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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re TIMOTHY M., JR., a Person Coming  
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

TIMOTHY M., SR.,

Defendant and Appellant.

G046777

(Super. Ct. No. DP008705)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Gary G. Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Jr., Deputy County Counsel, for Plaintiff and Respondent.

\* \* \*

Timothy M., Sr., (father) appeals from the juvenile court's judgment terminating his parental rights to Timothy M., Jr. (Timothy). (Welf. & Inst. Code, § 366.26; all statutory citations are to this code unless noted.) Father contends the Orange County Social Services Agency (SSA) did not adequately investigate whether Timothy might be an Indian child subject to the Indian Child Welfare Act. (ICWA; 25 U.S.C. § 1901 et seq.) Finding no basis to overturn the judgment, we affirm.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

Timothy was born in June 2003. In August 2003, the juvenile court declared Timothy a dependent of the court under section 300, subdivisions (b) and (j). According to the petition, the parents' unresolved substance abuse and mental illness impaired their ability to provide care and parental support. The family received reunification and maintenance services, and reunified in November 2004, when the court terminated dependency proceedings.

In October 2007, Garden Grove police and a mental health worker responded to reports of a family dispute. Timothy's mother approached the officer with Timothy in her arms and reported he "needed to go to the hospital, as he was not feeling well." Timothy displayed no physical illness or injuries, however. The mother also spoke to herself saying, "I believe in God. Do you believe in God?" Father explained mother was "off her medication and was not supposed to be carrying the child." Father admitted he was under the influence of methamphetamine. The officer arrested father, and detained mother under section 5150 (person danger to self or others or gravely disabled as a result of mental disorder).

SSA filed a petition alleging Timothy came within the jurisdiction of the juvenile court based on his parents' inability to care for him because of the parents' substance abuse and mental illness. (See § 300, subd. (b).) At the December jurisdictional hearing, the court sustained the petition as amended. At the disposition

hearing in January 2008, the court removed Timothy from his parents' custody and approved SSA's reunification plan.

Social workers interviewed the parents regarding possible Native American ancestry in advance of the jurisdiction hearing. Mother claimed heritage with the Cherokee and Chippewa Tribes. In the prior dependency case, father had claimed ancestry with the "Cochachi" tribe. In the report prepared for the jurisdictional hearing, the social worker stated father claimed lineage through the "Coucha" tribe in New Mexico. The ICWA social worker "had the father spell the name of the tribe since it was not a recognizable tribe." She researched the Coucha tribe but was unable to find the tribe "or any tribe with a similar sounding name in on-line research." SSA spoke to the child's "parents, and all known, available relatives regarding the child's possible Indian heritage," and submitted all known information to the court. SSA sent ICWA notices to the tribes identified by mother and to the Bureau of Indian Affairs (BIA). Six days before notices went out, the parents admitted they had no Native American heritage.

At the six-month review, the court noted SSA had filed ICWA notices with the court and they had been served as required by statute. At the 12-month review in November 2008, the court found ICWA did not apply.

Reunification efforts failed and the juvenile court terminated reunification services at the 18-month review in June 2009. The parties stipulated Timothy was not adoptable and legal guardianship was the best permanent plan. The court established a legal guardianship in the home of Timothy's caretakers, Timothy's maternal aunt and her husband.

In early 2010, the guardians petitioned to terminate the guardianship because father had threatened to kill them. Father had stopped taking his psychotropic medication and resumed his alcohol abuse. Medical professionals diagnosed Timothy with attention deficit hyperactivity disorder and enuresis (bedwetting), and he occasionally misbehaved at school. In March 2010, the juvenile court granted the

guardians' petition and scheduled a section 366.26 hearing to consider whether to terminate parental rights.

At the section 366.26 hearing in July 2010, the parties again stipulated Timothy was not likely to be adopted and the court ordered long-term foster care. The court investigated a paternal aunt's Arizona home under the Interstate Compact for the Placement of Children (ICPC). In December 2010, SSA placed Timothy with the aunt, Gina C., and her husband in Arizona. About a year later, Timothy's caretakers decided they wanted to adopt Timothy. The court scheduled another section 366.26 hearing. At the April 2012 hearing, the juvenile court found that Timothy was adoptable and terminated parental rights.

