Filed 6/15/23 In re V.C. 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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 V.C., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.B. et al., Defendants and Appellants.	E080563 (Super.Ct.No. J292242) OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Conditionally reversed with directions.

Michelle D. Pena, under appointment by the Court of Appeal, for Defendant and Appellant J.B.

Emily Uhre, under appointment by the Court of Appeal, for Defendant and Appellant Victor C.

Tom Bunton, County Counsel, Kaleigh Ragon, Deputy County Counsel for Plaintiff and Respondent.

Defendants and appellants J.B. (Mother) and Victor C. (Father; collectively, Parents) are the parents of V.C. (male, born February 2022; minor). Parents appeal the juvenile court's termination of their parental rights under Welfare and Institutions Code[1] section 366.26. Parents' sole argument is that a conditional reversal is warranted because plaintiff and respondent San Bernardino County Children and Family Services (CFS) failed to comply with the Indian Child Welfare Act of 1978.[2] (ICWA). In its respondent's brief, "CFS concedes that limited remand is appropriate for compliance with ICWA." For the reasons set forth *post*, we agree with the parties and conditionally reverse the court's termination order.

FACTUAL AND PROCEDURAL HISTORY[3]

On February 18, 2022, CFS received an immediate response referral alleging general neglect of minor by Parents.

During an investigation, CFS found that in early February 2022 Mother went to the hospital when she was in her second trimester of pregnancy, suffering from severe

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

[2] "[B]ecause ICWA uses the term 'Indian,' we do the same for consistency, even though we recognize that other terms, such as 'Native American' or 'indigenous,' are preferred by many." (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 739, fn. 1.)

[3] We focus on the facts and procedural history that pertain to ICWA.

preeclampsia and other complications. Mother left the hospital against medical advice. Nine days later Mother returned to the hospital; she suffered from a ruptured placenta and severe anemia. Mother delivered minor at 25 weeks gestation. Minor weighed 2 pounds and 11 ounces.

Minor was placed in an incubator in the neonatal intensive care unit (NICU). A nurse stated that minor was very ill and would be in the hospital for a while.

A social worker found that Mother had an older son, I.B., who was removed from Mother's care due to her substance abuse. Mother's reunification services were terminated and a section 366.26 hearing was scheduled.[4] Mother told the social worker that Mother was not aware she had an open dependency case regarding I.B.

When the social worker interviewed Mother, she appeared disoriented and had difficulty focusing. Mother told the social worker that she had no Native American ancestry. Mother also denied the allegations of general neglect or using substances. Mother admitted that Parents were homeless.

Thereafter, the social worker "conferred with [a supervisor] and the decision was made to seek a warrant to detain [minor] from [Parents] as CFS has concerns that the mother's substance use is impacting her ability to make sound medical decisions for [minor]. The [social worker] authored, submitted, and was granted a warrant to detain [minor] from [Parents]." A social worker, accompanied by a deputy, served mother with

[4] On March 29, 2023, we granted Mother's request and took judicial notice of the unpublished opinion in *In re. I.B.*, case No. E079403.

the warrant at the hospital. "Mother was noticed of the detention hearing date, time, and location."

When the social worker spoke with the paternal grandmother, she confirmed that Parents had substance abuse issues and were homeless. Father assaulted paternal grandmother when she told Father she would not give him the keys to her car. As a result, Father was arrested. The social worker learned that Parents had criminal histories.

On February 23, 2022, CFS filed a petition on behalf of minor under section 300, subdivisions (b)(1), (g), and (j).

At the detention hearing on February 24, 2022, Mother was present but Father was not; he was in custody and in quarantine. Although Mother, in her ICWA inquiry form, noted that she did not have any Native American ancestry, the court questioned Mother. The following discussion occurred:

The Court: "Do you have Native American ancestry?

"THE MOTHER: My grandma.

[¶] . . . [¶]

"THE COURT: What tribe?

"THE MOTHER: Pala.

"THE COURT: Okay. You put 'none,' so I'll need to give her back the thing. [¶] Are you registered? Is your grandma registered?

"THE MOTHER: My grandma is registered."

The Court: "So it's Pala, and your grandmother is registered. You're not. [¶] Have you tried?

