Filed 11/24/14 In re Robin D. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ROBIN D. et al., Persons Coming Under the Juvenile Court Law.	
CONTRA COSTA CHILDREN & FAMILY SERVICES BUREAU, Plaintiff and Respondent, v. R.K., Defendant and Appellant.	A140782 (Contra Costa County Super. Ct. Nos. J1200987 & J1200988)

Mother R.K. appeals from an order terminating her parental rights to her daughter Robin D. She contends the juvenile court erred in finding that respondent Contra Costa Children & Family Services Bureau (Bureau) provided proper notice of a child custody proceeding for an Indian child, as required by the Indian Child Welfare Act, 25 U.S.C. section 1901, et seq. (ICWA). This is so, R.K. argues, because the Bureau's notice omitted information pertaining to Robin's grandmother, and great, great grandmother. We agree that the juvenile court's finding of proper notice was unsupported by substantial evidence, and we reverse.

BACKGROUND

The Petitions and Detention

In June 2012, R.K. gave birth prematurely to a daughter, Robin. At the time of Robin's birth, R.K. tested positive for methamphetamine. Already the mother of five-year-old P.G. and 15-year-old D.D., R.K. had an extensive history with the Bureau, including 21 prior referrals, many for neglect and parental absence due to R.K.'s long history of substance abuse. R.K's positive drug test prompted the Bureau to remove Robin and P.G. from her care.[1] It intended to recommend a family maintenance plan if R.K. would commit to and complete an inpatient drug treatment program.

On June 20, 2012, the Bureau filed Welfare and Institutions Code section 300[2] petitions alleging that R.K.'s extensive substance abuse problems interfered with her ability to parent Robin and P.G. The petitions identified Robert D. as Robin's alleged father; P.G.'s father was unknown.[3] Appended to the petitions was an "Indian Child Inquiry Attachment" in which the Bureau represented that on June 18, it had questioned R.K., who stated that the girls had no Native American heritage or tribal affiliation.

Robin and P.G. were formally detained following a June 21 hearing. In the findings and orders after hearing, the court indicated that R.K. was provided a "Parental Notification of Indian Status" and ordered to complete the form and submit it before leaving the courthouse that day.

Jurisdiction

In a combined detention/jurisdiction report, the Bureau informed the court that R.K. had told the social worker she would do whatever she had to in order to keep her children. According to the social worker, R.K. had stated, "[M]y momma lost all of us to

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[1] D.D. was not involved in the dependency proceeding because he was under the supervision of the probation department.

[2] All undesignated statutory references are to the Welfare and Institutions Code.

[3] This appeal only concerns the termination of R.K.'s parental rights to Robin. Accordingly, we omit details concerning Robert and P.G. except where relevant to the issues on appeal.

the system and didn't do nothing to get us back . . . and my little brother and sister are still in the system and she ain't doing nothing. My little brother calls me auntie because he doesn't realize that I am his sister . . . so knowing that I ain't gonna do my kids that way . . . ." The Bureau also reiterated that it had spoken with R.K. on June 18 and she confirmed the children had no Native American heritage.

At a July 13, 2012 jurisdictional hearing, the court sustained the allegation in the petition. It also raised Robert's status to presumed father.

Disposition

In a disposition report prepared for an August 31, 2012 hearing, the Bureau advised that R.K. and Robert had not participated in any services to address their substance abuse issues and their whereabouts were unknown. It recommended that the court not order reunification services unless the parents were located within the following six months. It also reiterated its prior representation that R.K. had previously denied any Native American heritage.

After the Bureau prepared its disposition report, however, R.K. apparently resurfaced. And at an October 3, 2012 contested disposition hearing, the court ordered reunification services for her but not for Robert, whose whereabouts remained unknown.

Six-Month Review

In advance of the six-month review hearing, the Bureau submitted a status report in which it recommended termination of reunification services for R.K. According to the Bureau, she had not engaged in the services offered under her case plan, and was not addressing the issues that led to the dependency proceeding or maintaining regular contact with the Bureau and her children.

A six-month review hearing was scheduled for March 20, 2013. R.K. appeared at the hearing and contested the Bureau's recommendation, and the matter was continued for a contested review hearing.[4]

[4] Around the same time, the Bureau filed a section 387 supplemental petition seeking to change the children's placement because the relative care provider with whom they were placed had recently given birth to medically-fragile twins, had three other

Shortly before the contested hearing, the Bureau informed the court that Robert had recently contacted the social worker and inquired about what he needed to do to have Robin placed in his care. He was referred to his attorney and sent referrals for the services necessary to address the issues that had led to the dependency proceeding. The Bureau recommended that he be provided reunification services to the 12-month mark.