## II

### DISCUSSION

Father contends the juvenile court erred in terminating his parental rights because it failed to comply with the requirements of the ICWA. He argues his claims (in 2003, and initially in this case) of ancestry through the "Cochachi" or "Coucha" tribe should have triggered notice to the Cochiti Pueblo (Pueblo of Cochiti) tribe in New Mexico, a federally recognized tribe.

Congress enacted ICWA "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 Levi U.* (2000) 78 Cal.App.4th 191, 195.) Congress sought to combat "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 32.) "When a court 'knows or has reason to know that an Indian child is involved' in a juvenile dependency

proceeding, a duty arises under ICWA to give the Indian child's tribe notice of the pending proceedings and its right to intervene. [Citations.]" (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538.) "The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848 (*Nikki R.*); Cal. Rules of Court, rule 5.481(a)(5)(A).)

Section 224.3 provides that the juvenile court and SSA have "an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings . . . if the child is at risk of entering foster care or is in foster care." (§ 224.3, subd. (a).) If the juvenile court or social worker "knows or has reason to know that an Indian child is involved" (§ 224.2, subd. (a)), the social worker must "make further inquiry regarding the possible Indian status of the child, and . . . do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2, contacting the Bureau of Indian Affairs and the State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership in and contacting 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).)

SSA concedes "father identified his potential tribal roots as springing from New Mexico, and also gave names that bore an admitted phonetic resemblance to that of the Cochiti tribe . . ." SSA also acknowledges under section 224.3, it had a duty to contact the Bureau of Indian Affairs for assistance in identifying the names and contact information of tribes in which the child might be eligible for membership. But SSA claims that father's later statement that he did not have Native American heritage relieved SSA of further responsibility to investigate Indian ancestry. (But see *In re Gabriel G.*

(2012) 206 Cal.App.4th 1160 [a statement by a parent denying Indian heritage did not relieve the court and SSA of its continuing duty where the parent had previously indicated Indian heritage on an ICWA form].)

We need not address whether SSA and the court's duty to investigate father's Cochiti heritage was relieved by father's disclaimer. While the case was pending on appeal, SSA conducted further investigation concerning Timothy's possible Indian heritage. (*In re C.D.* (2003) 110 Cal.App.4th 214, 224 [where a defect in ICWA notice is raised the first time on appeal, the defect may be cured while the appeal is pending].) SSA sent ICWA notices to the Cochiti tribe, and the tribe responded that Timothy did not qualify for enrollment, and is therefore not an Indian child.

SSA asks this court to receive this additional evidence to affirm the judgment. Code of Civil Procedure section 909 provides that: "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues."

Code of Civil Procedure section 909 permits appellate courts to accept evidence in dependency cases "to expedite just and final resolution for the benefit of the children involved." (*In re Carrie M.* (2001) 90 Cal.App.4th 530, 535; *In re*

*Zeth S.* (2003) 31 Cal.4th 396, 405 [right should be exercised sparingly and absent exceptional circumstances, no *findings* based on the receipt of evidence outside the record on appeal pursuant to Code of Civil Procedure section 909 should be made].) We note that in terminating parental rights, the court found Timothy was adoptable and prospective adoptive parents are ready to proceed with the adoption. Under these circumstances, a just and final disposition for Timothy compels us to accept SSA's new evidence. (See *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1412; see also *In re Christopher I.* (2003) 106 Cal.App.4th 533, 562 [record augmented to include record of ICWA notice served while appeal was pending and curing defects in initial notice].) Augmentation of the record is consistent with the strong public policy of expeditiously resolving a minor's issues on appeal. (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 867.) Code of Civil Procedure section 909 is to be construed liberally so that causes may be finally disposed of by a single appeal and without further proceedings in the trial court. (*Christopher I.*, at p. 562.)

