Filed 8/30/07 In re S.E. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.E. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. JAMIE E., Defendant and Appellant.	E042356 (Super.Ct.No. INJ17307) OPINION

APPEAL from the Superior Court of Riverside County. Christopher J. Sheldon, Judge. Affirmed in part; reversed in part with directions.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Joe S. Rank, County Counsel, and Sophia H. Choi, Deputy County Counsel, for Plaintiff and Respondent.

Leslie A. Barry, under appointment by the Court of Appeal, for Minors.

I. INTRODUCTION

Jamie E. (mother) appeals from an order of the juvenile court terminating her parental rights to S.E. and B.B. (the children) under Welfare and Institutions Code[1] section 366.26. Her sole issue on appeal is that the juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). Counsel for the children has joined in mother's argument.

II. FACTS AND PROCEDURAL BACKGROUND

In August 2005, the Riverside County Department of Public Social Services (Department) filed a petition alleging that then 23-month-old S.E. and one-month-old B.B. came within section 300, subdivisions (b) and (g). Specifically, the petition alleged that mother used inappropriate discipline with S.E., had an unresolved history of substance abuse, and failed to obtain proper medication for B.B.'s thrush infection.

The detention report stated, "The Indian Child Welfare Act does or may apply. The mother informed this social worker that there might be Native American Ancestry on the paternal side of her family[;] however, she was unable to provide specific information." At the detention hearing, mother's counsel indicated mother believed she might have "some Indian background in her family, not sure what tribe or which relative . . . ." The court inquired of the maternal grandmother, who was present at the

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hearing, whether she knew the "Indian issues," and the maternal grandmother replied, "Too far back." Mother's counsel added, "Maybe very distant, remote." The court stated, "We'll say no," and determined that the ICWA did not apply. The court ordered the children detained.

The petition was amended to delete the allegations of inappropriate discipline and failure to obtain medical care for B.B. At the jurisdiction/disposition hearing, the court found the allegations of the petition to be true as amended and found that the children came within section 300, subdivisions (b) and (g). The court ordered the children removed from mother's custody and ordered that mother participate in reunification services.

In the status review report filed on February 22, 2006, the social worker stated that mother had failed to comply with her reunification plan, although she did maintain regular visitation with the children.

The juvenile court ordered that mother's reunification services be terminated and set a permanency planning hearing under section 366.26.

Mother continued to visit the children weekly. Mother gave birth to another child in September or October 2006. By January 2007, the children seemed "indifferent" to mother's presence during visits.

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

At the section 366.26 hearing, the juvenile court found the children adoptable and ordered that mother's parental rights be terminated.

III. DISCUSSION

Mother contends the juvenile court failed to comply with the inquiry and notice requirements of the ICWA.

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) "The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) The juvenile court and social services agencies have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (Cal. Rules of Court,[2] rule 5.664(d).)

The duty to provide notice under the ICWA arises when "the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a); rule 5.664.) For purposes of the ICWA, an "Indian child" is one who is either a "member of an Indian tribe" or is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); rule 5.664(a)(1)(A), (B).) The court has reason to know a child might be an Indian child if, among other things, "[a]

person . . . informs the court or the county welfare agency . . . or provides information suggesting that the child is an Indian child[.]" (Rule 5.664(d)(4)(A).) In addition, section 224.3, subdivision (b), provides in part, "(b) The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following: [¶] (1) 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. . . ."

Once the ICWA notice provisions are triggered, notice must be sent to the Indian child's tribe, and, if the tribe is unknown, to the Bureau of Indian Affairs (BIA). (25 U.S.C. § 1912(a); rule 5.664(f).) The BIA and the tribe have the right to determine whether a child is an Indian child. (*In re Junious M.* (1983) 144 Cal.App.3d 786, 794.)

Courts have repeatedly held that only a hint or suggestion of Indian ancestry is required to trigger the ICWA notice requirements. (See *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549 ["'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 Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408.) In *In re Antoinette S.*, for example, the court held that the father's statement that he believed his

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2 All further references to "rules" are to the California Rules of Court.

deceased maternal grandparents might have had Indian ancestry, without identifying a tribe or the birthdates, birthplaces, tribal affiliations, or enrollment statuses of the deceased maternal grandparents, was sufficient to trigger the ICWA notice requirements. (*Id.* at pp. 1405-1408.) As the court explained in *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 257, "We agree that '[t]o maintain stability in placements of children in juvenile proceedings, it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child. [Citation.]'"

The facts of this case are substantially similar to those of *In re Antoinette S.*, *supra*, 104 Cal.App.4th 1401. We therefore conclude the court erred in failing to direct the Department to provide notice to the BIA, as required when no specific tribe has been identified. (25 U.S.C. § 1912(a); rule 5.664(f).) Although the failure to comply with the notice requirements of the ICWA is subject to reversal, only a conditional remand is necessary to ensure compliance. (See *In re Francisco W.* (2006) 139 Cal.App.4th 695, 710-711.)

IV. DISPOSITION

The juvenile court is directed to order the Department to give notice to the BIA in compliance with the ICWA and related federal and state law. Once the juvenile court finds that there has been substantial compliance with the notice requirements of the ICWA, it shall make a finding with respect to whether the children are Indian children. (See rule 5.664(f)(6), (g)(4).) If at any time within 60 days after notice has been given there is a determinative response that the children are or are not Indian children, the juvenile court shall find in accordance with the response. If there is no such response, the juvenile court shall find that the children are not Indian children. (Rule 5.664(f)(6), (g)(1), (g)(4).) If the juvenile court finds that the children are not Indian children, it shall reinstate the original orders entered after the section 366.26 hearing. If the juvenile court finds that the children are Indian children, it shall set a new section 366.26 hearing and

conduct all further proceedings in compliance with the ICWA and related federal and state law.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.