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

In re L.B., a Person Coming Under the Juvenile
Court Law.

TULARE COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

G.B.,

Defendant and Appellant.

F071657

(Super. Ct. No. JJV067146A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Hugo Loza,
Judge.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant
and Appellant.

No appearance for Plaintiff and Respondent.

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*Before Levy, Acting P.J., Detjen, J., and Smith, J.

INTRODUCTION

Appellant G.B. (father) contends the juvenile court erred in terminating his parental rights to L.B. because no specific inquiry was made pursuant to the Indian Child Welfare Act (ICWA), 25 U.S.C. section 1901 et seq., of father. Consequently, father maintains the juvenile court's finding that ICWA does not apply to L.B. is unsupported by substantial evidence. Although father and the Tulare County Health and Human Services Agency (Agency) filed a stipulation on August 27, 2015, to reverse and remand for failing to comply with ICWA, we decline to accept the stipulation. By failing to raise this issue in the juvenile court, or earlier by way of a writ proceeding, father has waived the issue. We will affirm.

FACTUAL AND PROCEDURAL SUMMARY

On July 10, 2013, the Agency filed a Welfare and Institutions Code¹ section 300 petition on behalf of L.B., then aged five. The petition alleged that mother, V.L. (mother²), had intentionally burned L.B. with a cigarette; that mother had a substance-abuse issue that prevented her from providing adequate care; and that both parents were incarcerated and unavailable to provide for L.B. Consequently, it was alleged that L.B. came within the provisions of section 300, subdivisions (a), (b), and (g).

In the detention report filed July 10, 2013, the Agency stated that the ICWA did not apply, as mother stated she had no Indian heritage. It was noted in the report that father was incarcerated in state prison and was not interviewed.

At the July 10, 2013, detention hearing, counsel were present for mother, father, and L.B. Counsel accepted the appointment as counsel for father and acknowledged receipt of the petition and all accompanying documents on behalf of father. The written

¹References to code sections are to the Welfare and Institutions Code unless otherwise specified.

²Neither mother nor L.B.'s sibling, C.L., are parties to this appeal.

findings and order from the detention hearing, filed July 22, 2013, specifically states “[t]here is insufficient reason to believe the child [L.B.] is or may be an Indian child”

There were multiple subsequent hearings in the case at which father was present with counsel, or present through counsel. On August 13, 2013, father was present with counsel. It was at this hearing that father was denied reunification services.

Father and counsel both were present at the disposition hearing on August 22, 2013. The disposition order filed after the hearing specifically incorporates the findings and orders of the juvenile court that were made at the July 10 and August 13, 2013, hearings.

At the February 13, 2014, status review hearing, counsel for father was present. The July 31, 2014, status review hearing reflects that counsel for father was present. An adoption assessment of L.B. was prepared for the July 31 hearing. In that document, it states that there are no ICWA issues with respect to L.B.

On September 11, 2014, both counsel and father were present. This was a contested section 366.21, subdivision (f) hearing, where the juvenile court determined the permanent plan for L.B. At the September 11 hearing, there was a discussion about the applicability of ICWA. The juvenile court stated, “if it was an ICWA issue with respect to [father], there would be an issue with respect to this child.” Counsel for L.B. and for the agency asked the juvenile court to take judicial notice of its prior ruling on ICWA with respect to L.B.

Also at the September 11 hearing, the juvenile court set the section 366.26 hearing at which parental rights could be terminated. Father was served with a form entitled “Notice of Necessity to Seek Writ Review.” The juvenile court noted that father could discuss with his attorney his right to file a writ within seven days to contest the juvenile court’s ruling. There is no indication that any writ petition was filed.

Father was present through counsel at the section 366.26 hearing on February 26, 2015. This hearing was continued because father had not been transported. The matter was continued to March 24, 2015.

The continued section 366.26 hearing was held March 24, 2015. For the March 24, 2015, hearing, father declined transport and was represented by counsel at the hearing. At this hearing, father's counsel submitted on the social study, which recommended adoption as the permanent plan for L.B. Father's parental rights were terminated at this hearing. The written order was filed March 24, 2015.

The notice of termination of parental rights was filed March 24, 2015. On May 22, 2015, an Appeal Rights form, signed by father on May 13, was filed. The form notifies father of the 60-day deadline to file an appeal. On May 26, 2015, the juvenile court filed a letter received from father, dated May 13, indicating he wished to file an appeal and requesting an extension of time to do so because the deadline was May 24, 2015. The clerk of the court apparently treated the letter as a notice of appeal.

