Filed 2/7/23 In re T.K. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re T.K., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. C.K., Defendant and Appellant.	E079901 (Super.Ct.No. SWJ2000532) OPINION

APPEAL from the Superior Court of Riverside County. Kelly L. Hansen, Judge. Conditionally reversed and remanded with directions.

Meghan Grim, under appointment by the Court of Appeal, for Defendant and Appellant.

Minh C. Tran, County Counsel, Teresa K.B. Beecham and Julie K. Jarvi, Deputy County Counsel for Plaintiff and Respondent.

Defendant and appellant C.K. (Mother) appeals after the termination of her parental rights to T.K. (Minor; born January 2007) at a Welfare and Institutions Code section 366.26[1] hearing. Mother adopted Minor in 2010. Minor frequently snuck out of Mother's home and Mother could no longer care for her. Minor was detained and eventually placed with N.K., her biological maternal aunt (Aunt), in Massachusetts. Mother's parental rights were terminated.

On appeal, Mother contends the matter must be reversed for the failure of plaintiff and respondent Riverside County Department of Public Social Services (the Department) to adequately perform its initial duty of inquiry and further duty of inquiry about Indian ancestry to determine whether Minor was an Indian child pursuant to the Indian Child Welfare Act (ICWA) and California law (§ 224.2). Remand is necessary in order for additional inquiry as to whether Minor is an Indian child and to provide adequate notice, if necessary.

FACTUAL AND PROCEDURAL HISTORY

A. DETENTION

On November 1, 2020, Mother called law enforcement to report that Minor was refusing to come home. Minor was located at a friend's house. Minor reported that she did not want to return home because Mother hit her with a leather belt and wooden spoon. Minor started screaming and yelling when she was asked to "come downstairs."

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

She threatened to kill herself if she had to return home.[2] Minor had scars on her wrists, which she reported was from cutting herself. Minor was placed on a psychiatric hold.

Minor was released to Mother but 30 minutes later the Department was advised Minor was "going to run again." Mother advised the Department that she wanted the Department to take custody of Minor. Mother had not been feeling well and she could not continue to worry about Minor. She could not handle the stress of caring for Minor. Mother was 78 years old. Mother adopted Minor in 2010. She previously had adopted Minor's biological mother. Mother believed that the biological mother lived in Florida or Massachusetts; it had been over one year since Mother had heard from her. Mother provided a name for Minor's father and that he may reside in North Carolina. Mother denied that she physically abused Minor.

Minor was interviewed. She reported Mother disciplined her by hitting her on the arms, buttocks, thighs, and legs with either a leather belt or wooden spoon. Mother called her "stupid" and told her that she was not wanted. Minor had cut herself in the past when she felt stressed. Minor did not have any visible bruises. Minor admitted being disrespectful and sneaking out of the house to hang out with friends in the park. Minor did not feel safe and wanted to be removed from Mother. She wanted to be adopted by her friend's parents but Mother would not consent. Minor and Mother got into a heated argument in front of a social worker. The social worker decided to place

[2] Minor later admitted to making this statement but that she was not serious.

Minor in a foster home. Mother had to be hospitalized on November 3, 2020, for undisclosed reasons.

On November 4, 2020, the Department filed a section 300 petition for Minor against Mother (petition). It was alleged pursuant to section 300, subdivision (b), failure to protect, that (1) Mother failed to seek medical care and mental health services for Minor even though Minor had suicidal ideations, cut herself several times, and had been placed on a psychiatric hold; and (2) Mother utilized inappropriate discipline measures by hitting Minor on her legs, arms, buttocks, and thighs with a wooden spoon or belt, and by calling her belittling names. Pursuant to section 300, subdivision (g), no provision of support, it was alleged that Mother was unwilling to provide Minor with care and support due to Minor's behavior.

On November 2, 2020, Mother "denied any Native American Heritage for herself and for [Minor]." The social worker checked the box on the ICWA inquiry attached to the petition indicating that she had no reason to believe Minor was an Indian child. Minor was placed in foster care. The Department recommended that the juvenile court find that ICWA did not apply.

The detention hearing was conducted on November 5, 2020. Mother was not present. Minor was doing well in the foster home. Mother was ordered to complete an ICWA-020 form as soon as possible. Based on the current information, ICWA did not apply. The juvenile court found a prima facie showing had been made and Minor was detained. Minor was to participate in individual therapy and possibly therapy with Mother.

B. JURISDICTION/DISPOSITION REPORT AND HEARING

The jurisdiction/disposition report was filed on November 24, 2020. The Department recommended that the allegations in the petition be found true and that family reunification services should be granted to Mother. An ICPC was to be ordered for the State of Massachusetts to assess Aunt for possible placement. It was also recommended that the juvenile court find ICWA did not apply. Minor remained in a foster home.

