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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re J.B. et al., Persons Coming Under the Juvenile Court Law.	
SONOMA COUNTY HUMAN SERVICES DEPARTMENT, Plaintiff and Respondent, v. S.B., Defendant and Appellant.	A143597 (Sonoma County Super. Ct. No. 4149-DEP, 4150-DEP)

S.B. (Mother) appeals from an order dismissing dependency proceedings for her daughters J.B, born in 2002, and S.G., born in 2005. Mother contends that the dispositional orders in the cases, as well as the dismissal orders, must be reversed because of violations of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA). The issue is whether ICWA applied in the cases after a tribe advised the Sonoma County Human Services Department (the Department) that the girls were Indian children, but agreed, and failed, to confirm its determination in writing and failed to respond to a follow-up inquiry by the Department. Although the tribe's advice was not definitive, it provided information suggesting, and gave the Department and the court reason to know, that the girls were Indian children. In these circumstances, we conclude that the Department and the court were required to assume that ICWA applied and proceed with

the cases accordingly. Because the tribe was not provided with notice of the hearing at which the dependencies were dismissed, we conditionally reverse the order dismissing the dependencies, and direct the juvenile court to ensure compliance with ICWA's notice requirements in connection with the dismissal hearing.

I. BACKGROUND

In March 2013, dependency petitions were filed for the girls on the grounds of failure to protect (Welf. & Inst. Code, § 300, subd. (b)),[1] and serious emotional damage (§ 300, subd. (c)). The petitions alleged that in February 2013 Mother and J.G. (Father), J.B.'s stepfather and S.G.'s father,[2] had a physical altercation at a restaurant in the presence of the girls, and that from July 2008 to September 2012, Mother was arrested seven times and convicted twice for substance abuse offenses. On March 29, the court ordered the children detained, and set a jurisdiction/disposition hearing for April 25. Mother and Father agreed to drug test after the hearing concluded, and the dependency petitions were later amended to allege that they tested positive for methamphetamine on the date of the hearing.

On March 29, Mother filed a "Parental Notification of Indian Status" (form ICWA-020) stating that she might have Indian ancestry through the Colville Tribe in the state of Washington. Father also filed this form, stating that he was unaware of any Indian ancestry.

On April 9, the Department sent a "Notice of Child Custody Proceeding for Indian Child" (form ICWA-030) of a jurisdiction/disposition hearing for S.G. on April 25 to the Sacramento Area Director of the Bureau of Indian Affairs, the Secretary of the Interior, and the Colville Business Council at the address listed in the Federal Register. On April 12, the Department sent this notice for J.B. to these same parties. The April 12 notice included a letter from Kara Jacobs, the Department's case worker, attaching: a 1998 descendant certification from the Colville Confederated Tribes stating that Connie

[1] Subsequent statutory references are to the Welfare and Institutions Code.

[2] Father is not J.B.'s biological father, but he raised her as her father since she was two years old.

Maxine Best-Elgin, identified as the children's maternal great-great aunt, was a descendent of Arthur Best Jr., an enrolled member of the tribe; a death certificate for Arthur Best, identified as the maternal great-great grandfather; and a birth certificate for Jack Best, identified as the maternal grandfather.

The Department's report for the April 25 hearing indicated that the children were on an extended visit with their maternal great-aunt and her husband. The report stated with respect to IWCA: "The Indian Child Welfare Act does or may apply. [¶] The children, [J.B.] and [S.G.], may be Indian children with the Colville Tribe (state of Washington). Based on documents, copies of which have been both filed with the Court and sent to the B.I.A., Dept. of Interior, and the Tribe, it appears that at least one family member and probably more are registered members of the Colville Tribe. Therefore, this writer anticipates that this will likely be an ICWA case. However, that is up to the Tribe, and as of this writing no response has yet been received. The writer is hopeful that some response will be forthcoming next week, preferably before the Jurisdiction/Disposition hearing. If it is not, the Department has no choice but to ask the Court to find that ICWA **does not** apply at this time, with the understanding that this status is liable to change in the near future."

At the April 25 hearing, the cases were continued for a settlement conference at the parents' request. At a master calendar hearing on May 22, the parties advised that they had participated in a settlement conference, and the court and the case worker had the following colloquy: "The Court: All right. The Court has read the report and with regard to the ICWA issue, the status is such that ICWA may apply, but the tribe has not responded to the inquiries of the department. Has that changed? [¶] Ms. Jacobs: The tribe contacted me by phone and said it would apply and they would intervene. This was some weeks ago. They said they would send me something in writing and they have not, and they have not filed a motion to intervene. [¶] The Court: Following the basic philosophy that minors can't wait for adults to act, the Court will proceed. If the tribe elects to become involved, the Court will certainly recognize and accept that upon their action, but they will need to take that action. The Court won't wait for that [to] happen.

