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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Plaintiff and Respondent,

v.

D.C.,

Defendant and Appellant.

F070704

(Super. Ct. Nos. 515331, 516466)

OPINION

APPEAL from orders of the Superior Court of Stanislaus County. Ann Q.
Ameral, Judge.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and
Appellant.

John P. Doering, County Counsel, and Robin L.G. Gozzo, Deputy County
Counsel, for Plaintiff and Respondent.

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D.C. (mother) appeals from the juvenile court's orders pursuant to Welfare and Institutions Code section 366.26¹ terminating her parental rights to her daughters C. and A. Francis S. is the presumed father of both children. His rights were also terminated, but he is not a party to this appeal. Mother argues for the first time on appeal that the juvenile court erred when it found the children were not Indian children within the meaning of the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). We reject mother's contentions and affirm the juvenile court's orders.

FACTS AND PROCEEDINGS

In November 2012, the Stanislaus County Community Service Agency (agency) filed a section 300 petition alleging that father struck his mother (the children's paternal grandmother) with whom he was residing, and then left the home leaving behind four-year-old C. and 21-month-old A. who had been in his custody and care. Grandmother was in a wheelchair and unable to care for the children. Mother, who did not live in the home, had previously received reunification services with C., but failed to complete her case plan. She had an older child, S., for whom a guardianship was established.

Mother reported that the children had Indian heritage on their father's side through the Passamaquoddy Tribe in Maine and on her side through Choctaw ancestry. Notice of Child Custody Proceeding for Indian Child (ICWA-030) was sent December 5, 2012, to the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, the United Keetowah Band of Cherokee, the Choctaw Nation of Oklahoma, the Mississippi Band of Choctaw Indians, the Jena Band of Choctaw, two Passamaquoddy Tribes of Maine, the Bureau of Indian Affairs (BIA), and the Department of the Interior.

During December 2012 and January 2013, responses were received from the Choctaw Nation of Oklahoma, the United Keetowah Band of Cherokee, the Cherokee

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

Nation, the Mississippi Band of Choctaw Indians, the Jena Band of Choctaw Indians, one Passamaquoddy Tribe, and the Eastern Band of Cherokee all stating that C. and A. were not considered Indian children as defined in ICWA. At the time of the jurisdiction and disposition hearing on January 14, 2013, the juvenile court stated that it was “unknown” whether ICWA applied. The allegations of the section 300 petition were found true, the children removed from mother and father’s custody, and reunification services ordered.

The report prepared in anticipation of the section 366.21, subdivision (e), six-month review hearing stated mother was in a clean and sober living facility, was doing well, and had weekly visits with the children. At the July 8, 2013, scheduled six-month review hearing, the juvenile court, after noting ICWA notices were re-sent, found ICWA did not apply unless the agency became aware of “any different information regarding ICWA.” At the subsequent contested six-month review hearing July 29, 2013, the juvenile court renewed its finding that ICWA did not apply after noting an additional “green return receipt card” was received and filed from the Department of the Interior.² Reunification services for mother were continued, but terminated for father.

At the time of the section 366.21, subdivision (f), 12-month review hearing in January 2014, mother was participating in and doing well in all of her services.³ She had successfully corrected a number of parenting issues and was compliant with her medication. The director of the clean and sober facility thought mother should remain there for two to three more months.

Both the agency and mother filed section 388 petitions in April 2014.⁴ The agency filed a section 388 petition requesting that the children’s trial visits with mother

² The Clerk’s Transcript reveals that additional return receipt cards had been received and filed before this hearing.

³ The minute order from this hearing reflects that ICWA did not apply.

⁴ Subsequent references to dates are to dates in 2014 unless otherwise indicated.

be terminated as she no longer resided at the clean and sober living facility. Mother requested the children be placed with her.

At the April 25 section 388 hearing, county counsel informed the juvenile court that the maternal grandmother “brought some information regarding potential Native American ancestry,” and that the social worker would collect the information from the maternal grandmother.

On April 28, the social worker spoke to the maternal grandmother who stated that her paternal grandfather was registered as a Choctaw member. A January 9 letter from the Choctaw Nation was provided to the social worker. The letter stated that, per the Choctaw Nation’s records, “Ed [W.] was enrolled as a 1/4 blood Choctaw, Roll No. 6895.” The letter further informed maternal grandmother that she would need to fill out some information and return it to the Choctaw Nation, along with her birth certificate and a death certificate for her mother and grandfather. According to the maternal grandmother, she had submitted this information to the tribe, but had not yet received her enrollment card. When the social worker inquired why this information had not been disclosed earlier, the maternal grandmother could not provide an answer.

ICWA notice was re-sent to the Choctaw tribes on April 28 to include the information the maternal grandmother provided in the Choctaw Nation’s letter, including Ed W.’s roll number.

In a subsequent section 366.22, 18-month status review report filed May 2, the social worker referenced the information received from the maternal grandmother and asked the juvenile court to make a new finding that ICWA “does or may apply.”

