Filed 8/28/07 In re Skyler C. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re Skyler C. a Person Coming Under the Juvenile Court Law.	H031280 (Monterey County Super. Ct. No. J40027)
MONTEREY COUNTY DEPARTMENT OF SOCIAL AND EMPLOYMENT SERVICES, Plaintiff and Respondent, v. AMBER B., Defendant and Appellant.	

In this appeal, the mother of a dependent child challenges the order terminating her parental rights and freeing the child for adoption. The mother's sole contention on appeal is that the juvenile court failed to comply with the Indian Child Welfare Act (ICWA), a point that the respondent concedes. Having reviewed the record, we agree that the ICWA claim has merit. We therefore conditionally reverse the order terminating parental rights, and we remand the matter to the juvenile court with directions to comply with the inquiry and notice requirements of the Indian Child Welfare Act.

PROCEDURAL HISTORY

The dependency proceedings at issue here were undertaken pursuant to the Welfare and Institutions Code, sections 300 et seq. Unspecified statutory references in this opinion are to that code.

This appeal concerns Skyler C., who was born in April 2004. Skyler's mother is Amber B., the appellant here. The child's father, Robert C., is not a party to this appeal. A brief summary of this case will suffice to frame the single issue presented here, compliance with the Indian Child Welfare Act.

***Petition/Detention**:* These proceedings were instituted in May 2005 by the Monterey County Department of Social and Employment Services (Department). The Department filed a section 300 petition on Skyler's behalf. The petition alleged that the parents had failed to protect Skyler. (§ 300, subd. (b).) The petition further asserted that the parents were incarcerated and unable to care for him. (§ 300, subd. (g).) Skyler was detained in the custody of the Department.

***Jurisdiction/Disposition**:* The juvenile court conducted a jurisdiction/disposition hearing in July 2005. In a report prepared for that hearing, the Department stated that the ICWA does not apply. At the hearing, the court declared Skyler a dependent child, and it ordered reunification services for both parents. Skyler was in a foster home.

Reunification Period: The court conducted a series of periodic review hearings in 2006, which were held in January, July, and November. In reports prepared for each of those hearings, the Department repeated its earlier statement that the ICWA does not apply. At the eighteen-month status review hearing, held in November 2006, the Department recommended that the court terminate reunification services and set a selection and implementation hearing. (See § 366.26.) The court did so.

Permanency Planning: Following a contested hearing in March 2007, the court terminated appellant's parental rights and it freed Skyler for adoption.

Appeal: In March 2007, appellant brought this timely appeal from the order terminating her parental rights to Skyler. We granted her request to augment the appellate record to include the reporter's transcript of two hearings that were not included with the record as filed.

ISSUE ON APPEAL

Appellant's sole argument on appeal is that the juvenile court committed reversible error by failing to assure compliance with the inquiry and notice requirements of the Indian Child Welfare Act. The Department concedes the issue. By letter dated July 2, 2007, the Department informed this court that it "is stipulating to a limited reversal to comply with the Indian Child Welfare Act ("ICWA") inquiry and notice requirements."

DISCUSSION

Having reviewed the record, we accept the Department's concession. As we explain below, there is no evidence of ICWA compliance.

I. The Indian Child Welfare Act

To place our decision in this case in context, we briefly summarize the Indian Child Welfare Act, a federal law that is recognized and applied in California.

A. Federal Law

Congress enacted the Indian Child Welfare Act in 1978. (See 25 U.S.C. § 1901 et seq.) The ICWA was enacted to protect the interests of Indian children and to promote the stability and security of Indian tribes and families. (25 U.S.C. § 1902; see, e.g., *In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.)

"Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the

opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421; accord, *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1265.) In broad brush, the ICWA requires notice when there is reason to know that a child affected by certain custody proceedings may be an Indian child. (25 U.S.C. § 1912(a).) "Notice is mandatory, regardless of how late in the proceedings a child's possible Indian heritage is uncovered." (*In re Kahlen W.,* at p. 1424.)

B. California Law

California recognizes the ICWA's notice requirements, both in statutes and by court rule. (See §§ 290.1-297, 360.6; Cal. Rules of Court, rule 5.664 (Rule 5.664).) In addition, state agencies have adopted procedures intended to satisfy those requirements.

Rule 5.664 of the California Rules of Court implements the notice provisions of the federal law. Under Rule 5.664, whenever the "the court knows or has reason to know that the child is or may be an Indian child," the tribe "must be notified of the pending petition" and of its right "to intervene in the proceedings." (Rule 5.664(f).) The notice requirements apply to "every hearing … unless and until it is determined that the act does not apply to the case." (Rule 5.664(f)(5).) Under the rule's explicit terms, the juvenile court and the Department "have an affirmative and continuing duty to inquire" whether a dependent child "is or may be an Indian child." (Rule 5.664(d); see *id.*, (d)(2), (d)(3).)

II. Application

The sole issue before us is appellant's claim that "the juvenile court and the Department failed to satisfy their affirmative duty to investigate the ICWA's applicability." The Department has effectively conceded the claim, with its stipulation to a "limited reversal" to allow compliance with the Act. To assess appellant's claim and the Department's concession, we have reviewed the entire appellate record.

Like the parties, we find no evidence in the record before us to support a determination concerning application of the Indian Child Welfare Act to this case. We therefore agree both that the juvenile court erred in failing to assure compliance with the notice requirements of the Indian Child Welfare Act and that the error requires conditional reversal.

DISPOSITION

The order terminating appellant's parental rights is conditionally reversed, and the matter is remanded to the juvenile court with directions to order the Department (1) to make appropriate inquiry concerning any Native American ancestry; (2) if and as warranted, to provide all known ancestral information to all affected tribes; and (3) if notice is given, to file any proofs of receipt of such notice by the tribes, along with a copy of any notices sent and any responses received.

In the event that notice is given but no tribe responds, or if any responses received indicate that Skyler is not an Indian child within the meaning of the Indian Child Welfare Act, then the order terminating parental rights shall be immediately reinstated. In the event that notice is given and any tribe determines that Skyler is an Indian child within the meaning of the ICWA, then the juvenile court shall conduct further proceedings applying the provisions of the ICWA, Welfare and Institutions Code section 360.6, and

rule 5.664 of the California Rules of Court. The court shall reappoint trial counsel to represent appellant in connection with these proceedings on remand.

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McAdams, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P.J.

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Duffy, J.