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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

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

MADERA COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.M. et al.,

Defendants and Appellants.

F070064

(Super. Ct. Nos. MJP016382,
MJP016381 & MJP016870)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Thomas L. Bender, Judge.

Susan M. O'Brien, under appointment by the Court of Appeal, for Defendant and Appellant, M. M.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant, J. M.

Douglas Nelson, County Counsel, Miranda P. Neal and Christine Nijjer, Deputy County Counsel, for Plaintiff and Respondent.

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M.M. (father) and J.M. (mother) appeal from the juvenile court's orders made at the August 28, 2014, Welfare and Institutions Code section 366.26 hearing terminating their parental rights to B.M., J.M., and C.M.¹ Father and mother argue that the Madera County Department of Social Services (department) failed to follow properly the requirements of their children's Indian ancestry pursuant to the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). The department conceded the error. We do not accept the department's concession, reject father and mother's contention, and affirm the juvenile court's orders.

FACTS AND PROCEDURAL HISTORY

Father and mother are appealing from orders made at a third dependency case involving the two of them. Although the first two dependency cases are not at issue here, we include the following background to place the current case in context.

First dependency petition

In April of 2009, six-month old twins B.M. and J.M. (collectively, the twins) first came to the attention of the department when J.M. suffered burns after father left her unattended near a wood stove. The juvenile court sustained a section 300 petition which alleged that the twins and their older half-sibling N.V.² came within the provisions of subdivisions (b) (failure to protect) and (j) (abuse or neglect of a sibling).

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

²N.V. is the child of mother and K.V. K.V. is not a party to this appeal and N.V. is not a subject child of this appeal.

After the petition was filed, father and mother both completed Parental Notification of Indian Status forms (ICWA-020).³ On the form, mother stated she had no Indian heritage and neither did N.V. Father checked the following boxes on the form: that he may be a member, or eligible for membership, in an Indian tribe, listing Cherokee and Patawotami; that he may have Indian ancestry; but also that he had “no Indian ancestry as far as I know.” Father noted that he was not a registered member of a tribe but thought he might be eligible for membership and enrollment. In an interview with the department, father said he was not a registered member of a tribe, but that he might be eligible for enrollment. The department asked father to complete the form entitled Notice of Child Custody Proceeding for Indian Child (ICWA-030).⁴ The department filed ICWA-020 completed by father but reported that it had not yet received father’s

³ICWA-020 is a preliminary form, calling for minimal data. It asks for the names of tribes in which the parent or child may be a member or eligible for membership, or from which the parent may be descended, and the names and relationships of any ancestors with memberships in tribes. The juvenile court must order the parent to complete ICWA-020 at the beginning of the case. (Cal. Rules of Court, rule 5.481(a)(2), (3).)

⁴ICWA-030 is a more extensive form. It calls for information regarding parents, grandparents, and great-grandparents, including their names, current and former addresses, dates and places of births and deaths, names and locations of tribes, and tribal membership and enrollment numbers. As optional questions, ICWA-030 asks for information concerning other relatives (for example, aunts, uncles, siblings, first and second cousins, and stepparents), including their names; current and former addresses; dates and places of births; and tribes, bands, and locations. Additional optional inquiries concerning the child and family members include information regarding attendance at Indian schools; receipt of medical treatment at Indian health clinics and U.S. Public Health Service hospitals; and residence on federal trust land, reservations, Rancherias, and allotments. If the department has reason to know the child may be an Indian, “as soon as practicable,” the department must interview the parents and extended family members to gather the information specified in ICWA-030. (Cal. Rules of Court, rule 5.481(a)(4)(A).) The department must execute ICWA-030 under penalty of perjury and send it to identified tribes or the Bureau of Indian Affairs.

completed ICWA-030. At the conclusion of the contested jurisdiction hearing, the juvenile court found father had claimed Indian heritage and that ICWA applied.

In the disposition report, the department stated that, as of June 8, 2009, it had not yet received ICWA-030 from father, but that the department had received information from paternal grandmother, via telephone, that the family did have Indian ancestry, although they did not have enrollment cards. Paternal grandmother stated that she had ancestry information, and the department mailed an ICWA-030 to her for completion.

At the contested disposition hearing July 2, 2009, the juvenile court asked whether the department had notified the tribes. Deputy county counsel stated they had not because neither father nor paternal grandmother had as yet returned the completed ICWA-030 forms. The juvenile court found ICWA did not apply based on available evidence, as it was father's responsibility "to come forward with that information."

Reunification services were ordered and continued. At both the 6- and 12-month review hearings, the juvenile court found that the children might be Indian children based on father's heritage; that the department had given proper notice to all identified tribes; that the tribes had responded and denied the children were members or eligible for membership; and that, therefore, ICWA did not apply.⁵

On July 23, 2010, the children were returned to their parents and family maintenance was provided until March 24, 2011, when the proceedings were dismissed.