On May 6, in setting the upcoming contested section 388 and section 366.22 hearings for June 5, the juvenile court warned the agency to be sure ICWA notice was sent for the upcoming hearing because “ICWA may actually apply.” Notice of the June 5 hearing was sent to the three Choctaw tribes, the BIA and the Department of the Interior.

On June 13, the agency filed a motion asking that the juvenile court make a finding that ICWA “does not apply.” Recent letters received from the Choctaw Nation of Oklahoma dated May 7 and May 19 stated they had researched their records and were unable to establish Indian heritage for C. and A. and that ICWA did not apply at that time. Letters received on May 8 from the Mississippi Band of Choctaw and on June 3 from the Jena Band of Choctaw Indians also stated that C. and A. were not eligible for membership or enrollment in those tribes.

The agency had also received a tribal certification from the Passamaquody Tribe dated May 19, in which the Tribal Clerk stated that father was a member of the Passamaquoddy Tribe and “is considered to possess no less than one-quarter (1/4) Passamaquody Indian Blood.” A subsequent June 3 letter from the Passamaquody Tribe stated that C. and A. were not eligible for membership in the tribe because they were only 1/8 Passamaquody blood and would need at least 1/4 Passamaquody Blood to be eligible for tribal membership.

On June 17, the juvenile court signed an order finding that ICWA did not apply. At the scheduled June 27 section 388 and section 366.22 hearings, the juvenile court again found that ICWA did not apply.

The section 388 and section 366.22 hearings were eventually heard in July of 2014. The juvenile court found ICWA did not apply, denied mother’s section 388 petition, terminated her services, and set a section 366.26 permanency planning hearing. Mother was advised of her right to file a writ.

At the December 12 section 366.26 hearing, the juvenile court again made a finding that ICWA did not apply. It then terminated mother and father’s parental rights. Mother filed a notice of appeal on December 30 and an opening brief with this court on February 26, 2015.

On March 2, 2015, mother filed a motion to take additional evidence and to make a factual finding on appeal. The motion states that mother’s counsel received a letter

dated February 25, 2015, from the Choctaw Nation of Oklahoma stating that maternal grandmother had received a “CDIB”⁵ card with the Choctaw Nation on November 10, 2014.” The letter goes on to state that, if certain forms are completed, C. and A., could be “eligible to obtain a CDIB and Tribal membership” with the Choctaw Nation of Oklahoma.

On March 6, 2015, we denied mother’s request that this court make a factual finding that C. and A. were eligible for membership in the Choctaw Nation of Oklahoma if certain steps were followed. We did reserve ruling on mother’s request that we take judicial notice of mother’s counsel’s declaration and the letter itself.

On April 20, 2015, mother filed a second motion to take additional evidence, this time asking that we take evidence of a letter dated April 9, 2015, from the director of the Indian Child Welfare Department of the Choctaw Nation of Oklahoma, stating that, as of April 8, 2015, mother, C. and A. were enrolled members of the Choctaw Nation of Oklahoma and that ICWA must be applied in a dependency case. Included was a letter dated April 8, 2015, from the CDIB Specialist of the Choctaw Nation of Oklahoma, stating that mother, C. and A. became tribal members on April 8, 2015. Copies of the CDIB and tribal membership cards for all three were attached. Also attached were CDIBs from the BIA for mother, C. and A. On April 24, 2015, we deferred ruling on the second motion pending consideration of mother’s appeal on its merits.

DISCUSSION

1. Juvenile Court’s finding that ICWA did not apply

On appeal, mother challenges the juvenile court’s finding that ICWA did not apply to C. and A. Specifically, mother cites conflicting information received from the Choctaw Nation. As argued by mother, the Choctaw Nation sent a letter in January 2014

⁵ CDIB is an acronym for Certificate of Degree of Indian Blood. (See *In re Pedro N.* (1995) 35 Cal.App.4th 183, 188 (*Pedro N.*).

stating that the children's maternal great-great grandfather was an enrolled member of the Choctaw Tribe. Letters received from the Choctaw Nation in December 2012 and again in May 2014 state that they had researched their records and were unable to establish Indian heritage for C. and A. and that ICWA did not apply at that time, but also contained the following: "According to the Constitution of the Choctaw Nation of Oklahoma, ARTICLE II, MEMBERSHIP Section 1. The Choctaw Nation of Oklahoma shall consist of all Choctaw Indians by blood whose names appear on the final rolls of the Choctaw Nation approved pursuant to Section 2 of the Act of April 26, 1906 (34 Stat. 136) and their lineal descendants." Mother contends the agency failed to perform its duties under ICWA because "[n]o one ever questioned the conflicting information or followed up with the tribe as to how it could have concluded there was no Indian heritage."

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 which 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.) 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 shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and their right of intervention. (25 U.S.C. § 1912(a).) Notice to the tribe provides it the opportunity to assert its rights by intervening in a proceeding. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174.)

ICWA applies to children who are eligible to become or who are members of a tribe, but does not limit the manner in which membership is to be defined. (*In re Jack C., III* (2011) 192 Cal.App.4th 967, 978.) Instead, it is the tribe's right to define its own membership for tribal purposes. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72, fn. 32.)