[¶] . . . [¶]

"THE MOTHER: No.

"THE COURT: Are your parents registered?

"THE MOTHER: My parents are deceased.

"THE COURT: Do you know if they ever tried to register?

"THE MOTHER: I'm not sure.

"THE COURT: And, then, have you ever lived on the reservation?

"THE MOTHER: No.

"THE COURT: Ever?

"THE MOTHER: No.

"THE COURT: Okay. Is your grandma still alive?

"THE MOTHER. Yes.

"THE COURT: Are you in contact with her?

"THE MOTHER: Yes.

"THE COURT: All right. You contact her and make sure the Department contacts her. [¶] Did you put her address and phone number on here by chance, on the family form?

"THE MOTHER: It should be. I'm not sure.

[¶] . . . [¶]

The Court: "Whoever represents [Mother], before she leaves, make sure she gets whatever contact for her . . . grandma.

"[MOTHER'S COUNSEL]: Yes..

"THE COURT: And give it to the County there so they can investigate. Okay."

At the conclusion of the hearing, the juvenile court found a prima facie case for detention and set a jurisdiction and disposition hearing for March 17, 2022.

In the jurisdiction and disposition report filed on March 14, 2022, CFS noted that ICWA "does or may apply to this case." The social worker reported that Mother stated having Native American ancestry in the Pala Tribe and that the social worker had been unable to question Father. The social worker reported that she had been unable to interview Parents "for the purpose of writing this report."

Based on the information the social worker was able to gather, the social worker opined that the prognosis for reunification for Parents was "exceptionally poor." Minor remained in the NICU with no known discharge date. Although the social worker contacted maternal aunt R.P., R.P. stated that she already had her hands full and was not interested in minor's placement. The social worker reported that she was going to reach out to a second maternal aunt, D.B. to check if she would be interested in the placement of minor. The social worker noted her concerns about considering maternal grandmother for placement.

CFS recommended that the juvenile court sustain the allegations in the section 300 petition, that no reunification services be provided to Mother, and asked for additional time to make a recommendation regarding Father.

Parents attended the jurisdiction and disposition hearing on March 17, 2022. Father's counsel requested predisposition services; the court granted that request. Father's counsel also noted that Father had a sister who had been visiting minor at the

hospital and she would be contacting CFS to be considered for placement. Mother's counsel requested to set the matter for trial. The court set the matter for a pretrial settlement conference on May 11, 2022.

Father filed an ICWA-020 form on the date of the jurisdiction and disposition hearing. Father indicated that he had no Native American ancestry.

On May 10, 2022, CFS filed an additional report. The report indicated that Mother had not made herself available to the social worker and Mother's whereabouts were unknown. Father remained incarcerated. CFS again recommended denying reunification services to Mother and updated its recommendation to offer reunification services to Father.

On June 2, 2022, CFS filed its second additional report. The report stated that Father was convicted of carjacking and was sentenced to one year in prison. When the social worker interviewed Father, he confirmed that the allegations in the petition were true. Although Father was sad about CFS's change in recommendation to deny Father services, he supported minor being adopted by his sister. Minor remained in the NICU. Upon discharge, minor would be placed in the home of a paternal aunt, (Aunt). Father again denied any Native American ancestry. Mother failed to make herself available to the social worker for an interview.

Neither parent attended the contested jurisdiction and disposition hearing on June 6, 2022. The court continued the hearing to July 25, 2022, so Father may be transported to the court.

On July 13, 2022, CFS filed its third additional report. It provided that on June 24, 2022, minor was placed with Aunt and was doing well.

Neither parent attended the contested hearing on July 25, 2022. Although Parents' counsels requested a continuance, the court denied the requests because there had been no contact with either parent since the prior hearing. The juvenile court sustained the allegations in the petition and adopted the findings and orders denying reunification services to Parents. The court then found that minor did not come under the provisions of ICWA.

In the section 366.26 report filed on November 10, 2022, CFS noted that ICWA "may apply." The social worker stated that although she attempted to contact Mother to collect additional information regarding Mother's Native American ancestry on two occasions—October 7 and 11, 2022, the social worker was unable to reach Mother. When the social worker contacted D.B. she informed the social worker that there may be Native American ancestry on her grandmother's side but D.B. had no further information. On October 7, 2022, the social worker attempted to contact paternal grandmother, but was unable to reach her. However, the social worker was able to reach Aunt, who confirmed that they had no Native American ancestry on the paternal side.

