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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CRYSTAL B.,

Petitioner,

v.

THE SUPERIOR COURT OF VENTURA
COUNTY,

Respondent;

VENTURA COUNTY HUMAN
SERVICES AGENCY,

Real Party in Interest.

2d Civil No. B261834
(Super. Ct. No. J070052)
(Ventura County)

Crystal B., the biological mother of Olivia M., seeks extraordinary writ relief from the juvenile court's February 2, 2015 order terminating reunification services and setting a permanent placement hearing. (Welf. & Inst. Code, §§ 366.21, subd. (e); 366.26; Cal. Rules of Court, rule 8.452.)¹ The augmented record on appeal shows that real party in interest, Ventura County Human Services Agency (HSA), failed to comply with the inquiry and notice provisions of the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.) and that Olivia M. is a blood member of the Choctaw Nation of

¹ All statutory references are to the Welfare and Institutions Code unless otherwise stated.

Oklahoma. Pursuant to ICWA, we issue a peremptory writ of mandate directing the juvenile court to vacate its February 2, 2015 order terminating reunification services, the order granting Olivia's caretakers de facto parent status, and the order setting a permanent placement hearing. (*Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 785; *In re H.G.* (2015) 234 Cal.App.4th 906, 909-910.)

Procedural History

On June 23, 2014, HSA filed a dependency petition alleging that new born Olivia tested positive for amphetamine. (§ 300, subd. (b).) The petition stated that mother abused pain medication and methamphetamine while pregnant, creating a significant risk of harm to Olivia. Olivia's father, Aaron M., a methamphetamine user, had a lengthy history of substance abuse and was on parole for a domestic violence related conviction.

At the June 24, 2014 detention hearing, mother reported that she had Choctaw and Cherokee ancestry through her mother and Cherokee ancestry through her father. The trial court found that ICWA may apply and ordered HSA to give ICWA notice.

At the July 23, 2014 jurisdiction/disposition hearing, the trial court sustained the petition, continued Olivia's placement with the paternal grandfather, and ordered reunification services. Mother was warned that the failure to make substantive progress in a court-ordered treatment program or avail herself of the services provided could result in the termination of reunification services and a section 366.26 permanent placement hearing. (§ 361.5, subd. (a)(3).)

On August 12, 2014, HSA reported that "[m]other and maternal grandmother provided all information for the ICWA 030 [notice] at the detention hearing, and . . . there is no one in the family with additional information." At a September 19, 2014 ICWA hearing, letters were received from the tribes stating that Olivia was not eligible for membership. The trial court found that ICWA did not apply.

At the February 2, 2015 six-month review hearing, the trial court found there was no reasonable probability that mother would reunite with Olivia within six

months and terminated services. (§ 366.21, subd. (e).) The trial court granted Olivia's caretakers (paternal grandfather, Augie M., and his partner (Ricardo D.) de facto parent status and set the matter for a May 26, 2015 permanent placement hearing (§ 366.26).

Mother timely filed a petition for extraordinary relief. (Cal. Rules of Court, rule 8.452(c)(1).) On April 8, 2015, we granted mother's motion to take additional evidence that Olivia's maternal great-grandmother, Roberta Mae J., is an enrolled member of the Choctaw Nation of Oklahoma (Choctaw Nation). (Code Civ. Proc., § 909; Cal. Rules of Court, rule 8.252(c); see e.g., *In re H.G.*, *supra*, 234 Cal.App.4th at p. 908, fn. 2; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1117, fn. 5.) The augmented record on appeal includes Roberta Mae J.'s birth certificate and Choctaw Nation enrollment card. On May 5, 2015, we granted mother's second motion to take additional evidence that mother and Olivia became enrolled members of the Choctaw Nation tribe on April 15, 2015, and that the tribe filed a Notice of Intervention in the dependency proceeding. (See 25 U.S.C. § 1911(c) [Indian child's tribe has statutory right to intervene at any point in the proceeding]; Welf. & Inst. Code, § 224.4 [same].)

ICWA

Mother argues that HSA failed to comply with the inquiry and notice provisions of ICWA which applies to any state court proceeding involving the foster care, adoptive placement, or termination of parental rights to an Indian child. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 338.)² Under ICWA, HSA has an "affirmative and continuing duty" to "inquire whether a child . . . is or may be an Indian child. . . ." (§ 224.3, subd. (a); Cal. Rules of Court, rule 5.481(a); *In re W.B.* (2012) 55 Cal.4th 30, 53.) Once the agency "knows or has reason to know that an Indian child is involved, the social worker . . . is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable. . . ." (§ 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4); *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165-1166.) The duty of

² " 'Indian child' is defined as a child who is either (1) 'a member of an Indian tribe' or (2) 'eligible for membership in an Indian tribe' (25 U.S.C. § 1903(4).)" (*In re Jonathon S.*, *supra*, 129 Cal.App.4th at p. 338.)

further inquiry requires "interviewing the parents, Indian custodian, and extended family members, [and] . . . contacting the Bureau of Indian Affairs, . . . the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility." (§ 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4); *In re Gabriel G.*, *supra*, 206 Cal.App.4th at p. 1165.)