Minor spoke with a social worker on November 18, 2020. Minor was happy in her foster home placement and did not want to return to Mother's care. She wanted to be placed with Aunt. Minor was no longer having suicidal thoughts. In the past when she told Mother that she thought about killing herself, Mother would tell her to get over it and would not get her help. Minor suffered from depression, anxiety, and ADHD. Minor maintained that Mother hit her with wooden spoons and a leather belt.

Mother had not been participating in any services. Minor and Mother had telephonic visits as Mother was in a rehabilitation hospital.

The Department filed an amended petition on December 1, 2020 (amended petition). The section 300, subdivision (b), allegation, failure to protect, was amended to delete that Mother failed to seek mental health treatment for Minor, who had suicidal ideations. The allegation was also amended to allege only that Mother hit Minor on the buttocks with a leather belt. The section 300, subdivision (g), allegation also was amended to provide that Mother was unable, rather than unwilling, to provide care and support due to Minor's behavior and also because of Mother's health problems.

Mother filled out an ICWA-020 form. She stated her relationship with Minor was "parent." Mother stated that her father was a member of the "Blackfoot"[3] Tribe.

A hearing was held on December 1, 2020. The Department noted that it had filed the amended petition. The Department sought an order denying family reunification services to Mother and an ICPC with Massachusetts for Aunt. Mother clarified that she was referring to her own father as having Indian ancestry. Mother then claimed that Minor's biological mother may have Indian ancestry. Mother waived her right to reunification services. She waived her right to present evidence at the jurisdiction/disposition hearing and submitted on the reports. The juvenile court continued the case so that ICWA notice could be served. Mother agreed to provide the Department with any information she had regarding Indian ancestry in her family and Minor's biological family.

An addendum report was filed on January 25, 2021. Minor remained in a foster home. Mother provided the name of her father, who was the "Blackfoot" Tribe member. She had no information about Minor's biological family. Minor was doing well in the foster home. During the reporting period, Minor had spoken on the telephone with Mother, but Mother did not want in-person visits. On January 2, 2021, Minor had left the caregiver's home without permission and did not return until the following day. The caregiver would seek removal of Minor if she left without permission again. Mother was

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[3] We place "Blackfoot" in quotation marks because "there is frequently confusion between the Blackfeet Tribe, which is federally recognized, and the related Blackfoot Tribe which is found in Canada and thus not entitled to notice of dependency proceedings." (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1198.)

refusing parenting classes but agreed to participate in individual and family counseling. The Department was now recommending family reunification services for Mother.

On January 26, 2021, the Department filed the ICWA noticing documentation. An email response was received from the "Blackfoot" Tribe ICWA coordinator. Neither Mother, Mother's father, nor Minor were listed as enrolled members. Further, the "Blackfoot" Tribe did not enroll children using adopted parents.

A hearing was conducted on January 28, 2021. The Department sought a continuance in order to conduct a legal guardianship assessment of Aunt in Massachusetts. The Department noted that the "Blackfoot" Tribe had responded that there was no enrollment. The juvenile court could conclude that ICWA did not apply. The juvenile court inquired, "It's the Department's belief that no other Indian tribe is involved." The Department confirmed there was no other tribe involved. The juvenile court then asked the parties if there was any objection to the finding that ICWA did not apply; there was no objection. The juvenile court ruled, "The Court having received the report from the ["Blackfoot" T]ribe finds that ICWA does not apply to this child and that this is not an ICWA case."

An addendum report was filed on March 12, 2021. Minor remained in a foster home. Minor was attending individual therapy. Minor had in-person visits with Mother. Aunt had been in contact with the Department. She was willing to take legal guardianship of Minor in Massachusetts. There had been no progress in getting ICPC approval from the State of Massachusetts. The Department recommended reunification services for Mother and continued attempts to get approval in Massachusetts.

The jurisdiction/disposition hearing was held on March 17, 2021. The juvenile court found the allegations in the amended petition true after Mother submitted on the Department's reports. Mother signed a waiver of reunification services. An ICPC for the State of Massachusetts was ordered immediately for Aunt. The permanent plan was for legal guardianship. The juvenile court found that ICWA did not apply.

C. COMBINED SECTION 366.26 AND 366.3 REPORTS AND HEARING

The combined sections 366.26 and 366.3 report was filed on July 9, 2021. The Department sought additional time to complete the ICPC in Massachusetts and to assess other potential biological relatives for placement. On June 24, 2021, Minor had been moved to a new placement with a friend's mother. No new information that ICWA applied came to light during the reporting period. Aunt was trying to obtain a bigger apartment to accommodate Minor. The matter was continued.

