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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.C. et al., Persons Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.B.,

Defendant and Appellant.

E057648

(Super.Ct.No. SWJ005596)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso,
Judge. Reversed with directions.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel,
for Plaintiff and Respondent.

I

INTRODUCTION

Mother appeals from a juvenile court order terminating her parental rights under Welfare and Institutions Code section 366.26,¹ to her daughter, S.C. (born in 2005), and her two sons, J.D. (born in 2010) and J.J.D. (born in 2011). Mother contends the juvenile court failed to ensure proper notice was provided under the Indian Child Welfare Act of 1978 (ICWA) 25 U.S.C. § 1901 et seq.

Because the record on appeal does not demonstrate compliance with ICWA notice requirements, the order terminating parental rights is reversed, and the proceedings are remanded to the juvenile court to allow ICWA notice compliance. If, after proper ICWA notice, a tribe claims the children are Indian children, the juvenile court shall proceed in conformity with all the provisions of ICWA. If no tribe claims that the children are Indian children, the order terminating parental rights shall be reinstated.

II

FACTS AND PROCEDURAL BACKGROUND

We primarily discuss only the facts pertinent to this appeal regarding ICWA notice.

Before initiation of the instant juvenile dependency proceedings, S.C. was placed in protective custody and mother received Family Reunification services from March

¹ Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

2006 until June 2007. Ultimately, S.C. was returned to mother and the juvenile dependency case was dismissed.

In 2009, mother met J.D.'s father (father), lived with him, and became pregnant with J.D. Mother and father separated in April 2011. Before separating, mother became pregnant with J.J.D. J.J.D. was born in November 2011. It is undisputed that father is J.J.D.'s biological father.²

Detention Hearing

The Department of Public Social Services (DPSS) initiated the instant proceedings following a referral of general neglect in December 2010. Mother and father reportedly had engaged in domestic violence and were both arrested. S.C. and J.D. were placed in protective custody.³ DPSS filed a juvenile dependency petition under section 300, as to S.C. and J.D. At the detention hearing, the juvenile court found S.C. and J.D. came within section 300, subdivisions (b) (failure to protect) and (g) (no provision for support), and ordered the children detained in protective custody.

During the detention hearing, the court found that ICWA "may" apply to S.C. but did not apply to J.D. DPSS reported that on December 14, 2010, mother and father were asked if the children had Indian ancestry. Mother said there was no known Indian ancestry as to S.C. and J.D. Father also said there was no known Indian ancestry as to J.D. DPSS was unable to ask S.C.'s father if S.C. had Indian ancestry, since his

² Father is not a party to this appeal.

³ S.C.'s father's whereabouts were unknown throughout the juvenile dependency proceedings.

whereabouts were unknown. The court found that ICWA did not apply to J.D. and ordered mother, father, and S.C.'s father to complete and submit a Parental Notification of Indian Status form (ICWA-020).

Jurisdiction and Disposition Hearing

DPSS reported in its jurisdiction/disposition report filed in January 2011, that mother had been released from incarceration and was visiting the children weekly. S.C.'s father's whereabouts were still unknown. Therefore ICWA inquiry was not made as to S.C. DPSS noted that during juvenile dependency proceedings in 2006, the court found that ICWA did not apply to S.C.

In January 2011, father filed a Parental Notification of Indian Status form stating he had no Indian ancestry as far as he knew. In February 2011, DPSS filed ICWA noticing documentation. The documentation included copies of form ICWA-030, entitled Notice of Child Custody Proceeding for Indian Child, regarding S.C. The notice identified mother and S.C.'s father but stated their addresses were confidential. The form stated as to mother that there was no Indian ancestry through her and Indian ancestry through S.C.'s father was unknown. Other than S.C.'s parents, no other maternal or paternal relatives were listed, such as grandparents or great-grandparents. The form indicated that notice was sent to Indian Child & Family Services in Temecula, the Bureau of Indian Affairs (BIA) in Sacramento, and the U.S. Secretary of the Interior in Washington D.C. A copy of the return receipt from the BIA in Sacramento was filed with the court.