In the section 366.26 report, the social worker stated that minor was doing well with Aunt, and there appeared to be a mutual positive attachment between minor and Aunt. Aunt and her wife expressed a desire to adopt minor; they were committed to caring for minor's needs.

Mother and Father were present at the section 366.26 hearing on November 22, 2022. The court set the matter for contested on January 23, 2023.

On January 17, 2023, CFS filed an additional report updating the juvenile court. CFS reported that minor continued to suffer from various conditions and developmental delays. His caregivers, however, continued to do an excellent job caring for minor's special needs. CFS recommended the termination of parental rights and a permanent plan of adoption be implemented.

The following day, CFS filed another additional report. In the report, the social worker summarized her numerous and continued attempts to contact Parents; neither got back to the social worker.

Parents attended the section 366.26 hearing on January 23, 2023. Father testified that he believed it was in minor's best interest for Father to remain in minor's life; Father had not seen minor since he was born. Mother testified that she had not seen minor since he was in the NICU. She did not contact the social worker to set up visitation because she believed minor was too fragile for visits. Mother testified that she did not want her rights terminated, and wanted to have continued contact with minor.

At the conclusion of the hearing, the juvenile court terminated Mother's and Father's parental rights, finding that Parents did not meet their burden to prove that they met the elements of the parental bond exception.

Mother filed her notice of appeal on January 23, 2023, and Father filed his notice of appeal on January 25, 2023.

DISCUSSION

Parents contend that CFS failed to conduct an adequate inquiry into minor's Native American ancestry. Specifically, Mother contends that "CFS did not complete initial inquiry or further inquiry under the ICWA and Cal-ICWA because it did not ask all available relatives, nor did it contact the Pala Tribe or [Bureau of Indian Affairs], all of which precluded finding ICWA did not apply and invalidated the orders made under section 366.26." Father contends that "in light of Mother claiming Pala ancestry, the Agency failed to satisfy its duty of 'further inquiry' into that ancestry." In its respondents brief CFS "concedes that limited remand is appropriate for compliance with ICWA."

A. LEGAL BACKGROUND

Under ICWA, the juvenile court and CFS have an " 'affirmative and continuing duty to inquire' whether a child in a dependency proceeding 'is or may be an Indian child.' " (*In re Ricky R.* (2022) 82 Cal.App.5th 671, 678, quoting § 224.2, subd. (a).) "The duty to inquire consists of two phases—the duty of initial inquiry and the duty of further inquiry." (*Ibid.*)

Under section 224, subdivision (b), when a minor is taken into temporary custody by the department under section 306, the county welfare department must ask 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." (§ 224.2, subd. (b).) At the parties' first appearance before the juvenile court, the court must ask "each participant present in the hearing whether the participant

knows or has *reason to know* that the child is an Indian child" (§ 224.2, subd. (c), italics added), and "[o]rder the parent . . . to complete *Parental Notification of Indian Status* ([Cal. Judicial Council] form ICWA-020)." (Cal. Rules of Court, rule 5.481(a)(2)(C).)

Thereafter, when there exists a *reason to believe* that an Indian child is involved, the social worker must "make further inquiry regarding the possible Indian status of the child." (§ 224.2, subd. (e).)

"On appeal, we review the juvenile court's ICWA findings for substantial evidence. [Citations.] But where the facts are undisputed, we independently determine whether ICWA's requirements have been satisfied." (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1051.)

B. INITIAL INQUIRY UNDER ICWA

Parents contend that CFS failed to conduct an initial inquiry under ICWA because it failed to ask paternal grandmother about her possible Native American ancestry. In its response, CFS stated, "CFS does not concede any error here."

As noted above, under section 224.2, subdivision (b), the county welfare department must ask the "child, parents, legal guardian, Indian custodian, extended family members, . . . whether the child is, or may be, an Indian child." (§ 224.2, subd. (b).)