DISCUSSION

Father filed an opening brief on August 10, 2015, contending the order terminating parental rights should be reversed and the matter remanded because: (1) it was error to terminate parental rights when no ICWA inquiry had been made of father and (2) because no ICWA inquiry was made of father, the finding that ICWA did not apply was not supported by substantial evidence.

On August 27, 2015, a stipulation between father and the Agency was filed in this court. That stipulation asks that the findings and order from the March 24, 2015, section 366.26 hearing be reversed to allow the juvenile court to comply with ICWA. By order dated September 1, 2015, this court deferred ruling on the joint stipulation pending a determination on the appeal.

No respondent's brief was filed.

Because the notice of appeal apparently was mailed within the 60-day time period, it is timely filed. (*People v. Pierce* (1995) 40 Cal.App.4th 1317, 1319, fn. 2.) However, we decline to reverse and remand the case because, as discussed below, father has waived the ICWA issue.

Waiver of ICWA by father

The stipulation of the parties and father's opening brief fail to address this court's seminal case on the waiver of ICWA issues, *In re Pedro N.* (1995) 35 Cal.App.4th 183 (*Pedro N.*). In *Pedro N.*, the mother did not raise an issue regarding compliance with ICWA until the juvenile court terminated her parental rights. (*Pedro N.*, *supra*, at p. 189.) We concluded mother had not timely raised the ICWA issue because "all persons involved were aware at the dispositional hearing, and earlier" of the ICWA issue, and mother did not raise the issue until two years after the dispositional order. (*Pedro N.*, *supra*, at p. 190.) Having failed to raise the ICWA issue timely by appealing from the dispositional order, we concluded mother was foreclosed from raising the issue in an appeal from the order terminating her parental rights. (*Pedro N.*, *supra*, at p. 189.)

As was the mother in *Pedro N.*, father was aware that the juvenile court had found ICWA did not apply to L.B. for nearly two years before raising any challenge to this finding. The July 10, 2013, jurisdictional order found that ICWA did not apply. The August 22, 2013, disposition order included the July 10, 2013, findings. Father did not object to this finding until he appealed the termination of his parental rights in May 2015. While there is no direct appeal from a jurisdictional order, the jurisdictional order and findings are appealable by way of a challenge to the dispositional order. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490 & fn. 4.) Father did not timely challenge the disposition order.

There were multiple hearings between July 10, 2013 and March 24, 2015, at which father could have raised any concern about the Agency failing to make ICWA inquiries of him. He did not do so, even when he was present with counsel at the September 11,

2014, permanency setting hearing, where the juvenile court reaffirmed on the record that ICWA did not apply to L.B.

In *In re Anthony B.* (1999) 72 Cal.App.4th 1017, we stated that challenges to the findings and orders made at a hearing setting the section 366.26 hearing must be by way of a writ. (*Anthony B.*, *supra*, at pp. 1021-1022.) Assuming father could still challenge the juvenile court's reaffirmation at the September 11, 2014, hearing of its finding that ICWA did not apply to L.B., that challenge would have to have been made by way of a writ proceeding. In fact, the juvenile court notified him of the writ requirement at the conclusion of the hearing and provided him with relevant forms. No writ was filed.

Section 366.26, subdivision *l*, "applies to all 'issues arising out of the contemporaneous findings and orders made by a juvenile court in setting a section 366.26 hearing.'" (*In re Anthony B.*, *supra*, 72 Cal.App.4th at p. 1021.) Section 366.26, subdivision *l*(2), provides that failure to file a petition for extraordinary writ review within the period specified "shall preclude subsequent review by appeal of the findings and orders made pursuant to this section."

Having failed timely to appeal from the disposition order, which incorporated the July 10, 2013, finding that ICWA did not apply to L.B., and having failed to file a timely writ petition challenging the reaffirmation of the ICWA finding made at the September 11, 2014, hearing at which the section 366.26 hearing was set, father is precluded from raising any challenge to ICWA compliance in this appeal from the order terminating his parental rights. (§ 366.26, subd. *l*(2); *In re Pedro N.*, *supra*, 35 Cal.App.4th at pp. 189-190.)

Conclusion

Although we conclude father is precluded from raising any issues of noncompliance with the ICWA, any tribe's rights are not foreclosed. (*In re Desiree F.*

(2000) 83 Cal.App.4th 460, 477-478.) We note, however, that nowhere in his opening brief or in the stipulation filed by the parties does father assert he has any Indian heritage.

DISPOSITION

The March 24, 2015, order terminating parental rights is affirmed.