During oral argument, father's counsel cited *Nikki R.* and argued we should reverse the judgment terminating parental rights and remand to conduct further proceedings. In *Nikki R.*, the court asked the mother at the detention hearing whether she had American Indian heritage. The mother replied she did not, but that the father, who was incarcerated, had Cherokee heritage. The court ordered SSA to notify the BIA and "the Cherokee Tribe." (*Nikki R.*, *supra*, 106 Cal.App.4th at p. 847.) On appeal, the mother raised for the first time compliance with ICWA. The court noted the record did not contain any evidence that SSA notified the BIA or the tribe. (*Id.* at p. 849.) SSA filed a motion requesting the appellate court to receive evidence showing SSA had sent notices to BIA and the tribe before the jurisdictional hearing, and responses reflecting the child was not an Indian child. The mother and child's counsel opposed the motion on the ground the notices included only minimal information about the child's background. (*Id.* at p. 850.) SSA filed another motion asking the appellate court to receive additional

evidence, including information concerning the adoptions social worker's efforts to "re-check whether the child is an Indian child" (*ibid.*) by asking the paternal grandmother about Cherokee heritage and transmitting the information to BIA and three Cherokee tribes. The tribes responded they could not identify an Indian ancestor for the child and did not consider her an Indian child. (*Id.* at p. 851.)

*Nikki R.* declined to take additional evidence and distinguished *Antoinette S.* and *Christopher I.* The court stated, "there are no extraordinary circumstances compelling us to act as the juvenile court and determine whether ICWA notice was adequate based on the proffered additional evidence. First, the additional evidence does not convince us that proper notice was given as a matter of law. We do not know whether more and better avenues of information are open to SSA. Second, if the juvenile court finds the notice sufficient on remand, no new hearing would be necessary and the case can proceed normally. [Fn. omitted.] And third, we share the concern of other courts that SSA fully satisfy ICWA's notice requirements. [Citations.] It is not 'acceptable for juvenile courts to completely ignore indications that a child may be of Indian ancestry.'" (*Nikki R., supra*, 106 Cal.App.4th at p. 855.)

Here, SSA made inquiries and provided notice based on the information supplied by the parents, and the juvenile court found Timothy was not an Indian child. After father raised an issue on appeal concerning the Cochiti tribe, SSA conducted additional inquiries. Father did not file written opposition to SSA's Code of Civil Procedure section 909 motion, and he does not complain the notifications provided to the Cochiti tribe contained insufficient information to allow the tribe to determine whether Timothy was an Indian child. Nor does father suggest any additional steps SSA or the court would take upon remand, or any basis for the juvenile court to reject the additional information. The evidence convinces us that no different result would have been obtained had SSA and the juvenile court proceeded as father suggests based on the information supplied by father. The record shows the juvenile court did not "completely

ignore” indications of Indian ancestry in this case, and there is no basis to question the finding that Timothy is not an Indian child.

At oral argument, father also cited ICWA section 1912 of title 25 of the United States Code (section 1912), and suggested an appellate court may not take additional evidence under Code of Civil Procedure section 909 to affirm a finding of non-Indian status because any determination concerning notice must be made during a hearing with the parties present. Section 1912 requires SSA, when investigating whether a child has Indian ancestry, to notify the child’s parent of the section 300 proceedings, and of the parent’s right to intervene. Here, father, with appointed counsel, fully participated in the section 300 proceedings leading up to the termination of his parental rights. We find nothing in section 1912 precluding an appellate court from considering additional evidence to affirm a judgment where the evidence clearly indicates any error was harmless and a different result was not reasonably probable.

We agree with SSA that reversal would be an idle act; there is no reasonable probability father would receive a better result. The evidence received under Code of Civil Procedure section 909 demonstrates SSA satisfied its responsibilities under ICWA and Timothy did not qualify for enrollment as a member of the Cochiti tribe. Consequently, any error or defect in the original record in failing to identify and notify the Cochiti tribe was harmless. Substantial evidence supports the juvenile court’s finding that ICWA does not apply.

III

DISPOSITION

The judgment terminating parental rights is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.