The Bureau also advised that a man claiming to be P.G.'s father—A.P.—had recently reached out to the Bureau, asking what he could do to have P.G. placed with him or his sister. While R.K. denied A.P. was P.G.'s father, the Bureau recommended reunification services if he was found to be P.G.'s biological father.

The Bureau also informed the court that R.K. had just entered a drug treatment program days before, but given her long history of substance abuse, it did not believe there was a substantial probability of reunification if her services were extended to the 12-month mark. It therefore maintained its prior recommendation that the court terminate reunification services.

On April 17, 2013, Robert filed a "Parental Notification of Indian Status," representing that he had no Indian ancestry.

That same day, the court held a contested six-month review hearing. It terminated reunification services to R.K., continued services for Robert to the 12-month mark, and ordered A.P. to take a paternity test.

12-Month Review

In its 12-month status report, the Bureau recommended that the court terminate Robert's services and set a section 366.26 permanency hearing for Robin, as Robert had not engaged in services or made any progress on his case plan. It recommended, however, that the court order reunification services for A.P., as a paternity test established that he was P.G.'s biological father. It also repeated its prior assertion that

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biological children, and was incapable of caring for Robin—who herself had medical issues—and P.G. at that time. Following a hearing on the petition, the girls were placed in foster care pending assessment of a potential relative placement.

ICWA did not apply, as all of the parents had denied Native American heritage or tribal affiliation.

At the June 5, 2013, 12-month review hearing, both R.K. and Robert appeared. The court terminated services to Robert, and set the matter for a section 366.26 selection and implementation hearing as to Robin. As to P.G., the court set an 18-month review date.

R.K.'s Section 388 Petition

After a short continuance, the matter was scheduled for a section 366.26 selection and implementation hearing on October 4, 2013. That same day, R.K. filed a section 388 request to change order, seeking to change two of the court's prior orders, one finding that ICWA did not apply, the other terminating reunification services.[5] As to what had changed since the previous orders, R.K. represented that her maternal grandmother was either eligible for enrollment or a recognized member of the Blackfeet and/or Cherokee tribes, but noted that the Bureau had never sent an ICWA notice. She also represented that she had been actively involved in outpatient drug treatment services for six weeks and was on a waiting list for an inpatient treatment program. She requested that the matter be continued for ICWA compliance and to allow her to enter an inpatient treatment program.

At the scheduled section 366.26 hearing, the court first considered R.K.'s section 388 petition. It denied her request to change the order terminating her services. The ICWA issue was more troubling, however. Counsel for R.K. advised the court that in a conversation two days earlier, R.K. had informed him she did in fact have Native American ancestry. And county counsel noted that R.K. had apparently never signed a "Parental Notification of Indian Status." Accordingly, the court ordered R.K. to complete the parental notification form with all information known to her within one week. It then continued the permanency hearing to November 18 to afford the Bureau an opportunity

[5] We could not locate any evidence in the record that the court had actually made a finding regarding ICWA applicability. Clearly, however, all involved were all operating under the understanding that the proceeding did not involve an Indian child.

to "explore the new information re ICWA." The matter was subsequently continued to December 9, pending receipt of information regarding ICWA applicability. Both parents were ordered to appear at the December 9 hearing.

Section 366.26 Selection and Implementation Hearing

The Bureau submitted a section 366.26 report recommending termination of the R.K.'s and Robert's parental rights to Robin and adoption as the appropriate permanent plan for her.

The section 366.26 hearing was held on December 9, and despite the court's prior order, neither parent appeared. In their absence, the Bureau presented an ICWA packet that it claimed demonstrated its compliance with ICWA. Included in the packet was a "Parental Notification of Indian Status" signed by R.K. on October 7 and filed with the court on October 9, in which she represented that her ancestors were members of the Cherokee and Blackfeet tribes. She specifically identified her great grandmother and great, great grandmother, listing them both by first and last names.

The Bureau also submitted a "Notice of Child Custody Proceeding For Indian Child" that it had served on November 1. It identified R.K. as Robin's biological mother and provided her date and state of birth, and her current and former addresses. As to tribe or band and location, it identified the Blackfeet Tribe and three Cherokee tribes (the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee, and the Cherokee Nation).

The form contained no information regarding R.K.'s mother—Robin's maternal grandmother—stating, "No information available" for all categories. It identified R.K.'s great grandmother by her first and last names, as well as an alias, and provided her date of birth but not place of birth. It provided a last known address, with no former addresses listed. It also identified R.K.'s great, great grandmother by her full name but provided no birth date or other identifying information. For both, it listed the Blackfeet tribe and the three above-noted Cherokee tribes as "[t]ribe or band, and location."