Second dependency petition

A second section 300 petition was filed May 16, 2012, this time alleging the twins and their eight-month-old sibling, C.M., came within the provisions of subdivisions (b) (failure to protect) and (j) (abuse or neglect of a sibling). C.M., who had been left

⁵We find none of the notices to or responses from the identified tribes in the record before us.

unattended in a car by father, wiggled out of his car seat and fell out of the car window, sustaining head trauma.

At the detention hearing held May 18, 2012, father stated he had Native American ancestors and that he had “filled out a form last time and it was denied.” The juvenile court inquired further regarding father’s knowledge of his tribal affiliation. He said the Cherokee tribe would be in Oklahoma and the Potawatomi tribe in Wisconsin. The juvenile court then questioned father’s mother who was present in the courtroom. She stated she was not a member and wasn’t sure if she was eligible for membership, but that she had done additional research “since last time” and had more names and information. Father’s mother stated she would try to contact father’s father and get more information. The juvenile court then found that ICWA “may apply,” that the issue should be pursued, and asked that father’s mother contact the social worker with information.

The children were released to mother with an admonition that father was not to be allowed to reside in the home with mother and children.

At the jurisdiction hearing held July 9, 2012, the petition was sustained as to the count pertaining to C.M. but dismissed as to the twins. The juvenile court further ordered that mother was not to allow contact between the children and father without department supervision. The juvenile court found that ICWA did not apply because the children were not in out-of-home placement.

At the disposition hearing held July 23, 2012, the juvenile court dismissed dependency proceedings and terminated jurisdiction.

Third dependency petition

The section 300 petition at issue here was filed September 10, 2013, alleging that N.V., the twins, and C.M. came within the provisions of subdivisions (b) (failure to protect) and (g) (no provision for support) after both mother and father were arrested and incarcerated. It was alleged that father had shot and killed his brother in the family home while the children were present, and mother allegedly assisted father in disposing of the

body and cleaning up the evidence. Attached to the petition was an Indian Child Inquiry Attachment (ICWA-010(A)) for each child stating that, per mother, none of the children had known Indian ancestry.

An amended petition the following day added allegations that the children came within the provisions of subdivisions (a) (serious physical harm) and (c) (serious emotional damage) because father blew methamphetamine and marijuana smoke in the children's faces; mother and father allowed father's brother, a registered sex offender, to reside in the home; and father and mother engaged in domestic violence in front of the children. The children were detained and placed into the same foster home where they had been in 2009.

The detention report stated, inter alia, that the social worker had spoken to mother on September 6, 2013, and that mother reported that neither she nor any of her children had any Native American ancestry.

At the detention hearing held September 11, 2013, the juvenile court stated it knew it had dealt in the past with the question of father's Indian ancestry, but had forgotten, and asked if he had any. Father replied, "Can we overlook it?" The juvenile court stated no, and father replied, "Yes, but the tribe—also, if you don't mind me saying, the tribe has been contacted and they're just inconclusive. Basically, they're not going one way or the other." Mother stated she had no Indian ancestry.

The juvenile court questioned deputy county counsel and asked whether ICWA applied in the prior case. She replied, "I don't believe it did. I have not pulled out the case, though." The juvenile court then made a finding that ICWA did not apply "based on the available information" and ordered mother and father to complete ICWA-020 and ICWA-030 forms.

The addendum report prepared in anticipation of jurisdiction/disposition and filed September 30, 2013, repeated the earlier assertions by mother that neither she nor any of the children had any Native American ancestry. The report also stated that the juvenile

court had found at the September 11, 2013, detention hearing that, “with the current information provided by the parents, [ICWA] does not apply.”

At the noncontested jurisdiction hearing October 7, 2013, both mother and father submitted on the social worker’s reports, which consisted of both the September 11, 2013, detention report and the September 30, 2013, addendum report claiming that ICWA did not apply. The juvenile court found the allegations true and sustained the petition.

The disposition report filed by the department in anticipation of the January 16, 2014, hearing states, inter alia, that the juvenile court had found at detention that, based on information provided by the parents, ICWA did not apply.

Both father and mother were present and represented by counsel at the noncontested disposition hearing on January 16, 2014. The issue of the applicability of ICWA was not raised during the hearing; however, both mother and father submitted on the report. The juvenile court removed the children from mother and father’s custody, denied reunification services, and set a section 366.26 permanency planning hearing for the three youngest children. N.V.’s case was continued for disposition. Father and mother were served notice of the section 366.26 hearing in open court and both, through counsel, waived advisements of writ and appellate rights. The juvenile court granted a JV-180/section 388 petition by counsel for the children that visits between the children and mother and father be suspended.

On April 1, 2014, father filed a JV-180/section 388 petition requesting that the children be removed from the foster home and placed with the maternal grandmother. Mother, through counsel, subsequently joined in the section 388 petition.

The June 6, 2014, section 366.26 report stated that the department “recognizes that the children have a significant bond with maternal grandmother and would recommend that the relationship continue.” However, it also stated that, “[a]t this point the Department is unable to complete their assessment, as to whether or not visitation

between the children and their maternal grandmother ... should be maintained and are in the best interest of the children.” The department assessed the children as being “generally adoptable” and recommended that they not be moved from their current placement. A June 9, 2014, addendum report stated that the children’s therapist was concerned about overnight visits with maternal grandmother, as “any visitation with anyone at this time could set the children back.”