During the jurisdiction/disposition hearing in March 2011, DPSS's attorney told the court that at the hearing on January 26, 2011, the juvenile court found that ICWA notice had been provided.⁴ DPSS's attorney noted that DPSS had not yet received responses from additional tribes. The court stated that it was going to adopt the ICWA findings included in DPSS's jurisdiction/disposition hearing report. The March 2011 minute order for the hearing states that the court found that S.C. and J.D. were not Indian children and ICWA did not apply to them. The minute order further states that the court found there was reason to know that an Indian child was involved and DPSS had provided notice to all identified tribes and the BIA, as required. The minute order adds that, by law, proof of "such notice must be filed with this court. ICWA may apply."

Six-Month Review as to S.C. and J.D.

DPSS reported in its six-month hearing report filed in September 2011, that ICWA did not apply. At the six-month review hearing in October 2011, the juvenile court ordered reunification services for mother and terminated services for father. No mention was made regarding ICWA compliance.

Detention and Jurisdiction as to J.J.D., on Second Juvenile Dependency Petition

In November 2011, mother gave birth to J.J.D. Several days after J.J.D.'s birth, DPSS filed a juvenile dependency petition as to J.J.D., under section 300, subdivisions (b), (g) and (j) (abuse of sibling). Juvenile dependency proceedings as to mother's other

⁴ A reporter's transcript of the January 26, 2011, is not included in the record on appeal, and the hearing minute order makes no mention of such a finding.

children, S.C. and J.D., remained pending. J.J.D. was detained in protective care shortly after his birth.

The Indian Child Inquiry Attachment (ICWA Form 010(A)) to the juvenile dependency petition as to J.J.D., stated that on November 23, 2011, mother told DPSS that she may have Native American ancestry but she did not provide any other details. Mother indicated “she has some Native American ancestry but not enough to be recognized for ICWA eligibility.” Father’s whereabouts were unknown. Therefore he was not interviewed regarding his Native American ancestry. The social worker noted that on March 14, 2011, the court found that ICWA did not apply to the family. DPSS concluded that ICWA did not apply.

At the November 2011 detention hearing, the juvenile court found that J.J.D. came within section 300, subdivisions (b), (g), and (j), but allowed J.J.D. to reside with mother. When asked if J.J.D. had any Indian ancestry, mother’s attorney said there was Indian ancestry through mother. Counsel for DPSS said that she believed that since J.J.D. was not being removed from mother, ICWA was not triggered. The court agreed, finding that J.J.D. was not an Indian child and ICWA did not apply because J.J.D. would not be removed at that time. The court ordered mother and father to file ICWA Form 020(A) regarding J.J.D.

That same day, mother filed ICWA Form 020(A), stating that she may have Indian ancestry and named the tribe, “Shashone.” Father also filed Form ICWA-020, entitled Parental Notification of Indian Status, which stated that he had no Indian ancestry as far as he knew.

DPSS reported in its December 2011 jurisdiction/disposition report regarding J.J.D., that ICWA did not apply. DPSS noted that in November 2011, the court found ICWA was inapplicable. Mother completed another form entitled, Parental Notification of Indian Status, ICWA-020, indicating that she may have Shoshone Indian ancestry. Father also completed the same form and indicated he did not have any Indian ancestry. DPSS further reported that “The tribe had previously been contacted regarding [mother’s] eligibility for enrollment and it was determined that she was not eligible.”

In January 2012, DPSS filed an amended petition regarding J.J.D., alleging that mother had been arrested for domestic violence. The juvenile court ordered J.J.D. detained and removed from mother’s care. During the jurisdiction hearing in February 2012, as to J.J.D., the juvenile court sustained the petition.

Disposition Hearing as to J.J.D. and 12-Month Review as to S.C. and J.D.

In May 2012, during the 12-month review hearing regarding S.C. and J.D., the juvenile court terminated reunification services, set a section 366.26 hearing (.26 hearing), and reduced visitation to twice a month. S.C. and J.D. were ordered removed from maternal grandmother’s home because she had permitted the children to have unsupervised contact with mother. The court ordered S.C. and J.D. placed together in the foster home where J.J.D. had been residing since his removal from mother in January 2012. Reunification services as to S.C. and J.D. were terminated.