[¶] Ms. Jacobs: I will keep them apprised, your Honor, of upcoming court dates." The court set a contested hearing for July 16. The day after the master calendar hearing, Jacobs telephoned the Colville Tribe's ICWA representative.

The Department reported for the July 16 hearing that the girls had been placed with the paternal grandmother and step-grandfather on June 1. A previous reported had noted that the girls lived with these grandparents from December 2008 to October 2009 under a guardianship that resulted from "mother's substance abuse and General Neglect issues, and the father's unavailability due to his incarceration in prison."

With respect to ICWA, the July 16 report stated: "The children may or do have Indian heritage on the maternal side. The Department noticed the B.I.A. and Colville (Washington) Tribe in April, 2013. On May 8, 2013, this writer received a phone call from Buffy Nicolson, ICWA specialist for the Colville Tribe, stating that the minors were Indian children and that the Tribe intended to intervene. This writer asked her to confirm this in writing, and gave her contact information for assigned county counsel, suggesting that their attorney call that person. To date, no motion has been filed and the writer has not received status confirmation in writing. There was no response to this writer's follow-up phone call to Ms. Nicolson on May 23, 2013. The Department must therefore ask the Court to find that ICWA does not apply at this time."

On July 16, at the request of the parties, the court supervised a settlement conference. On July 17, a contested hearing was set for August 23. The Department's report for the August 23 hearing indicated that the girls continued to reside with the paternal grandparents. At the August 23 hearing, the cases were continued for a master calendar hearing on September 4, and a contested hearing on September 17. In its report for the September 4 hearing, the Department recommended that reunification services for Mother and Father be denied under section 361, subdivision (b)(13), which provides for denial of services if a parent has failed or refused court-ordered substance abuse treatment.

When the jurisdiction/disposition hearing was finally held on September 17, the parties reached a settlement. Mother and Father accepted denial of reunification services,

waived their rights to a section 366.26 hearing, and agreed to a permanent plan of guardianship with the paternal grandparents. The court found that ICWA did not apply to the cases.

The Department filed reports in March and July 2014 recommending that the permanent plan of guardianship be continued. On July 10, the court continued the guardianship plan "with a specific goal of dismissal." On September 11, the court dismissed the dependency cases.

I. DISCUSSION

Mother contends that the court erred when it found that ICWA did not apply in these cases because the Colville Tribe determined that the girls were Indian children and that ICWA applied. This determination was communicated to the case worker by the tribe's representative in the May 8 phone call, and by the case worker to the court at the May 22 hearing. Mother argues once the determination was made, compliance with ICWA was mandatory.

Because the Department and the court did not follow ICWA's requirements following the determination, Mother maintains that various ICWA violations occurred, including lack of notice (§ 224.2, subd. (b) [tribe must be notified of every hearing whenever it is known or there is reason to know that an Indian child is involved]), failure to make necessary findings (e.g., § 361.1, subd. (d) [in an Indian child custody proceeding, court must find that active efforts were made to prevent or eliminate the need for removal of the minor from his or her home]), and failure to apply ICWA's placement preferences (§ 361.31).

Mother notes that on May 8, 2013, when case worker Jacobs spoke with Colville Tribe representative Nicholson, the girls were residing with their maternal great-aunt, who may have been an Indian relative. They were thereafter placed with non-Indian paternal grandparents. Mother contends that if the Colville Tribe had been notified of the jurisdiction/disposition hearing and learned that the girls had "moved from an Indian home to a non-Indian home, it may have asserted its right to intervene at that point or, at the very least, chosen to attend the proceedings."

All of these contentions hinge on Mother's claim that the Colville tribe determined that the girls were Indian children. Mother's reply brief states that "ICWA notice is not in question. Proper notice was given." Rather, her argument is that "an ICWA determination had been made and communicated; the ICWA was applicable when the trial court was informed of the Tribe's determination in 2013." She contends that "[s]ince the tribe determined that [J.B.] and [S.G.] were Indian children within the meaning of the ICWA, the provisions of the ICWA should have been followed."