A combined contested section 388 and section 366.26 hearing commenced June 26, 2014, and took place over the course of two months. The juvenile court admitted five reports filed by the department and heard testimony from social workers; the children’s therapist; the foster mother; the maternal grandmother; the maternal great-grandmother; N.V., the children’s older half-sibling; and mother.

On August 28, 2014, the juvenile court denied the section 388 motion, finding that it was not in the best interests of the children to move them from their foster home and place them with maternal grandmother. The juvenile court then terminated mother’s and father’s parental rights as to the three younger children. As for N.V., the juvenile court terminated family reunification for her father (mother’s had already been terminated) and set a section 366.26 permanency planning hearing. Mother was advised of her writ and appellate rights as to N.V.

This appeal follows.

DISCUSSION

On appeal from the orders made at the August 28, 2014, section 366.26 hearing, father and mother challenge for the first time the juvenile court’s previous rulings, claiming noncompliance with ICWA. Father and mother argue that, because there was evidence that father may have been eligible for membership in two specifically named tribes, it was mandatory that notice regarding the proceedings be given to those tribes. We find no error.

ICWA was enacted 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 that will reflect the unique values of Indian culture. (*In re C.Y.* (2012) 208 Cal.App.4th 34, 39; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195.) In state court proceedings involving the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe have the right to intervene at any point in the proceeding. (25 U.S.C. § 1911(c).)

Thus, in any involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child must notify the parent or Indian custodian and the Indian child's tribe of the pending proceedings. (25 U.S.C. § 1912(a).)

In *In re Pedro N.* (1995) 35 Cal.App.4th 183 (*Pedro N.*), we held that a parent who fails timely to challenge a juvenile court's action regarding ICWA is foreclosed from raising ICWA issues, once the juvenile court's ruling is final, in a subsequent appeal from later proceedings. The proper time to raise such issues is after the dispositional hearing. The juvenile court's rulings and findings at the dispositional hearing are appealable upon a timely notice of appeal. We noted in *Pedro N.* that the parent there was represented by counsel and failed to appeal the juvenile court's orders from the dispositional hearing. (*Pedro N., supra*, at pp. 189-190.)

Father acknowledges he failed to appeal from prior orders of the juvenile court finding that ICWA was not applicable to the children and that, pursuant to our decision in *Pedro N.*, he is foreclosed from raising those issues on appeal from an order terminating his parental rights. However, he asks that we "consider revisiting that decision because the nature of the violation of the ICWA is so egregious in this case, to wit, the department completely ignored the ICWA required procedures, failed to send any notice of any kind,

and the court accepted the department's failure, and failed to order the department to comply as required by state and federal law." We decline to do so.

Here, the dependency petition at issue included ICWA-010(A) forms that, per mother, neither she nor any of her children have any Native American ancestry. At the detention hearing, father mentioned that he did have Indian ancestry, but that the "tribe has been contacted and they're just inconclusive." The findings and orders for the detention hearing state that both mother and father denied Indian heritage, both were asked to complete ICWA-020, and that ICWA did not apply. Neither of the requested ICWA-020 forms are before us in the record.

Furthermore, following detention, the juvenile court conducted separate jurisdiction and disposition hearings during which neither parent sought clarification on the applicability of ICWA. At neither hearing did mother or father challenge the department's proposed order that ICWA was inapplicable to their case, and neither mother's nor father's counsel ever argued that ICWA was applicable. In fact, at both hearings, mother and father submitted on reports that included the assertion that ICWA did not apply.

The juvenile court's dispositional findings and orders became final and, on this appeal from the order terminating father's and mother's parental rights, are no longer subject to attack. (*Pedro N.*, *supra*, 35 Cal.App.4th at pp. 185, 189-191.)

One final note: *Pedro N.* does not foreclose a tribe's right under ICWA, due to a parent's forfeiture or waiver of the issue, to file a timely appeal when procedurally entitled to do so. (*Pedro N.*, *supra*, 35 Cal.App.4th at pp. 185, 189-190; see *In re Desiree F.* (2000) 83 Cal.App.4th 460, 477-478 [wherein we reversed juvenile court's denial of tribe's motion to intervene after final order terminating parental rights and invalidated actions dating back to outset of dependency that were taken in violation of ICWA].) In *Pedro N.*, we held we were addressing only the rights of the parent of a heightened evidentiary standard for removal and termination, not those of the tribe (*Pedro N.*, *supra*,

at p. 191), or, for that matter, the rights of the children. As a result, we conclude father and mother have forfeited their personal rights to complain of any alleged defect in compliance with ICWA.

DISPOSITION

The orders and findings of the juvenile court are affirmed.

Smith, J.

WE CONCUR:

Cornell, Acting P.J.

Gomes, J.