At the May 2012 disposition hearing regarding J.J.D., the court adjudged J.J.D. a dependent of the court, denied reunification services under section 361.5, set a .26 hearing on the same date as S.C. and J.D.’s .26 hearing, and ordered supervised visitation

reduced to twice a month. The court made no findings regarding ICWA during the May 12-month review hearing or disposition hearing, other than through adopting DPSS's recommendations. However, the minute orders for the two hearings state that the juvenile court found the children were not Indian children and ICWA did not apply.

Section 366.26 Hearing as to S.C., J.D., and J.J.D.

At the .26 hearing on October 25, 2012, S.C. testified she did not want to live with mother or visit her, and would not feel sad if she never saw her again. Mother did not testify. The juvenile court found the three children were adoptable, rejected the beneficial parent-child relationship exception (§ 366.26, subd. (c)(1)(B)(i)), and terminated parental rights as to the three children.

III

ICWA NOTICE

Mother appeals from the order terminating her parental rights over S.C., J.D., and J.J.D. (the children). She contends that substantial evidence did not support the juvenile court's finding that proper notice was given under the ICWA. We agree. Although DPSS reported in several hearing reports that it had complied with IWCA notice requirements, there was no evidence that DPSS provided notice to the Shoshone tribes. Because DPSS's compliance with ICWA notice provisions was deficient, this matter must be remanded to allow compliance with ICWA notice requirements.

“Congress passed the ICWA in 1978 ‘to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children “in foster or adoptive homes

which will reflect the unique values of Indian culture. . . .” [Citations.]” (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1164.) If the court “knows or has reason to know that an Indian child is involved” in a dependency proceeding, the social worker or probation officer shall provide notice to the child’s tribe. (§§ 224.2, subd. (a), 224.3, subd. (d).)

Pursuant to section 224.2, subdivision (a) “(3) Notice shall be sent to all tribes of which the child may be a member or eligible for membership, until the court makes a determination as to which tribe is the child’s tribe in accordance with subdivision (d) of Section 224.1, after which notice need only be sent to the tribe determined to be the Indian child’s tribe. [¶] (4) Notice, to the extent required by federal law, shall be sent to the Secretary of the Interior’s designated agent, the Sacramento Area Director, Bureau of Indian Affairs. If the identity or location of the parents, Indian custodians, or the minor’s tribe is known, a copy of the notice shall also be sent directly to the Secretary of the Interior, unless the Secretary of the Interior has waived the notice in writing and the person responsible for giving notice under this section has filed proof of the waiver with the court.” (§ 224.2, subd. (a)(3), (4).)

Notice must include “specified” information, including “[a]ll names known of the Indian child’s biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.” (§ 224.2, subd. (a)(5)(C).)

“If the court or the Department ‘knows or has reason to know that an Indian child is involved, the social worker . . . is required to make further inquiry regarding the

possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members . . . , contacting the Bureau of Indian Affairs . . . [,] the tribes and any other person that reasonably can be expected to have information regarding the child’s membership status or eligibility.’ (§ 224.3, subd. (c); see Cal. Rules of Court, rule 5.481(a)(4).) The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, ‘A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child’s extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child’s biological parents, grandparents, or great-grandparents are or were a member of a tribe.’ (§ 224.3, subd. (b)(1).)” (*In re Gabriel G.*, *supra*, 206 Cal.App.4th at pp. 1165-1166.)

Because “‘failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe, [ICWA] notice requirements are strictly construed.’” (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174; see also *In re Robert A.* (2007) 147 Cal.App.4th 982, 989.) The juvenile court’s findings whether proper notice was given under ICWA and whether ICWA applies to the proceedings are reviewed for substantial evidence. (*In re E.W.* (2009) 170 Cal.App.4th 396, 403-404.)

Here, the record does not show that DPSS fully complied with ICWA notice requirements. The juvenile court’s findings of ICWA notice compliance are premised on determinations that during previous juvenile dependency proceedings, there was

compliance with ICWA notice requirements and that mother's children do not have Indian ancestry. But, "[t]o enable the juvenile court to review whether sufficient information was supplied, [DPSS] must file with the court the ICWA notice, return receipts and responses received from the tribes. [Citation.]" (*In re Robert A.*, *supra*, 147 Cal.App.4th at p. 989.) This was not done in the instant case as to the Shoshone tribe or BIA after J.J.D. was born and a second juvenile dependency petition was filed as to J.J.D. Without reviewing such documentation, this court has no way of determining whether proper ICWA notice was provided.

