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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.W., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

S.W. et al.,

Defendants and Appellants.

E059137

(Super.Ct.No. RIJ114244)

OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson,
Judge. Reversed.

Richard D. Pfeiffer, under appointment by the Court of Appeal for Defendant and
Appellant J.W., father.

Brent D. Riggs, under appointment by the Court of Appeal for Defendant and
Appellant S.W., mother.

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

S.W. (mother) and J.W. (father) appeal from the juvenile court's order of July 9, 2013, terminating their parental rights to their daughter D.W. (child) and freeing her for adoption at a hearing held under Welfare and Institutions Code, section 366.26.¹ Both parents argue the juvenile court erred when it found the Indian Child Welfare Act (ICWA) does not apply to the child. Mother further argues the court erred when it failed to apply the beneficial parental relationship exception to the presumption for adoption; father joins in mother's argument, but provides no additional argument regarding his relationship with the child. As discussed below, we reject the beneficial parental relationship argument. However, we find the ICWA issue to be a close one; because ICWA notice requirements are to be strictly construed, we order a limited remand so the Department of Public Social Services (Department) can properly notice all three recognized Cherokee tribes and provide additional information about and from the paternal grandmother, if available.

FACTS AND PROCEDURE

Initial Petition and Family Maintenance with Mother – March to July 2012

On March 7, 2012, the Riverside County Department of Public Social Services (DPSS) filed a section 300 petition alleging as to both mother and father that their mental

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

health issues and history of failure to regularly take their prescribed medication prevented them from providing regular care to the child. The petition also alleged mother failed to reunify with seven previous children, has a history of abusing controlled substances, has a criminal history for battery, assault and drug charges, and has a history of engaging in domestic violence with the child's father. The petition alleged regarding father that he had failed to reunify with five previous children, has a history of abusing controlled substances, has a history of engaging in domestic violence with the child's mother, and does not provide support for the child.

In the detention report filed March 7, 2012, DPSS recommended the juvenile court allow mother to retain custody of the child and to provide her with family maintenance services. Mother had been staying at a sober living home for the previous few weeks. It was reported that she was not taking her medications and was constantly cussing and screaming at the child and "saying scary things" to her like calling her the anti-Christ and telling people the child needed to be "exorcised."

At the detention hearing held on March 8, 2013, the juvenile court detained the child from her father's custody but permitted the child to remain in mother's custody.

In the jurisdiction and disposition report filed April 13, 2012, DPSS recommended the child remain with mother on family maintenance. At the jurisdiction and disposition hearing held on May 24, 2012, the juvenile court sustained the section 300 petition, granted family maintenance services to mother and denied reunification services to the father.

Supplemental Petition and Removal—July 2012

On July 17, 2012, DPSS filed a supplemental dependency petition under section 387, in which it alleged mother was not taking her medications and “may be suffering from delusions and hallucinations.” In the detention report filed on that date, the social worker reported receiving a referral from a person at mother’s new sober living home, who did not want to be identified. The referent told the social worker that mother was not taking her medications, was acting crazy and delusional, was making threats to hurt people, and said she was getting messages to kill the child. The child was removed from her mother and placed in foster care. At the detention hearing held on July 18, 2012, the juvenile court ordered the child detained.

The jurisdiction/disposition hearing was set for August 13, 2012. In the report prepared for that hearing, DPSS recommended offering mother reunification services. However, mother’s counsel asked for a contested jurisdiction hearing on the supplemental petition, which the court then set for September 11. In the addendum report filed for the September 11 hearing, DPSS changed its recommendation to denying mother reunification services and setting a section 366.26 hearing. The reason for the changed recommendation is that mother was not cooperating in obtaining a medication evaluation. This was important because mother’s therapist stated mother could not benefit from reunification services until she first addressed her mental health issues. Mother’s mental health had deteriorated since the previous hearing, but mother was not cooperating in efforts to stabilize her mental health.

On September 11, 2012, the juvenile court ordered mother to participate in two psychological evaluations to assist in developing her case plan. The hearing was continued to October 24.