The proof of service of the notice indicated that the Bureau had sent it to the Blackfeet Tribe in Montana, the Cherokee Nation in Oklahoma, the Eastern Band of

Cherokee Indians in North Carolina, and the United Keetoowah Band of Cherokee in Oklahoma, as well as the Bureau of Indian Affairs and the Department of the Interior.

The Bureau also submitted responses from two Cherokee tribes. The first was a November 7 letter from the United Keetoowah Band of Cherokee Indians representing that based on the information supplied, there was no evidence Robin was a descendant of anyone on the Keetoowah Roll, and the Band would therefore not be intervening.

In a second letter, dated November 18, the Cherokee Nation responded that based on the information provided, it was "impossible to validate or invalidate this claim . . . ." It advised that it needed additional information, specifically, "maternal grandparent's and great-grandparent's complete names and dates of birth."

In light of the Bureau's submission, the court queried whether there was any objection to it finding, one, that the Bureau had provided reasonable ICWA notice and, two, that Robin was not covered by ICWA. Counsel for R.K. objected but acknowledged he had no evidence to present in opposition.

Having received no evidence to the contrary, the court found that the Bureau had given proper notice as required by ICWA and that ICWA did not apply. It further found that Robin was adoptable and no exceptions to adoption as the permanent plan applied. It therefore terminated the parental rights of R.K. and Robert and ordered adoption as the permanent plan. The court also terminated services to A.P. and set a section 366.26 hearing as to P.G.

R.K. filed a timely notice of appeal from the order terminating her parental rights to Robin.

DISCUSSION

ICWA was enacted in 1978 to address the "rising concern . . . 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." (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32; see also 25 U.S.C. § 1902 [ICWA enacted to "protect the best interests of Indian children and

to promote the stability and security of Indian tribes and families . . . .".) In recognition of the belief that "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), ICWA thus establishes minimum federal standards, both procedural and substantive, governing the removal of children of Indian ancestry from their families. It creates a preference for giving jurisdiction to the tribe, which has the right to intervene at any point in state court dependency proceedings. (25 U.S.C. § 1911(c); *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253.)

Strict notice requirements are a fundamental component of ICWA. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421 ["Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families."].) This is so, of course, because " 'the tribe's right to assert jurisdiction over the proceeding or to intervene is meaningless if the tribe has no notice that the action is pending.' [Citation.] 'Notice ensures the tribe will be afforded the opportunity to assert its rights under [ICWA] irrespective of the position of the parents, Indian custodian or state agencies.' [Citation.]" (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 253.) Accordingly, when a social services agency has reason to know that a child involved in a dependency proceeding might be an Indian child, which requires only the suggestion of Indian ancestry, notice of the proceeding must be provided to the child's potential tribe, or to the Bureau of Indian Affairs (BIA) if the tribal affiliation is unknown. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 702–703; 25 U.S.C. § 1912(a).)

Section 224.2, subdivision (a)(5)(C)[6] specifies that notice to the tribe must include the following: "All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, place of birth

[6] In 2006, the California Legislature incorporated ICWA's requirements into California law, adding, among other provisions, section 224 to the Welfare and Institutions Code. (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 703–704.)

and death, tribal enrollment numbers, and any other identifying information, if known." (Accord, 25 C.F.R. § 23.11(d)(3); see also *In re Francisco W., supra*, 139 Cal.App.4th at p. 703.) Fundamental to the notice requirement is the concept that the notice must contain enough information to constitute meaningful notice. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.).

California Rules of Court, rule 5.481 imposes an affirmative duty on a social services agency to interview the extended family to ascertain the required information. (Cal. Rules of Court., rule 5.481, subd. (a)(4) [social worker must, among other things, interview the parents, Indian custodian, and extended family members to gather information required by the notice]; *In re C.D.* (2003) 110 Cal.App.4th 214, 225 [agency "has a duty to inquire about and obtain, if possible, all of the information about a child's family history" required under regulations promulgated to enforce ICWA].)

Against this statutory framework, we turn to the Bureau's notice, which R.K. contends did not contain enough information to constitute meaningful notice. Specifically, she complains it did not contain any information regarding Robin's maternal grandmother (not even her name), nor the complete name, birth date, or birthplace of Robin's great, great grandmother. R.K. submits that the inadequacy of the information provided was evidenced by the response from the Cherokee Nation in which it stated that it was impossible to validate or invalidate the claim without additional information, specifically, the complete names and dates of birth of Robin's maternal grandparents and great grandparents. A challenge such as this to the adequacy of an ICWA notice is reviewed for substantial evidence (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430), and we agree with R.K. that the juvenile court's finding of proper notice was unsupported by substantial evidence.