We have long held that a parent represented by counsel, who fails to timely 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. (*Pedro N., supra*, 35 Cal.App.4th at pp. 185, 189.)

Here, the juvenile court made multiple findings through dependency that ICWA did not apply and mother challenged none of the findings until her parental rights were terminated. The first such finding was made at the time of the scheduled six-month review hearing July 8, 2013, when responses had been received from all of the noticed tribes, the BIA and the Department of the Interior stating ICWA did not apply. At the subsequent contested hearing July 29, 2013, the juvenile court confirmed that ICWA did not apply. Mother did not appeal the juvenile court's ICWA finding made on July 29, 2013. Nor did mother appeal the finding that ICWA did not apply at the subsequent 12-month review hearing in January 2014.

Between the 12-month and 18-month hearings, the agency received additional information concerning possible ICWA applicability. In response, the agency again sent out notices to appropriate tribes, which including the newly received information concerning the children's maternal great-great grandfather. The agency received letters back from all tribes indicating ICWA did not apply. The juvenile court then signed an order June 17, 2014, finding that ICWA did not apply. At the section 366.22 trial (which was combined with trial on a section 388 petition), held July 15 and 17, 2014, the juvenile court continued to find that ICWA did not apply. Mother did not appeal this finding.

Mother failed, on multiple occasions, to timely challenge the juvenile court's rulings regarding ICWA applicability. As a result, she has forfeited her personal right to complain of any alleged defect in compliance with ICWA in a subsequent appeal, now that those rulings are final. (*Pedro N., supra*, 35 Cal.App.4th at pp. 185, 189.)

We note that *Pedro N.* does not foreclose a tribe's rights under ICWA due to a parent's forfeiture or waiver of the issue for failing to file a timely appeal when procedurally entitled to do so at the conclusion of an earlier proceeding. (*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 [court reversed juvenile court's denial of a tribe's motion to intervene after a final order terminating parental rights, and invalidated actions dating back to outset of dependency that were taken in violation of ICWA].)

Even if we were to find that mother has not forfeited her right to appeal this issue, we find the juvenile court's conclusion that ICWA did not apply is supported by substantial evidence. (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.)

Based on the information gathered by the social worker and provided by the family, the agency properly provided ICWA notices at the beginning of the case. Based on the responses received from the tribes, the court made a correct finding that ICWA did not apply. When the agency received additional information from maternal grandmother and the Passamaquody tribe, the agency again sent out proper ICWA notices, which included all of the new information received by the agency. In response to the notices, the agency again received letters from all of the noticed tribes stating ICWA did not apply. Because every tribe has the right to define its own membership, the juvenile court again made the correct finding that ICWA did not apply. (*Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. at p. 72, fn. 32.) We reject mother's claim to the contrary.

2. Additional Evidence

Mother's counsel filed two motions to take additional evidence, noting in the first that maternal grandmother had received a letter in February 2015 that she was a member of the Choctaw Nation and that the children could be as well if certain forms were completed. We denied the motion, but reserved ruling on a request for judicial notice. In the second motion, mother's counsel asked that we take additional evidence of a letter dated April 9, 2015, from the Indian Child Welfare Department of the Choctaw Nation

that C. and A. were enrolled members of the Choctaw tribe and that ICWA must be applied in a dependency case.

It has long been the general rule and understanding that “an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.” (*In re James V.* (1979) 90 Cal.App.3d 300, 304.) This rule reflects an “essential distinction between the trial and the appellate court ... that it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law” (*Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263.) There is no blanket exception to the general rule for juvenile dependency appeals. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405 (*Zeth S.*))

The California Supreme Court’s decision in *Zeth S.* instructs that appellate courts generally may not consider “postjudgment evidence of changed circumstances in an appeal ordering terminating parental rights” and use “such evidence to reverse juvenile court judgments” (*Zeth S., supra*, 31 Cal.4th at p. 413.) Thus, absent extraordinary circumstances, *Zeth S.* prohibits the admission of evidence (1) to show changed circumstances and (2) to reverse the juvenile court. (*Ibid.*) Granting mother’s motion would run afoul of both prongs of *Zeth S.* First, the evidence is being offered to show changed circumstances. And second, the proponent of the evidence is seeking reversal of the juvenile court’s order. As such, we will not consider the additional information and deny the second motion.

As for the judicial notice request in the first motion, we deny it. We conclude the requested documents are irrelevant because they were not before the trial court and are not relevant to this appeal. “It is true that, as a ‘reviewing court’ (Evid. Code, § 459, subd. (a)), we *must* take judicial notice of some matters (*id.*, § 451) and *may* take judicial

notice of others (*id.*, § 452). There is, however, a precondition to the taking of judicial notice in either its mandatory or permissive form – any matter to be judicially noticed must be relevant to a material issue.” (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.)

DISPOSITION

The orders of the juvenile court are affirmed.

GOMES, J.

WE CONCUR:

HILL, P.J.

KANE, J.