to comply with the ICWA notice requirements as to both children. Specifically, she asserts three errors require reversal of the order terminating parental rights: 1) ICWA notices omitted several pieces of information about both children's Native American ancestors that were available to DPSS; 2) the notices to the Cherokee and Blackfeet tribes were not addressed to the tribes' designated agents; and 3) a copy of each notice was not sent to the Secretary of the Interior.

a. Information Omitted

In providing the notice required by ICWA, "It is essential to provide the Indian tribe with all available information about the child's ancestors, especially the ones with the alleged Indian heritage. [Citation.] Notice to the tribe must include available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data. [Citation.]" (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.)

Mother argues the following specific pieces of information should have been included on the notices sent to the tribes in August 2009. Regarding D.B.: D.B.'s father and paternal great-grandmother were included on the notices, but the notices did not list their places of birth; the notices included only D.B.'s father's temporary prison address; and were missing D.B.'s father's former and permanent addresses. In addition, the name

of D.B.'s paternal grandmother was included, but no other information was given, when, as of the November 1, 2010 status review report, DPSS was in possession of paternal grandmother's criminal and DPSS histories and knew she had joined her son, D.B.'s father, in residing at the home of paternal great-grandmother and, presumably, DPSS could have provided at least paternal grandmother's address and date of birth. The record indicates mother denied any Native American ancestry, but suggested D.B.'s father might have some, and provided the social worker with the name and telephone number of D.B.'s paternal great-grandmother. The social worker spoke with paternal great-grandmother on August 12, 2009. Paternal great-grandmother stated generally that the family has Cherokee ancestry "from the East Coast," but could provide no other information, and did not claim that she was eligible for tribal membership.

DPSS argues any error was harmless. "Deficiencies in an ICWA notice are generally prejudicial, but may be deemed harmless under some circumstances." (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 577 [Fourth Dist., Div. Two].) Here, however, we cannot find the error to be harmless, as the tribes did not have a meaningful opportunity to search the tribal registry. (See, e.g., *In re Louis S.* (2004) 117 Cal.App.4th 622, 631 [due to misspellings and omissions in notice, "the tribe could not conduct a meaningful search to determine [the child's] tribal heritage"].)

In *In re Louis S.*, the court found the tribe could not conduct a meaningful search to determine the child's tribal heritage because the SOC 318 form, among other errors, did not provide birth dates for the maternal grandmother or maternal great-grandmother. The court noted the maternal grandmother's birth date was available because the children

were in foster care with her. The court also found fault with the omission of the maternal great-grandmother's full name and birth date, because there was no evidence the social worker was unable to get this "critically important" information about the person with the alleged Indian heritage. (*In re Louis S.*, *supra*, 177 Cal.App.4th at p. 631.) "Notice is meaningless if . . . insufficient information is presented to the tribe" asked to determine if a child is an Indian child. (*Id.* at p. 630.)

At a minimum, it appears DPSS erred in not providing places of birth for D.B.'s father and paternal great-grandmother, as both were available for interview and the record does not indicate that both were asked and were unable to provide this information.

In short, DPSS did not comply with ICWA's notice requirements because it did not supply the Indian tribes with all available information. (*In re Louis S.*, *supra*, 117 Cal.App.4th at p. 630.) On this record, we cannot find DPSS substantially complied with ICWA's notice requirements, and we will remand the matter. (*Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 268.)

Similarly, as to G.R.: father and the paternal grandmother were included on the notices, but the notices did not list their places of birth. Also as to G.R., although father listed Harry E. as an unspecified ancestor who is or was a tribe member on the "Parental Notification of Indian Status," only his name appears on the ICWA notice. Again, it appears that DPSS could have easily obtained places of birth for father and the paternal grandmother, and it erred in failing to include this information on the notices provided to the tribes, requiring remand.

b. Designated Tribal Agents

Mother also argues the court's orders should be reversed because the notices to the Cherokee and Blackfeet tribes were not addressed to the tribes' designated agents.

