Filed 1/31/23 In re X.R. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re X.R., a Person Coming Under the Juvenile Court Law.	B318808 (Los Angeles County Super. Ct. Nos. 20CCJP05092, 20CCJP05092A)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. I.R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Tara L. Newman, Judge. Affirmed.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant.

Dawyn R. Harrison, Acting County Counsel, Kim Nemoy, Assistant County Counsel, Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Father I.R. appeals from a juvenile court order terminating his parental rights to his son, X.R., under Welfare and Institutions Code section 366.26.[1] He contends the order must be reversed because the juvenile court and the Los Angeles County Department of Children and Family Services (DCFS) failed to comply with the initial inquiry requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) and related state statutes. Finding any ICWA errors harmless, we affirm.

BACKGROUND[2]

Father and mother D.G., who is not a party to this appeal, are the parents of X.R., born in fall 2019. The family came to the attention of DCFS in August 2020, when DCFS received an anonymous report alleging that mother was abusing drugs and expressing concern that X.R. was not safe in her care. Father was incarcerated at the time.

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

[2] Because the sole issue on appeal concerns compliance with ICWA and related state statutes, we limit our recitation of the facts and procedural background to those matters relevant to that issue, except as necessary for context.

During DCFS's investigation of the allegations, mother admitted drug use, though not abuse. Mother reported that father also used drugs. She also reported that father had physically abused her in X.R.'s presence; she stated that she had to put X.R. down "many times" to prevent him from being struck, and father had once almost stepped on X.R. during a dispute. Mother's family members reported seeing bruises on mother's arms. X.R. appeared well cared for and did not have any marks indicative of abuse.

DCFS detained X.R. and placed him with maternal relatives. On September 25, 2020, DCFS filed a dependency petition pursuant to section 300, subdivisions (a) and (b)(1). Counts a-1 and b-1 alleged that X.R. was at risk due to parents' domestic violence, and counts b-2 and b-3 alleged he was at risk due to mother's and father's respective substance abuse. The petition noted that mother denied X.R. had Native American ancestry during the investigation.

At a detention hearing on September 30, 2020, mother's counsel filed a Parental Notification of Indian Status form (ICWA-020) on mother's behalf. A checkbox on the unsigned form indicated that mother had "no Indian ancestry as far as I know." The court indicated during the hearing that it had reviewed the form, which it noted was "consistent with the information provided in the [detention] report." In a minute order finding detention appropriate, the court stated that it had no reason to know that ICWA applied "as to Mother." It deferred further findings until father appeared.

Father appeared remotely from state prison and was appointed counsel on December 15, 2020. Father's counsel filed an ICWA-020 form on father's behalf the same day. A checkbox

on the unsigned form indicated that father had "no Indian ancestry as far as I know." Father also orally told the court he did not have any Native American heritage. The juvenile court found that it did not have reason to know that X.R. was an Indian child. It also ordered both parents "to keep the Department, their Attorney and the Court aware of any new information relating to possible ICWA status."

After an adjudication hearing on May 3, 2021 at which mother pled no contest to the allegations in the petition, the court struck the section 300, subdivision (a) allegation and sustained the three subdivision (b)(1) allegations as amended by interlineation. The court declared X.R. a dependent and ordered him removed from both parents. The court ordered reunification services for mother but denied them to father pursuant to section 361.5, subdivision (e); it allowed father to interact with X.R. by letter and telephone, and to receive photographs of him.

In a status review report prepared in advance of the November 1, 2021 review hearing, DCFS reported that X.R. continued to do well with his caregivers. The caregivers stated that mother had not visited X.R. in person or over the phone since June. DCFS also reported that mother had "yet to make herself available to speak" with DCFS and to its knowledge had not enrolled in any services. DCFS recommended terminating mother's services and moving forward with a permanent plan of adoption for X.R. The court adopted the recommendations and terminated mother's reunification services at the November 1, 2021 hearing. The court set the matter for a permanency planning hearing pursuant to section 366.26.

The section 366.26 hearing took place on February 28, 2022. After hearing arguments from counsel, the juvenile court

terminated both parents' parental rights. Father timely appealed.

DISCUSSION

Father's sole argument on appeal is that the order terminating parental rights must be conditionally reversed because DCFS and the court failed to comply with their duties of inquiry under ICWA and related state statutes. We disagree.

I. Legal Principles and Standard of Review

ICWA reflects "a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards that a state court . . . must follow before removing an Indian child from his or her family." (*In re Austin J.* (2020) 47 Cal.App.5th 870, 881.) "In any given case, ICWA applies or not depending on whether the child who is the subject of the custody proceeding is an Indian child." (*In re Abbigail A.*, (2016) 1 Cal.5th 83, 90.) Both ICWA and state statutory law define an "Indian child" as a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4); accord, § 224.1, subds. (a)-(b).) When a court "knows or has reason to know that an Indian child is involved" in "any involuntary proceedings in a State court," the agency seeking foster care placement of an Indian child is required to "notify the parent or Indian custodian and the Indian child's tribe . . . of the pending proceedings and of their right of intervention. . . . No foster care placement . . . proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary. . . ." (25 U.S. § 1912(a).)