An addendum report was filed in which the Department requested additional time for the ICPC to be completed. The Department had been able to contact Minor's biological father and the biological paternal grandmother. Both resided in North Carolina. They agreed to try to contact Minor through letters. Contact was made with another paternal relative, who also lived in North Carolina. She had been in contact with Minor. Minor had been struggling and had been moved several times to different placements. On December 1, 2021, the matter was continued a second time at the request of the Department in order for the ICPC to be completed for Aunt.

On January 6, 2022, Minor was placed with Aunt. The Department recommended a permanent plan of legal guardianship. Minor was adjusting well to Aunt's home. In

addendum reports to both the section 366.26 and 366.3 reports, filed on July 11, 2022, July 21, 2022, and September 12, 2022, the Department was now recommending termination of Mother's parental rights and adoption of Minor by Aunt. Aunt was willing to adopt Minor and Minor wanted to be adopted. Aunt had been interviewed by a social worker on August 17, 2022. Aunt stated that she was of Cape Verdean and Native American (Mashpee Wampanoag) descent. There is no record of any notice to the Mashpee Wampanoag Tribe. Minor's biological mother was Aunt's half sister; biological mother's whereabouts were still unknown. Aunt was in contact with all of Aunt's other siblings.

The section 366.26 hearing was held on September 26, 2022. Mother was not present. The juvenile court terminated Mother's parental rights and freed Minor for adoption by Aunt.

DISCUSSION

Mother contends the matter must be remanded based on the failure of the Department to adequately perform its initial duty of inquiry, pursuant to section 224.2, with Minor's biological family about Indian ancestry to determine whether Minor is an Indian child. In addition, the Department failed to conduct further inquiry of Aunt regarding her Native American ancestry to determine whether Minor is an Indian child. The Department indicates that Aunt was asked about her ancestry and responded that she was of Cape Verdean and Native American, Mashpee Wampanoag descent. The Department concedes that no further inquiry was conducted of the Mashpee Wampanoag Tribe but that any conceivable error was harmless.

"Congress enacted ICWA in 1978 in response to '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.) " 'Notice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in, or exercise jurisdiction over, the matter.' " (*In re S.R.* (2021) 64 Cal.App.5th 303, 313.)

"ICWA provides: 'In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child, . . . shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.' [Citation.] ICWA also requires child welfare agencies to notify the [Bureau of Indian Affairs] of the proceedings, if the juvenile court knows or has reason to know the child may be an Indian child but the identity of the child's tribe cannot be determined." (*In re N.G.* (2018) 27 Cal.App.5th 474, 479-480, fns. omitted.) " 'ICWA itself does not impose a duty on courts or child welfare agencies to inquire as to whether a child in a dependency proceeding is an Indian child.' . . . . [¶] . . . 'ICWA provides that states may provide "a higher standard of protection to the rights of the parent or Indian custodian of

an Indian child than the rights provided under" ICWA.' " (*In re J.S.* (2021) 62 Cal.App.5th 678, 685.)

Pursuant to California law, "section 224.2 creates three distinct duties regarding ICWA in dependency proceedings. First, from the [Department]'s initial contact with a minor and his family, the statute imposes a duty of inquiry to ask all involved persons whether the child may be an Indian child. [Citation.] Second, if that initial inquiry creates a 'reason to believe' the child is an Indian child, then the Agency 'shall make *further inquiry* regarding the possible Indian status of the child, and shall make that inquiry as soon as practicable.' [Citation.] Third, if that further inquiry results in a reason to know the child is an Indian child, then the formal notice requirements of section 224.3 apply." (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1052.)

" 'The child welfare department's initial duty of inquiry includes "asking the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child and where the child, the parents, or Indian custodian is domiciled." [Citation.] The juvenile court must ask the participants in a dependency proceeding upon each party's first appearance "whether the participant knows or has reason to know that the child is an Indian child" [citation], and "[o]rder the parent . . . to complete Parental Notification of Indian Status ([Cal. Judicial Council] form ICWA-020)." ' " (*In re S.R.*, *supra*, 64 Cal.App.5th at p. 313.)

" 'If the court makes a finding that proper and adequate further inquiry and due diligence as required in [section 224.2] have been conducted and there is no reason to

know whether the child is an Indian child, the court may make a finding that [ICWA] does not apply to the proceedings, subject to reversal based on sufficiency of the evidence.' " (*In re Y.W.* (2021) 70 Cal.App.5th 542, 552; see also *In re A.M.* (2020) 47 Cal.App.5th 303, 314.)