ICWA notice must be sent to all tribes of which the child may be a member or eligible for membership. (Cal. Rules of Court, rule 5.481(b)(1).) Indian tribes may designate an agent for service of ICWA notices. (25 C.F.R. § 23.12.) A list of the designated agents and their addresses is published annually by the Bureau of Indian Affairs (BIA). (See, e.g., Indian Child Welfare Act, Receipt of Designated Tribal Agents for Service of Notice, 70 Fed. Reg. 13518-01 (Mar. 21, 2005); *In re Mary G.* (2007) 151 Cal.App.4th 184, 210.) Notice to the tribe "must be sent to the tribal chairperson unless the tribe has designated another agent for service." (Cal. Rules of Court, rule 5.481(b)(4).) "The purpose of the requirement that notice be sent to the designated persons is to ensure that notice is received by someone trained and authorized to make the necessary ICWA determinations, including whether the minors are members or eligible for membership and whether the tribe will elect to participate in the proceedings. Receipt by an unidentified person at the tribe's address does not fulfill this purpose." (*In re J.T.* (2007) 154 Cal.App.4th 986, 994.)

Any error here was harmless. Deficiencies in an ICWA notice are generally prejudicial but may be deemed harmless under some circumstances. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162.) Thus, where notice has been received by the tribe, as it was in this case, errors or omissions in the notice are reviewed under the harmless-error standard. (*Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784.) In this case,

each of the tribes received the notice and responded to it. Any defect in failing to name the tribal chairperson in these notices is harmless.

c. Notice to Department of Interior

Mother further contends the court's orders should be reversed because the record contains no indication that a copy of the notice was sent to the Secretary of the Interior, as is required by Federal regulations. Notice need only be given to the Secretary of the Interior and the BIA if the identity or location of the tribe cannot be determined. (25 U.S.C. § 1912(a); *In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.) California law provides that notice to these is only required "to the extent required by federal law" (Welf. & Inst. Code, § 224.2, subd. (a)(4).) Thus, as DPSS argues, because the Indian tribes were identified, it was not necessary to also provide notice to the Secretary of the Interior, and no error occurred.

2. Section 388 Petition for Modification

Father contends the juvenile court erred when it summarily denied his petition under section 388 to modify the order terminating his reunification services and setting the section 366.26 hearing.

Under section 388, "Any parent . . . having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . ." (§ 388, subd. (a).) "If it appears that the best interests of the child may be promoted by the

proposed change . . . the court shall order that a hearing be held” (§ 388, subd. (d).)

The right to a hearing on a section 388 petition is triggered only when a parent seeking modification has made a prima facie showing that (1) there is “a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child’s best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. [Citation.] We review the juvenile court’s summary denial of a section 388 petition for abuse of discretion.” (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

“ ‘The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.’ [Citations.]” (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) In his petition, father alleged: “Father . . . has continuously visited his child and created a father/son bond during those visits. He completed a parenting class and 24 sessions of individual counseling. Father has a residence in which his son can be placed with him.” Father appended to the section 388 petition a copy of a letter from his therapist documenting his attendance at 24 one-hour counseling sessions between October 9, 2010 and June 30, 2011. The juvenile court concluded father had not established changed circumstances. This conclusion is supported by father’s own petition, which simply showed he had continued for an additional four months the weekly counseling sessions he had begun four months before his services were terminated.

The court spent more time explaining its decision that father had not made a prima facie showing that the requested changes would be in G.R.'s best interest. The court explained that father had made no showing regarding how it would be in G.R.'s best interest to be removed from the foster parents with whom he had been placed since just after birth. "In this case, even if I was to construct the best possible scenario for the father, it doesn't militate towards the benefit of this child. It would be essentially destroying this child's life. The child has looked for the last period of time to the current caretakers for every provision you can think of from physical to mental to psychological, security to stimulus to shelter, just everything you can think of. The father's not been a part of that. *The fact that the father can interact with the child in a good way is hardly enough to show it's in the best interests of [G.R.] to grant the only relief I could grant [placement with father].* (Italics added.)

Father did not make a prima facie case for either changed circumstances or the best interests of G.R. Accordingly, a hearing on that petition was not required and the trial court did not err when it summarily denied father's petition. (See Cal. Rules of Court, rule 5.570(d); *In re Angel B.* (2002) 97 Cal.App.4th 454, 461.)

DISPOSITION

The order terminating parental rights is conditionally reversed and the case is remanded to the juvenile court with directions to order DPSS to comply with the inquiry and notice provisions of ICWA and related federal and state law, and to file all required documentation with the juvenile court for the court's inspection. If, after proper notice, a tribe claims either of the children is an Indian child, the juvenile court shall proceed in

conformity with the provisions of the ICWA as to that child. If no tribe claims that either child is an Indian child, the order terminating parental rights shall be reinstated as to that child.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

KING
J.