Although DPSS initially provided ICWA notice to BIA in January or February 2011, the notice was provided before mother disclosed after J.J.D.'s birth that she believed she had Shoshone ancestry. Up to that point there had been no notice of any specific tribes. Notice was only provided to the BIA. Therefore, DPSS was required to notify the Shoshone tribes as to all three children. The record on appeal does not show this was ever done.

The record shows that in November 2011, after J.J.D. was born, mother submitted to the court form ICWA-030, stating that she believed she had Shoshone ancestry. The court stated that since it was allowing J.J.D. to remain with mother, ICWA did not apply. ICWA did, however, apply because there was the possibility the children would ultimately be removed from mother. In fact, all three children were removed from mother and, when J.J.D. was removed, the court erroneously assumed that ICWA did not apply because the court had previously found ICWA did not apply. Under ICWA, DPSS was required to provide notice to the Shoshone tribes.

Even though there were previous juvenile dependency proceedings involving mother's children, during which the court found there was no Indian ancestry, later, mother disclosed new information regarding Shoshone Indian ancestry. We therefore reject DPSS's attempt to bootstrap this case to other juvenile dependency proceedings and ICWA findings made before mother disclosed in November 2011, at the inception of separate proceedings involving J.J.D., that she believed she had Shoshone ancestry. "It is important to not lose sight of the fact that ICWA notices in separate dependency cases are not fungible evidence—even when the separate cases involve half siblings who share the same parent with Indian heritage." (*In re Robert A.*, *supra*, 147 Cal.App.4th at p. 990.) "This inquiry obligation exists in every dependency case: 'The court and the county welfare department have an affirmative duty to inquire whether a child for whom a petition under [Welfare and Institutions Code] section 300 is to be, or has been, filed is or may be an Indian child.' (Cal. Rules of Court, rule 1439(d).)" (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1409.)

Because mother provided particular identifying information that J.J.D. might have Indian ancestry through mother, DPSS was required to provide ICWA notice to Shoshone tribes to allow the tribes to determine if the children are Indian children. DPSS was also required to provide the court with specific proof that such notice was given to, and received by, these tribes. (*In re Robert A.*, *supra*, 147 Cal.App.4th at p. 990; *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200; Cal. Rules of Court, rules 5.481(b)(1), 5.482(b).) Such proof includes ICWA "notices, any responses it received and proof of required postal receipts to allow the court to determine if there was proper and adequate notice

before deciding the ultimate issue—whether ICWA applied.” (*Robert*, at p. 990.) DPSS did none of these things after the second juvenile dependency petition was filed as to J.J.D., and after mother declared she had Shoshone ancestry. Therefore the court’s finding that ICWA did not apply as to S.C., J.D., and J.J.D. cannot stand, since this court is unable to verify that there was proper ICWA notice or that Shoshone tribes received actual notice of the instant proceedings. (*In re Asia L.* (2003) 107 Cal.App.4th 498, 508-509.)

Under these circumstances, this case must be remanded to the juvenile court with directions to order DPSS to comply with ICWA notice requirements, including providing proper notice of the proceedings to Shoshone tribes. We therefore conditionally reverse the juvenile court’s order terminating parental rights. (*In re Gabriel G.*, *supra*, 206 Cal.App.4th at p. 1168 [limited reversal appropriate to ensure that ICWA requirements are met]; see also *In re Asia L.*, *supra*, 107 Cal.App.4th at p. 509.) If, after proper notice, the court finds that the children are Indian children, the court shall proceed in conformity with the ICWA. If it is determined on remand that the children are not Indian children, the order shall be reinstated.

IV

DISPOSITION

The order of October 25, 2012, terminating parental rights is reversed as to S.C., J.D., and J.J.D, and the proceedings are remanded to the juvenile court with directions to order DPSS to comply with ICWA notice requirements, and to file all required documentation with the juvenile court for that court’s inspection. If, after proper notice,

a tribe claims any of the children are Indian children, the juvenile court shall proceed in conformity with all the provisions of ICWA. If no tribe claims that S.C., J.D., or J.J.D. are Indian children, the order terminating parental rights shall be reinstated.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

MILLER
J.