"The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 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." (§ 224.3, subd. (a).) "If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer is required to make further inquiry regarding the possible Indian status of the child . . . ." (§ 224.3, subd. (c).) "A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe . . . shall be conclusive." (§ 224.3, subd. (e)(1); see § 224, subd. (c).) "If proper and adequate notice has been provided pursuant to section 224.2 [specifying the notice required when an Indian child is involved] and neither the tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that [ICWA] does not apply to the proceedings . . . ." (§ 224.3, subd. (e)(3).)

Mother argues that the Colville Tribe made a "determinative response" to the Department's April 9 and 12 notices when its representative Nicolson called case worker Jacobs on May 8 and stated that the girls were Indian children. Mother observes that neither ICWA, the Bureau of Indian Affairs Guidelines for Indian child custody proceedings, nor the California statutes require that the determination be in writing.

Even if the Department could not require the tribe to confirm its determination in writing, Jacobs represented that Nicolson agreed to do so. In view of that agreement, the

determination could be seen as merely provisional, and subject to further confirmation. Since no written communication was received, and Nicolson did not respond to Jacobs' follow-up inquiry, it can be argued that the tribe did not provide a determinative response to the Department's ICWA notices.

However, continuing notices to a tribe are required so long as the agency or court "knows or *has reason to know* that an Indian child is involved." (§ 224.2, subd. (a) (italics added); 25 U.S.C. § 1912(a); see also 224.2, subd. (b)].) Section 224.3, subdivision (b) states: "(b) The circumstances that may provide reason to know the child is an Indian child include . . . : [¶] (1) A person having an interest in the child, including . . . a tribe . . . provides information *suggesting* the child is a member of a tribe or eligible for a membership in a tribe." (Italics added.) The Colville Tribe's response to the ICWA notice gave the Department and the court "reason to know" that the girls were Indian children, and at the least "suggested" that status. Accordingly, we conclude that the tribe's response was sufficient to require further notice in compliance with ICWA.

The statutes setting forth the notice required under ICWA must inform our analysis of the tribe's communication to the Department and the consequences of that communication. " 'Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies. Specifically, the tribe has the right to obtain jurisdiction over the proceedings by transfer to the tribal court or may intervene in the state court proceedings. Without notice, these important rights granted by the Act would become meaningless.' " *In re A.G.* (2012) 204 Cal.App.4th 1390, 1396.) "Because of their critical importance, ICWA's notice requirements are strictly construed." (*Id.* at p. 1397.) "When there is some credible reason to know a child is an Indian child notice, should be required. Further, courts should err on the side of reasonable caution and require ICWA notice if it is a close call." (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2015) § 2.125[2][b], p. 2-376 (Seiser).)

The Department asks us to take judicial notice of: (1) the Constitution of the Federated Tribes of the Colville Reservation, and (2) a declaration stating that, after Mother appealed, the Department unsuccessfully attempted to communicate with the Colville Tribe about the cases. The Department argues that provisions in the constitution show that the girls are not eligible for membership in the tribe. We decline to take judicial notice of the tribe's constitution because "membership criteria are the tribe's prerogative" (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1253) and the constitution is irrelevant to the issue on appeal, which concerns the effect of the tribe's response to the Department's ICWA notices. We likewise decline to take judicial notice of the Department's attempts to communicate with the tribe after the appeal was filed because they are irrelevant to the adequacy of ICWA compliance during the course of the dependency proceedings.

Mother contends that if we conclude the Department and the court erred when they failed to follow the dictates of ICWA, we must reverse the dispositional orders for the girls as well as the order terminating the dependencies from which she has appealed. However, "[i]f a dependency case is reversed on appeal due to an ICWA or California notice issue, the appellate court can only reverse the judgment the appeal was taken from, not any earlier findings and orders, since the error is a statutory one, not a jurisdictional one." (*Seiser, supra,* § 2.125[2][b], pp. 2-380–2-381, citing inter alia *In re Jonathan S.* (2005) 129 Cal.App.4th 334, 340-342; see also *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151 [waiver rule precluding challenges to final orders is not circumvented by claim of ineffective assistance of counsel].)

III. DISPOSITION

The order terminating the dependencies is reversed. The juvenile court is directed to order the Department to provide notice of the termination hearing to the Colville Tribe as required by ICWA, and to hold a new hearing if the tribe intervenes. If the tribe does not intervene after receiving proper notice, the order terminating the dependencies shall be reinstated.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Jenkins, J.