Filed 4/7/22 In re B.J. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re B.J., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent; v. M.J. et al., Defendants and Appellants.	E078126 (Super.Ct.No. J288814) OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Reversed and remanded with directions.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and Appellant A.J., mother.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant M.J., father.

Tom Bunton, County Counsel, and David Guardado, Deputy County Counsel for Plaintiff and Respondent.

Both mother, A.J., and father, M.J., appeal from a judgment terminating their parental rights respecting B.J., who was removed when a few days old after being born with methamphetamine in his system. When the dependency was initiated, father informed the social worker and executed a form indicating possible Native American ancestry, but because B.J. was the seventh child born to and removed from the parents' custody, and freed for adoption, the juvenile court determined that the Indian Child Welfare Act (ICWA) did not apply based on findings in the sibling cases, denied reunification services pursuant to Welfare and Institutions Code,[1] section 361.5, subdivision (b), and set a hearing to select and implement a permanent plan of adoption. After parental rights were terminated, both parents appealed.

On appeal, both parents argue that the judgment terminating parental rights must be reversed because the court and the San Bernardino County Children and Family Services (CFS) failed to discharge the duty of inquiry as to Native American ancestry from relatives. CFS concedes error in this case. We conditionally reverse.

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[1] All further statutory references are to the Welfare and Institutions Code, except where noted.

BACKGROUND

The minor child, B.J., was born in April 2021 in the front seat of a car. After being transported to the hospital, it was discovered there was methamphetamine in his system, as it was also present in his mother's system. Mother's behavior was erratic and agitated, and she actively attempted to prevent nurses from inserting a breathing tube in the infant when he experienced breathing difficulty, threatening them, and arguing with her husband.

B.J. was the seventh child born to his parents, A.J., and M.J., and he was the seventh child to enter the child protection system due to prenatal drug exposure and parental neglect. Of the dependencies relating to the older six children, the court by-passed family reunification services as to four of them, and then proceeded to a termination of parental rights; as to other siblings, reunification services were ordered but terminated, leading to a termination of parental rights.

A dependency petition was filed on April 8, 2021, alleging that B.J. came within the provisions of section 300, subdivision (b)(1), due to parental failure to provide adequate supervision, adequate food, shelter and medical care, and mother's inability to provide regular care due to mental illness, developmental disability, or substance abuse. The petition also alleged the child came within the provisions of section 300, subdivision (j), due to the parents' loss of custody of his older siblings with whom the parents failed to reunify resulting in a termination of parental rights. The infant was detained on April

9, 2021. The detention report noted that father claimed possible Native American ancestry of the Cherokee and Sioux tribes.

The social worker's Jurisdiction/Disposition Report was filed on April 27, 2021, again indicating father claimed Native American ancestry and describing the long child welfare history of the family that led to the removal and ultimate termination of parental rights as to six other children. The report reflects that father would be submitting an ICWA-030 form, though the record does not include it.

In the report, CFS also related the parents' failure to appear for the jurisdiction/disposition interview, and a visitation incident in which mother attempted to abscond with the baby, squeezing him until he cried when father attempted to take the baby from her, as the visit came to end. Mother referred to the social worker in vulgar terms and security had to be called to aid in the recovery of the baby.

This gave rise to the recommendation to terminate the parents' visitation and CFS submitted a report of amended petition, regarding an allegation to be added to the petition that father knew of mother's substance abuse but failed to protect the minor. At the next court date, when the matter was set for a contested hearing, the parents entered denials to the amended petition. The court found that mother's visits were detrimental to the child and suspended them, although it maintained father's visitation in place.

The contested jurisdiction hearing took place on May 28, 2021. The court received all the social worker's reports in evidence, including an additional information to the court indicating that mother refused to drug test when directed, and that she also

refused to sign the case plan. Both parents were present for the hearing, and testified, but mother's testimony was interrupted due to her vulgar language towards the court, and she was excluded from the courtroom.

The court made true findings as to the allegations of the petition and declared B.J. to be a dependent child and removed custody of the child from both parents. The court denied reunification services to both parents pursuant to section 361.5, and set a section 366.26 hearing. Visits were again ordered for father, but the court denied visitation for mother, finding visitation with mother was detrimental to the child.

Regarding ICWA, the trial court made a finding that ICWA did not apply, based on the number of prior dependencies involving the family in which the finding was made that ICWA did not apply, and precedent approving of such a procedure. The father filed a notice of intent to file a writ petition following the disposition, but it was dismissed after a no-issue brief was submitted.