Mother participated in two psychological evaluations, both on October 1, 2012. Edward J. Ryan, Ph.D., prepared a report dated October 9, 2012, in which he concluded: “It is my opinion that the level of pathology of her mental health issues is such as to preclude any possibility of her benefitting from reunification services.”

Robert L. Suiter, Ph.D., Psy.D., filed a report consistent with that of Dr. Ryan. Dr. Suiter opined that there was no reasonable likelihood that mother could benefit from services in the next six to 12 months “given the nature of her mental disorder, her lack of insight and her resistance to treatment.”

The contested disposition hearing was held on February 7, 2013. The court heard testimony from Dr. Ryan and from Dr. Suiter. After hearing argument from the parties, the juvenile court denied reunification services based on subdivisions (b)(2)² and (b)(11)³ and set the section 366.26 hearing for June 10, 2013. That same day, Mother filed her

² Section 361.5, subdivision (b)(2), provides that reunification services need not be offered to a parent if “the parent . . . is suffering from a mental disability . . . that renders him or her incapable of utilizing those services.”

³ Section 361.5, subdivision (b)(11), provides that reunification services need not be offered to a parent if “the parental rights of a parent over any sibling of the child had been permanently severed, and this parent is the same parent . . . and that, according to the findings of the court, has not subsequently made a reasonable effort to treat the problems that led to the removal of the sibling or half sibling of that child from the parent.”

Notice of Intent to File Writ Petition, which this Court denied by opinion filed on May 2, 2013, in case number E058034.

Selection and Implementation Hearing—July 9, 2013

At the selection and implementation hearing scheduled for June 10, 2013, the parties agreed that the court should continue the hearing to July 9, 2013. After continuing the hearing, the court found that ICWA does not apply to the child

The selection and implementation hearing was finally held on July 9, 2013. Father and his fiancée both testified in support of his section 388 petition for modification of the order denying reunification services, which the juvenile court denied. Regarding selection and implementation, mother's counsel argued that the beneficial parental relationship exception to the presumption for adoption did apply, based on the child having spent the first 14 months of her life in mother's care and on the continued visitation and bonding with mother. Mother's counsel also argued that guardianship would be a better plan for the child at that time because the prospective adoptive mother was unstable, in that she was undergoing a divorce and had issues with her own grown children, one of whom had a criminal history. Father's counsel joined in the mother's arguments and pointed out that the child had a relationship with both of her parents. The juvenile court concluded that, while it was obvious that both parents love the child very much, it was not in her best interest to remain with either parent. The court found the child to be adoptable, found that termination of parental rights would not be detrimental to the child, and ordered parental rights terminated as to both parents.

Both parents filed appeals.

DISCUSSION

1. *The Indian Child Welfare Act*

The parents argue the juvenile court erred when it found ICWA does not apply to the child because the Department provided insufficient information to only one Cherokee tribe. We review the evidence before the juvenile court to determine whether substantial evidence supports its ruling.

The facts regarding the Department's inquiry into the child's Native American background and compliance with the ICWA notice requirements are as follows:

The detention report indicates that father told the social worker on February 27, 2012, that he is registered with the "Cherokee or Cherokee Nation tribe in Oklahoma City, Oklahoma. He stated he does not know his registration number and his mother may have it; however, he does not know how to contact his mother."

At the detention hearing on March 8, 2012, father completed and filed a form ICWA-020 "Parental Notification of Indian Status" in which he indicated he "may have Indian ancestry" through the paternal grandmother, a Cherokee, and gave her name. The juvenile court asked whether the paternal grandmother was a registered Cherokee, to which father's counsel replied "Yes." Counsel for mother agreed to the Department's request to waive time so the Department could "give ICWA notice to the Cherokee Nation." The juvenile court found that ICWA may apply.

On April 12, 2012, the Department filed a copy of the form ICWA-030 “Notice of Child Custody Proceedings for Indian Child” and certificate of mailing showing the notice had been sent to the Cherokee Nation of Oklahoma in Tahlequah, Oklahoma and to the U.S. Department of the Interior in Washington, D.C. and had been received by them on March 23 and 26, respectively.⁴ The Notice contained the name, birth date and birthplace of the child, mother, and father, but only the paternal grandmother’s name and current address. The notice listed the “Tribe or band, and location” for father and paternal grandmother as “Cherokee Nation, Cherokee, Continental U.S. Indian Tribes.”