However, *In re Robert F.* (2023) 90 Cal.App.5th 492 (*Robert F.*), this court held that "[s]ubdivision (b) of section 224.2 requires a county welfare department to ask extended family members about a child's Indian status only if the department has taken the child into temporary custody under section 306." Moreover, on May 17, 2023, in *In*

re Ja.O. (2023) 91 Cal.App.5th 672 (*Ja.O.*) this court again held that "CFS must ask extended family members and others . . . only if that child has been placed into CFS's temporary custody pursuant to section 306." (*Id.* at pp. 677-678.) This court went on to state that "[t]he expanded duty of initial inquiry under subdivision (b) of section 224.2 . . . does not apply" when a child is taken into protective custody pursuant to a warrant under section 340, subdivision (b). (*Ja.O.*, at p. 679.)

In this case, minor was detained after CFS obtained a detention warrant, not under the authority of section 306. Therefore, the expanded duty of initial inquiry under section 224.2, subdivision (b) does not apply. (*Ja.O.*, *supra*, 91 Cal.App.5th at p. 679.)

Nonetheless, in her reply brief, Mother argues that there exists a duty of expanded initial inquiry because she "respectfully disagrees with [this court's] reasoning in *Robert F.*[and] *In re Ja.O.*, . . . based on a review of the legislative history in California and discussion of the intent of federal legislation." Contrary to Mother's argument, we agree with our recent decisions in *Robert F.*, and *Ja.O.*, and find that CFS had no expanded duty of initial inquiry under section 224.2, subdivision (b).

In his reply brief, Father contends that "[CFS] failed to comply with its duty of initial inquiry, as set forth in section 224.2, *subdivision (a)*. [CFS] failed to acknowledge or address its inquiry obligations under subdivision (a), and instead focused solely on the inquiry requirements under [] subdivision (b)."

Section 224.2, subdivision (a), requires the juvenile court and agency to "have an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child" in dependency cases. There is no dispute in this case that this duty to inquire

applies. The question is what types of inquiries are required under section 224.2, subdivisions (a), and (e). As discussed *ante*, the inquiry required under section 224.2, subdivision (b), does not apply to minor.

C. FURTHER INQUIRY UNDER ICWA

In this case, CFS and Parents agree that CFS failed to conduct a further inquiry as required under section 224.2, subdivision (e). We agree with the parties.

Section 224.2, subdivision (e)(1), states that there is a "reason to believe" an Indian child is involved in a proceeding when "the court, social worker, or probation officer has information suggesting that either the parent of the child or the child is a member or may be eligible for membership in an Indian tribe."

In this case, there is no dispute that the parties had "reason to believe" that minor was an Indian child. As noted in detail *ante*, at the detention hearing on February 24, 2022, Mother told the court that her grandmother belonged to and was registered with the Pala Tribe. The court then asked Mother to provide information on her grandmother to her counsel, and directed Mother's counsel to give the information "to the County there so they can investigate." Mother also identified the Pala Tribe on her ICWA-020 form. Moreover, D.B. also stated that there may be Indian ancestry through maternal grandmother. In the various reports filed by CFS, it acknowledged that ICWA may apply in this case.

Notwithstanding the reason to believe that minor may be an Indian child, there is nothing in the record to indicate that CFS either attempted to contact or contacted maternal grandmother, the Bureau of Indian Affairs, or the Pala Tribe. "As a result, CFS

concedes that a reasonably substantial inquiry into Mother's claims of Indian ancestry is not documented in the record" and "the record establishes a 'reason to believe' that [minor] may be an Indian child and a further inquiry is warranted."

We agree with the parties and remand this matter to the juvenile court to comply with the further inquiry provisions of ICWA and section

DISPOSITION

The order terminating parental rights is conditionally reversed. On remand, the juvenile court shall order CFS to comply with the duty of further inquiry (§ 224.2, subd. (e)) and, if applicable, the duty to provide notice to the pertinent tribes (25 U.S.C. § 1912(a); § 224.3). If, after all appropriate inquiry and notice, the court determines that ICWA does not apply, then the court shall reinstate the order terminating parental rights. If the court determines that ICWA applies, then it shall proceed in conformity with ICWA and related California law.

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MILLER
Acting P. J.

We concur:

CODRINGTON
J.

MENETREZ
J.