In September 2021, CFS filed its section 366.26 report, recommending termination of parental rights to free B.J. for adoption by the caretaker who had already adopted two of his older siblings. While B.J. was thriving in his placement, he appeared to have developmental delays and was receiving special services including infant massage therapy for stiff muscles, possible related to cerebral palsy. Nevertheless, the caretaker was committed to caring for B.J. to keep the siblings together.

The selection and implementation hearing took place on September 27, 2021. The court denied father's request for a continuance in order to obtain a bonding study, found

by clear and convincing evidence that it is likely the child would be adopted, and terminated parental rights of both parents. Both parents appealed.

DISCUSSION

The sole issue presented in this appeal is whether the court and CFS failed to discharge the duty of inquiry into B.J.'s possible Native American ancestry. The record shows that despite father's indication of Indian heritage, the juvenile court did not order an inquiry of relatives as to Indian heritage, or notice to the indicated tribes, despite father's execution of the ICWA-030 form, notifying the court and CFS that B.J. might be an Indian child. CFS did not inquire of relatives or make any other investigation into Indian heritage. Instead, the juvenile court relied on the fact that previous findings that ICWA did not apply obviated the need to inquire further. CFS concedes error, and we agree.

Congress enacted ICWA in 1978 to address "'rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of 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.'" (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8, quoting *Miss. Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32 [104 L. Ed. 2d 29, 109 S. Ct. 1597].) ICWA declared that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from

their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ." (25 U.S.C. § 1902; *In re Abbigail A.* (2016) 1 Cal.5th 83, 90.)

California has "'incorporate[d] ICWA's requirements into California statutory law.'" (*In re Abbigail A., supra*, 1 Cal.5th at p. 91, quoting *In re W.B.* (2012) 55 Cal.4th 30, 52; see §§ 224–224.6.) "[S]ection 224.3, subdivision (a), provides that courts and county welfare departments '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 and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care.'" (*In re Isaiah W., supra*, 1 Cal.5th at p. 9.)

"The continuing duty to inquire whether a child is or may be an Indian child 'can be divided into three phases: the initial duty to inquire, the duty of further inquiry, and the duty to provide formal ICWA notice.'" (*In re Y.W.* (2021) 70 Cal.App.5th 542, 552, quoting *In re D.F.* (2020) 55 Cal.App.5th 558, 566; see also *In re Charles W.* (2021) 66 Cal.App.5th 483, 489.) Failure to "make meaningful efforts to locate and interview 'extended family members,' as defined by ICWA and related California law, is error. (*In re Y.W., supra*, 70 Cal.App.5th at p. 553, citing *In re A.C.* (2021) 65 Cal.App.5th 1060, 1069 [child protective agency 'erred by failing to ask the father and his extended family members whether [the father] had any Indian ancestry' (fn. omitted)]; *In re S.R.* (2021) 64 Cal.App.5th 303, 314 ['[t]he statute obligates the court and child protective agencies

to ask all relevant involved individuals . . . 'whether the child is, or may be, an Indian child']; *In re T.G.* (2020) 58 Cal.App.5th 275, 290 [the 'duty to inquire begins with initial contact [citation] and obligates the juvenile court and child protective agencies to ask all relevant involved individuals whether the child may be an Indian child'].)"

A previous determination that the minor's siblings were not Indian children under the Act is not dispositive of the minor's Indian status because "'[a] determination of tribal membership is made on an individual basis . . . .'" (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111, citing *In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.) Yet, despite the father's indication of possible Indian ancestry and the social worker's indication in reports that ICWA may apply, the court found that ICWA did not apply based on previous determinations made in the minors' siblings' cases. There was no investigation whatsoever, much less a continuing inquiry.

Considering that some of the minor's siblings reside with relatives, it would not have been unduly burdensome to discharge the statutory duty to follow up the inquiry into father's continuing statements of Indian ancestry. But the court found that ICWA did not apply without further inquiry by CFS, and the record on appeal in this case does not reveal the nature and scope of the investigation or inquiry conducted in the siblings' cases, on which the trial court relied for its finding that ICWA did not apply. We cannot, therefore, find the error was harmless.

We therefore accept CFS's concession and remand the matter to the juvenile court for further inquiry and notice to the tribes.

DISPOSITION

The orders of the juvenile court terminating parental rights are vacated and the matter is remanded to the juvenile court with directions to order compliance with the notice provisions of ICWA. If, after proper inquiry and notice, no response is received from a tribe indicating the minor is an Indian child, all previous findings and orders shall be reinstated. If a tribe determines that the minor is an Indian child, or if other information is presented to the juvenile court that suggests the minor is an Indian child as defined by ICWA, the juvenile court is ordered to conduct a new section 366.26 hearing in conformity with all provisions of ICWA.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.