At the pretrial jurisdiction hearing on April 18, 2012, the juvenile court found that the Department had given proper ICWA notice “based on the notice filed with the Court on April 12, 2012.” Father’s counsel told the court that father had spoken to the “Cherokee Nation” and that they did have a registration number “under the paternal side,” but would only release it by court order. Father’s counsel indicated the Department was “working on” getting the number from the Cherokee Nation.

At a subsequent pretrial hearing held on May 10, 2012, county counsel asked the court to “find good ICWA notice pursuant to the documents filed with the Court on April 12, 2012. It’s also been past the 60-day timeline, so we’d ask that the Court find that

⁴ The Jurisdiction/Disposition report filed on April 13, 2012, stated that the ICWA-030 had been sent to the Department of the Interior “and the Cherokee tribes,” plural, but the notices provided to the court show the only tribe notified was the Cherokee Nation.

ICWA does not apply.” The court found ICWA notice had been done properly and that ICWA does not apply to the child.

In the second detention report filed July 17, 2012, the social worker reported that she questioned father on July 15 regarding his Native American ancestry. Father told the social worker that he is registered as a Cherokee from Oklahoma, but did not provide any other information.

At the detention hearing held on July 18, 2012, county counsel asked the juvenile court to find that ICWA does not apply, again citing the notice filed with the court on April 12, 2012. The court found that ICWA did not apply.

In the jurisdiction/disposition report filed August 8, 2012, the social worker reported that on August 2 father had told a Department supervisor that he is a registered member of the Cherokee Nation of Oklahoma. Father could not provide a registration number or the exact name of the tribe.

Father provided the Department with his mother’s telephone number in September 2012 so she could be considered for placement of the child.

At the selection and implementation hearing scheduled for June 10, 2013, which was continued to July 9, 2013, county counsel reported that the social worker had made further inquiry about father’s ICWA status by speaking to the paternal grandmother. The paternal grandmother told the social worker that father was “not eligible and not registered with any tribes.” Based on that information, county counsel asked the court to find that ICWA does not apply to the child. Father and his counsel were present in court

but did not object. After continuing the hearing, the court found that ICWA does not apply to the child.

“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, subds. (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.’ [Citations.] 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.’ [Citation.]” (*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.)

A. *March 2012 – The Department Should Have Notified All Three Cherokee Tribes*

In February 2012, father initially told the Department that he is registered with the “Cherokee or Cherokee Nation tribe in Oklahoma City, Oklahoma.” At the detention hearing on March 8, 2012, father completed a form ICWA-020 “Parental Notification of Indian Status” in which he indicated he “may have Indian ancestry” through the paternal grandmother, whom he described as “Cherokee.” Father left blank the spaces for naming a specific tribe or band. Later in March 2012, the Department sent the ICWA-030 notice to the Department of the Interior and the Cherokee Nation of Oklahoma in Tahlequah, Oklahoma. However, as mother’s appellate counsel points out, the federal government has recognized three separate Cherokee tribes: The Cherokee Nation of Oklahoma; the United Keetoowah Band of Cherokee Indians in Oklahoma; and the Eastern Band of Cherokee Indians. (77 Fed. Reg. 47869, 47872 (Aug. 10, 2012); *In re Mary G.* (2007) 151 Cal.App.4th 184, 210.) While the record indicates that both father and the Department at times focused their attention and efforts on the Cherokee Nation,⁵ it also

⁵ At the initial detention hearing on March, 2012, mother was asked to waive time so the Department could “give ICWA notice to the Cherokee Nation.” The Department then noticed only the Cherokee Nation and the Department of the Interior. At the April
[footnote continued on next page]

indicates father did not have much information about his tribal membership (apparently because he was not in contact with his family), at times declined to specify to which Cherokee tribe he believed he belonged, and continued to assert that he may be a member of a Cherokee tribe. Because 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,” and on this record father appears to have been uncertain in March 2012 to which Cherokee tribe he might belong, the Department should have sent notice to all three Cherokee tribes. For this reason, substantial evidence does not support the juvenile court’s findings on April 18 and May 10, 2012, that the Department had given proper ICWA notice.