"'"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. [Citation.] Federal regulations implementing ICWA, however, require that state courts 'ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child.' [Citation.] The court must also 'instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.'"'" (*In re Y.W.* (2021) 70 Cal.App.5th 542, 551; see 25 C.F.R. § 23.107(a) (2021).) Additionally, state law "more broadly imposes on social services agencies and juvenile courts (but not parents) an 'affirmative and continuing duty to inquire' whether a child in the dependency proceeding 'is or may be an Indian child.'" (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 741-742; see § 224.2, subd. (a); *In re Y.W.*, *supra*, 70 Cal.App.5th at p. 551.)

"The duty to inquire begins with the initial contact, including, but not limited to, asking the party reporting child abuse or neglect whether the party has any information that the child may be an Indian child." (§ 224.2, subd. (a).) The inquiry duty continues if a child is placed in the temporary custody of a county welfare department. (§ 224.2, subd. (b).) "Inquiry includes, but is not limited to, 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." (*Ibid.*) If this initial inquiry creates a "reason to believe" a child is an Indian child, DCFS is required to "make

further inquiry regarding the possible Indian status of the child, and shall make that inquiry as soon as practicable." (§ 224.2, subd. (e); *In re D.S.* (2020) 46 Cal.App.5th 1041, 1052.) If the further inquiry gives DCFS a "reason to know" the child is an Indian child, then the formal notice requirements set forth in section 224.3 apply. (§§ 224.2, subd. (d), 224.3, subd. (a); *In re D.S., supra,* 46 Cal.App.5th at p. 1052.) Alternatively, the juvenile court may find that a child is not an Indian child if the agency's "proper and adequate" inquiry and due diligence reveal no "reason to know" the child is an Indian child. (§ 224.2, subd. (i)(2); *In re D.S.*, *supra*, 46 Cal.App.5th at p. 1050.)

"We review claims of inadequate inquiry into a child's Indian ancestry for substantial evidence." (*In re H.V.* (2022) 75 Cal.App.5th 433, 438; see also *In re Josiah T.* (2021) 71 Cal.App.5th 388, 401 [applying substantial evidence standard to ICWA findings].)

II. Analysis

Father contends the juvenile court and DCFS failed to fulfill their inquiry duties under section 224.2, subdivisions (a) and (b). Specifically, he asserts DCFS failed to make any inquiry of various paternal and maternal relatives it contacted during the proceedings, including paternal grandmother, paternal great-grandparents, maternal grandparents, and the maternal great-aunt and great-uncle with whom X.R. was placed. He further asserts the juvenile court did not satisfy its duty because it failed to ensure DCFS asked extended family members about potential Indian ancestry. DCFS responds any ICWA error was harmless. We agree with DCFS.

Despite both parents' denial of Indian ancestry, DCFS had a duty to ask their extended family members about any potential

Indian heritage. (*In re Dezi C.* (2022) 79 Cal.App.5th 769, 776 (*Dezi C.*) ["the initial duty of inquiry mandated by California's version of ICWA obligates the Department to question 'extended family members' about a child's possible American Indian heritage"], review granted Sept. 21, 2022, S275578; § 224.2, subd. (b).) The relatives father identifies in his brief were readily available to provide information on possible Indian ancestry, but there is no indication that DCFS broached the topic with them. "Where, as here, there is no doubt that the Department's inquiry was erroneous, our examination as to whether substantial evidence supports the juvenile court's ICWA finding ends up turning on whether that error by the Department was harmless—in other words, we must assess whether it is reasonably probable that the juvenile court would have made the same ICWA finding had the inquiry been done properly. [Citation.] If so, the error is harmless and we should affirm; otherwise, we must send it back for the Department to conduct a more comprehensive inquiry." (*Dezi C.*, *supra*, 79 Cal.App.5th at p. 777.)

California appellate courts have formulated several different tests for deciding whether a defective initial inquiry is harmless. Unless and until our Supreme Court resolves the matter, Division Four of this court will apply the rule our colleagues in Division Two of this court set forth in *Dezi C.*: "[A]n agency's failure to conduct a proper initial inquiry into a dependent child's American Indian heritage is harmless unless the record contains information suggesting a reason to believe that the child may be an 'Indian child' within the meaning of ICWA, such that the absence of further inquiry was prejudicial to

the juvenile court's ICWA finding." (*Dezi C.*, *supra*, 79 Cal.App.5th at p. 779.)

Nothing in the record suggests any reason to believe either parent's knowledge of their heritage as expressed on the ICWA-020 forms and in open court is incorrect, or that X.R. might have Indian ancestry. Father has not proffered additional evidence in his appellate filings. (See *Dezi C.*, *supra*, 79 Cal.App.5th at p. 779, fn. omitted [for purposes of evaluating whether defective initial inquiry is harmless, "the 'record' includes both the record of proceedings in the juvenile court and any proffer the appealing parent makes on appeal"].) Under these circumstances, we conclude any deficiencies in the ICWA procedures were harmless.

DISPOSITION

The order is affirmed.

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COLLINS, ACTING P.J.

We concur:

CURREY, J.

SCADUTO, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.