Although mother and the maternal grandmother advised HSA of Olivia's Choctaw ancestry, no further inquiry was made. Had HSA asked, it would have learned that the maternal great-grandmother, Roberta Mae J., is alive, is an enrolled member of the Choctaw Nation, and was born on the Kiowa Reservation in Lawton, Oklahoma. This information was not set forth in the ICWA-30 notice and prejudiced Choctaw Nation's ability to search its tribal registry. (See e.g., *In re S.M.*, *supra*, 118 Cal.App.4th 1108, 1117 [omission of information about child's paternal grandfather and great-grandmother prevented tribes from conducting meaningful search].) Responding to the ICWA notice, Choctaw Nation wrote that eligibility for membership is based on lineal descent and "if any additional information becomes available which might help in establishing Indian heritage, please forward it to us so that a further determination can be made."

After the writ petition was filed, mother's counsel submitted certificates and enrollment applications to the Choctaw Nation tribe. On May 5, 2015, we granted mother's request to take additional evidence that Choctaw Nation issued membership cards to mother and Olivia on April 15, 2015. The tribe's determination that Olivia is a member of Choctaw Nation is conclusive. (§ 224.3, subd. (e)(1); *In re Jack C. III* (2011) 192 Cal.App.4th 967, 980; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 255.) HSA's failure to comply with the ICWA notice requirements before the six month review hearing requires that we reverse the February 2, 2015 order terminating reunification services, the order granting Olivia's caretakers de facto parent status, and the order for a section 366.26 hearing. (See e.g., *Nicole K. v. Superior Court*, *supra*, 146 Cal.App.4th at p. 785 [ICWA notice defect; order terminating reunification services and order scheduling a 366.26 hearing vacated]; *In re Louis S.* (2004) 117 Cal.App.4th 622,

634 [reversing order entered at 12 month review hearing and all subsequent orders]; *In re H.G.*, *supra*, 234 Cal.App.4th at pp. 909-910 [reversing section 366.26 order terminating parental rights].) Where, as here, the child is in out-of-home placement, ICWA notice must be provided with respect to any status review hearing (§ 293, subd. (g)) and section 366.26 hearing (§ 294, subd. (i)). "A parent's compliance with the case plan has no bearing on the tribe's right to notice and to intervene if appropriate." (*Nicole K. v. Superior Court*, *supra*, 146 Cal.App.4th at p. 784.)

Prior Orders

Mother requests that this court invalidate the jurisdiction and disposition orders on the ground that Olivia is a member of the Choctaw Nation tribe. We lack authority to do so. (*In re H.G.*, *supra*,) 234 Cal.App.4th at p. 909, fn. 3; *In re Jonathan S.*, *supra*, 129 Cal.App.4th at pp. 340-342.) The only orders before us are the February 2, 2015 orders. When a juvenile court fails to comply with ICWA, 25 United States Code section 1914 permits an Indian child, parent, or tribe to petition a court of competent jurisdiction to invalidate any action in violation of sections 1911 through 1913 of ICWA. (See § 224, subdivision (e); *In re Jonathon S.* *supra*, 129 Cal.App.4th at p. 341.) "[I]n many instances, a petition under the [ICWA] enforcement provision will require the resolution of disputed factual issues. We are not the right kind of court." (*Ibid.*)

California Rules of Court rule 5.486(a)-(b) provides that ICWA-based petitions to invalidate prior orders should be filed in the juvenile court. "Any petition under the enforcement provision [of ICWA] to invalidate an order in an open dependency must be filed in the juvenile court; only after the juvenile court renders an appealable ruling on the petition can we review the issues on appeal." (*In re Jonathon S.*, *supra*, 129 Cal.App.4th at p. 342.)

Disposition

Let a peremptory writ of mandate issue directing respondent juvenile court to vacate its February 2, 2015 order terminating reunification services, the order granting Olivia's caretakers de facto parent status, and the order setting a section 366.26 permanent placement hearing are reversed. The juvenile court is directed to conduct a

new six-month review hearing in conformity with the provisions of ICWA and applicable state law.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Bruce A. Young, Judge
Superior Court County of Ventura

Andrea R. St. Julian, for Petitioner.

No appearance for Respondent.

Andrew Wolf for Olivia M, Real Party in Interest.