B. The June 10, 2013 Finding of Non-Indian Status Was Error

We now review for substantial evidence the juvenile court’s finding on June 10, 2013, that ICWA does not apply to the child. County counsel represented at that hearing that the social worker had recently spoken with the long-lost paternal grandmother, who told the social worker that father was not registered with any tribes. Given that father consistently pointed to his mother as the source of both his Native American heritage and information about that heritage, it is understandable that those involved would conclude that father and the child had no such heritage. However, we are bound by section 224.3, which imposes on the Department an “affirmative and continuing duty” to inquire

18, 2012 pretrial hearing on jurisdiction, father’s counsel represented to the court that father had spoken with someone from the Cherokee Nation about getting his registration number and that the Department “is working on” getting them to release it by an order of the court.

whether the child is an Indian child when “A person having an interest in the child provides information suggesting . . . one or more of the child’s biological parents . . . are or were a member of a tribe.” Here, the father provided information suggesting that he is a member of a Cherokee tribe on numerous occasions, both before and after⁶ the March 2012 notice to the single Cherokee tribe. In such an instance the social worker “shall” provide ICWA notice. (§ 224.3, subd. (d).) Subdivision (e)(1) of that section further provides that a determination by an Indian tribe that a child is or is not a tribal member or eligible for membership is conclusive. Here, the Cherokee Nation’s failure to reply within the 60-day deadline, as stated by county counsel at the May 10, 2012 hearing is such a determination. However, we have already determined that the Department should have notified the other two Cherokee tribes. In addition, as of the June 10, 2013 hearing, the Department had been able to contact the paternal grandmother and at that time could have asked her to provide additional information about herself, such as the date and place of her birth, and other relatives.

We are aware of no legal authority that the determination of even the relative most in a position to know of the child’s eligibility is similarly conclusive to that of the noticed Indian tribe. For this reason, we conclude that substantial evidence does not support the juvenile court’s finding that ICWA does not apply to the child.

⁶ On August 2, 2012, father contacted a Department supervisor to assert that he is a registered member of the Cherokee Nation of Oklahoma, although he could not provide a registration number or the exact name of the tribe.

2. *The Beneficial Parental Relationship Exception Does Not Apply.*

Mother contends, and father joins, that the court erred in not applying the beneficial parental relationship exception under section 366.26, subdivision (c)(1)(B)(i). We disagree.

At a section 366.26 hearing, the court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) If the court finds that a child may not be returned to his or her parents and is likely to be adopted, it must select adoption as the permanent plan, unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one of the exceptions set forth in section 366.26, subdivision (c)(1)(B). One such exception is the beneficial parental relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i). (See *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.) This exception applies when the parents “have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The phrase “benefit from continuing the relationship” refers to a parent/child relationship that “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship

would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.) It is the parent's burden to show that the beneficial parental relationship exception applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345.)

Here, mother relies mainly on the fact that she took care of the child for the first 14 months of the child's life without abuse and neglect, and that the child remembered mother and enjoyed their supervised visits over the following year. Neither does the record provide additional support for overturning the juvenile court's ruling. Mother simply did not carry her burden to establish that the child would be greatly harmed if parental rights were terminated. For this reason, we conclude the juvenile court did not err when it found the beneficial parental relationship exception does not apply here.

DISPOSITION

The order terminating parental rights is conditionally reversed. We order a limited remand as follows: The juvenile court is directed to order the Department to give notice in compliance with the ICWA and related federal and state laws. Once the juvenile court finds there has been substantial compliance with the notice requirements of the ICWA, it

shall make a finding with respect to whether the child is an Indian child. If the juvenile court finds the child is not an Indian child, it shall reinstate the original order terminating parental rights. If the juvenile court finds the child is an Indian child, it shall proceed in compliance with the ICWA and all related federal and state laws. (*In re S.E.* (2013) 217 Cal.App.4th 610, 616-617 [conditional reversal in an ICWA case].)

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RAMIREZ
P. J.

We concur:

RICHLI
J.

KING
J.