Here, the Department made initial inquiries only with Mother. She provided that her own father had possible enrollment in the "Blackfoot" Tribe. The Department emailed the "Blackfoot" Tribe. The tribe responded that neither Mother, Mother's father, nor Minor were listed as enrolled members of the tribe. They also responded that they do not enroll children of adopted parents. Based on this information, on January 28, 2021, the juvenile court found that ICWA did not apply. No further inquiry of Aunt and her family was necessary.

Thereafter, the Department had contact with Minor's biological family. The Department first had contact with Aunt on March 12, 2021. There is no indication in the record that the Department inquired of her, despite being the half sister to Minor's biological mother, whether she had Indian ancestry. In addition, the Department was in contact with Minor's father and paternal grandmother on November 24, 2021. Based on the record, there was no initial inquiry as to Indian ancestry for Minor's biological family. The Department did not meet the requirements of section 224.2 by not making an inquiry as to Indian ancestry.

Moreover, when Aunt was interviewed on or about August 2022 she stated that she had Native American heritage from the Mashpee Wampanoag Tribe. The record does not support that the Department made any further inquiry despite having reason to

suspect the Minor may have Indian ancestry as required by section 224.2, subdivision (e). The Department did not make an adequate inquiry in failing to send notice to the Mashpee Wampanoag Tribe. This too was error.

This court has adopted the standard of prejudice articulated in *In re Benjamin M.* (2021) 70 Cal.App.5th 735, which rejects both an automatic rule of reversal and a rule that places the burden squarely on the parents to show the likelihood of obtaining a more favorable result. (*Id.* at pp. 743-745.) "[I]n ICWA cases, a court must reverse where the record demonstrates that the agency has not only failed in its duty of initial inquiry, but where the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child . . . . In such cases, courts have generally avoided applying broad, rigid reversal rules and instead focused on whether the missing information was readily obtainable and whether such information would have shed meaningful light on the inquiry that the agency had a duty to make." (*In re Benjamin M.*, *supra*, 70 Cal.App.5th at p. 744.)

Remand for the Department to provide additional information as to any other inquiries that were made, or to have it perform additional inquiry, is appropriate in this case. The disclosure by Aunt that she had Mashpee Wampanoag ancestry made it reasonable for the Department to conclude that Minor may be an Indian child. Inquiry would have likely resulted in meaningful information regarding Minor's status as an Indian child. (See *In re Benjamin M.*, *supra*, 70 Cal.App.5th at pp. 744-745 [child protective services conceded it "failed to obtain information that appears to have been both readily available and potentially meaningful" and remand for further inquiry was

appropriate].) Remand for further inquiry is appropriate as there is the "probability of obtaining meaningful information." (*Id.* at p. 744.)

The Department contends that under the unique facts of this case, the error is harmless. The Department insists that even if the tribe was contacted, the results of the proceeding would be the same. Minor could not be placed with Mother because she waived her reunification services and could not care for Minor. Further, placing Minor with Aunt achieved the preference for adoptive placement by a relative with Indian heritage.

Title 25 United State Code section 1915 provides, in part, that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (25 U.S.C. § 1915(a).) However, subsection (c) of that same statute also provides that, "[i]n the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order." (25 U.S.C. § 1915(c).) "Because ICWA defines 'Indian child' in terms of tribal membership, not race or ancestry, 'the question of membership is determined by the tribes.' [Citations.] Notice to the tribes is therefore 'central to effectuating ICWA's purpose' because it enables the tribe 'to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in, or exercise jurisdiction over, the matter.' " (*In re K.T.* (2022) 76 Cal.App.5th 732, 742.)

Here, without the Mashpee Wampanoag Tribe being notified, it is not possible to determine whether they would have intervened or stated a preference for Minor's adoption. Minor was adopted by Aunt, who was a half sister to Minor's biological mother. Further, Minor's father and paternal grandmother may have had additional information regarding other tribe affiliations. The proper resolution of this matter is remand to the juvenile court so that the Department can state on the record if it made any additional inquiries, and if not, to make the necessary inquiries and provide notice.

DISPOSITION

The orders terminating parental rights to Minor are conditionally reversed and the case is remanded to the juvenile court with directions to comply with the inquiry and notice provisions of ICWA and of sections 224.2 and 224.3. If, after the court finds adequate inquiry has been made, the court finds ICWA applies, the court shall vacate its existing orders and proceed in compliance with ICWA and related California law. If the court finds ICWA does not apply, the orders terminating parental rights to Minor shall immediately be reinstated. In all other respects, the court's orders are affirmed.

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MILLER
Acting P. J.

We concur:

FIELDS
J.

MENETREZ
J.