We begin with a concern not addressed by either party. California Rule of Court, rule 5.481(b) mandates that in a section 300 proceeding, the social services agency must send a "Notice of Child Custody Proceeding for Indian Child." This form is designated ICWA-030. The ICWA-030 form sent by the Bureau here, however, differs from the

ICWA-030 form available on the Judicial Council website.[7] Significantly, that ICWA-030 form, which consists of 10 pages, requests identifying information on the biological mother (section 5c), the mother's biological mother (section 5c), and the mother's biological grandmother (section 5d).[8] The ICWA-030 used by the Bureau, which was 12 pages, appears at first glance to be the same, but upon closer examination materially differs. It requests information on the biological mother (section 5c) and the mother's biological mother (section 5c), but it then skips to the mother's biological *great grandmother* and *great, great grandmother* (section 5d). Nowhere does it contain a section for information on the mother's biological grandmother.[9] By using what may be a faulty ICWA-030, the Bureau completely omitted all information on R.K.'s grandmother—Robin's great grandmother.[10]

Additionally, although the ICWA-030 requested information regarding R.K.'s mother, the Bureau omitted all information for her, stating "No information available" for every single category, including her name. This is, quite simply, inexplicable. At the very least, we can only assume that an inquiry of R.K. would have revealed her mother's name and, quite likely, additional information called for by the notice. But it is also probable that the Bureau could have obtained the information from R.K.'s mother herself. At the outset of the dependency proceeding, R.K. informed the social worker that her mother was involved in her own dependency proceeding. Additionally, R.K.'s mother was present at the June 5, 2013, 12-month review hearing, as evidenced by the reporter's transcript from the hearing. At one point, the court interrupted the proceeding to ask audience members to identify themselves, and one person responded, "I'm the mother of

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[7] (http://www.courts.ca.gov/documents/icwa030.pdf as of November 24, 2014.)

[8] It also requests information on the mother's male relatives, as well as the father's relatives, none of which is relevant here.

[9] It does contain a section for the father's biological grandmother (section 5e), suggesting that the omission of a similar category for the mother was an error.

[10] We encourage the Bureau to verify that the ICWA-030 it uses is in fact the form adopted by the Judicial Council for mandatory use.

[R.K.]" Both of these circumstances suggest that R.K.'s mother was accessible had the Bureau made an effort to speak with her. Additionally, the Bureau omitted the current and former addresses and the place and date of birth for R.K.'s great, great grandmother.

There exists a presumption of a duty regularly performed (Evid. Code, § 664), and we review the court's factual findings in the light most favorable to the juvenile court's order. (*In re Rebecca, supra,* 143 Cal.App.4th at p. 1430.) But we cannot conclude here that there was substantial evidence the Bureau satisfied its duty of inquiry, given its failure to include any information regarding R.K.'s mother and grandmother. (Contra, *In re Rebecca, supra,* 143 Cal.App.4th at p. 1430 [affirming the juvenile court's rejection of the father's claim that the agency failed to satisfy its duty of inquiry because there were no inconsistencies in the evidence to rebut the Evidence Code section 664 presumption].)

It is well recognized that unless a tribe expressly indicates that it has no interest in the state court proceeding, the social services agency's failure to comply with ICWA's notice requirement constitutes reversible error. (*In re B.R.* (2009) 176 Cal.App.4th 773, 785; *In re I.G.* (2005) 133 Cal.App.4th 1246, 1252; *In re Desiree F., supra,* 83 Cal.App.4th 460, 472.) In light of the above-noted deficiencies in the Bureau's "Notice of Child Custody Proceeding For Indian Child," the juvenile court's finding of ICWA notice compliance by the Bureau cannot stand.

DISPOSITION

The order terminating R.K.'s parental rights to Robin is conditionally reversed, and the matter is remanded for the limited purpose of providing notice of the proceedings in accordance with the notice provisions of ICWA and related provisions of California law, and to file all required documentation with the juvenile court. If, after proper notice, a tribe claims that Robin is an Indian child, the juvenile court shall proceed in conformity with all provisions of ICWA. If, on the other hand, no tribe claims her to be an Indian child, the order terminating R.K.'s parental rights shall be reinstated.

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Richman, J.

We concur:

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Kline, P.J.

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Stewart, J.