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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

In re D. T. et al., Persons Coming Under the Juvenile Court Law.	
EL DORADO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. DARCI S., Defendant and Appellant.	C043785 (Super. Ct. No. PDP20010021)

APPEAL from a judgment of the Superior Court of El Dorado County, Gregory W. Dwyer, Temporary Judge[1]. Reversed in part and affirmed in part.

Janet H. Saalfield, under appointment by the Court of Appeal, for Defendant and Appellant.

Louis B. Green, County Counsel and Cherie J. Vallelunga, Deputy County Counsel, for Plaintiff and Respondent.

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* Under California Rules of Court, rules 976(b) and 976.1, only the Factual and Procedural Background and part I of the Factual and Procedural Background, part II of the Discussion, and the Disposition are certified for publication.

1 Although the stipulation inadvertently referred to article VI, section 22 of the California Constitution, the designation was made pursuant to article VI, section 21.

Appellant, the mother of D. T. and R. T. (the minors), appeals from the juvenile court's order terminating her parental rights. Appellant contends the juvenile court failed to ensure compliance with the notice provisions of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) We agree and shall reverse.[2]

FACTUAL AND PROCEDURAL BACKGROUND

A dependency petition was filed in July 2001 concerning R. T. and D. T., ages one and two respectively, after their father was arrested on a warrant.

I

ICWA Issues

On forms entitled "DESIGNATION OF AMERICAN INDIAN STATUS," appellant and the minors' father indicated Indian heritage through the Cherokee tribe. The father indicated, more specifically, that his tribal affiliation was "Cherokee (Tennessee)." At the detention hearing, the juvenile court inquired whether the parents knew the particular tribe. The father's attorney replied "Tennessee for the father," while appellant's attorney stated that appellant "[wa]s not sure" but she would try to get the information and provide it to the social worker. The juvenile court ordered that notice be provided to the Bureau of Indian Affairs (BIA) and "the Cherokee

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[2] In the unpublished portion of this opinion we conclude that appellant has waived her contention that the juvenile court's finding of adoptability was not supported by substantial evidence.

Nation." The court sustained the petition as amended and continued the matter for a dispositional hearing.

In the social worker's report for the dispositional hearing, under a section entitled "INDIAN CHILD WELFARE ACT STATUS," it was reported: "Notices have been sent. SEE NOTICES." The record contains notices on form "SOC 319" to the three federally-recognized Cherokee tribes and the BIA. (65 Fed.Reg. 13298 (Mar. 13, 2000).)

At a subsequent hearing, the juvenile court inquired whether there had been any response from "the Cherokee Nation." The social worker said she had "received nothing back on the father." As to appellant, the social worker reported "it says that they have insufficient information." In response to the court's question as to what information was needed, the attorney for the social services agency responded: "It is important in most cases to be able to trace back to 1900 with names, birth dates, and birth places of ancestors." Appellant's attorney said appellant did not have any of this information but she was attempting to get it from her father, whom she had been unable to contact.

At the dispositional hearing, the attorney for the social services agency reported that a response had been received from the BIA "indicating that the child is not considered an Indian child, either one of them." In response to the court's query whether "[t]hey [we]re declining to be involved in these proceedings," the attorney responded "it says, 'Is not registered nor eligible to register as a member of this tribe.'"

The court found the "Cherokee Indian Nation has been noticed, they have responded, and . . . they are declining to participate in these proceedings." All subsequent reports from the social services agency stated the ICWA did not apply.

At the six-month review hearing, the juvenile court terminated reunification services and set a hearing to select a permanent plan for the minors pursuant to Welfare and Institutions Code section 366.26[3] because neither parent had complied with the case plan.

After the section 366.26 hearing, the juvenile court found the minors adoptable and terminated parental rights.

II

Adoptability Issues

Prior to the section 366.26 hearing, the minors' father wrote a letter to the juvenile court requesting an opportunity to reunify with the minors. In April and May 2002, the juvenile court held a hearing regarding the father's request and, ultimately, ordered additional reunification services for the father. At the hearing, the social worker testified she did not feel either minor had any "significant problems" that would interfere with a successful adoption. However, D. T. had some behavioral problems when he was first placed in foster care and, although he had made considerable progress in therapy, the social worker felt that a trauma, such as an unsuccessful

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

attempt at reunification, could cause him a set back. Likewise, D. T.'s therapist testified she did not have concerns about his ability to form attachments but that a failed reunification attempt with the father could create attachment problems.

Following the hearing, the father did not comply with services and was arrested for possession for sale of an "[i]llegal [s]ubstance." Meanwhile, the minors had "been assessed as adoptable" and, according to the social worker, would remain so "for a little while longer."

By November 2002, D. T.'s behavior was regressing, according to his therapist. She opined that D. T. was in need of "a permanent, safe, nurturing, consistent environment, so that he can build healthy attachments and feel safe in this world."

In December 2002, the juvenile court terminated the father's reunification services and, again, set a hearing to select and implement a permanent plan.

In the report for the section 366.26 hearing, the social worker stated that the minors were "considered adoptable," although an adoptive home had not yet been identified for them. The minors had remained in the same foster home throughout the dependency proceedings and had formed a close attachment to their foster parents, but the foster parents were not pursuing adoption. The minors were described as "attractive, healthy and normally developed," and they had shown an ability to develop close attachments to caregivers. D. T. was receiving speech and language services and, according to his foster mother, had "made

great progress." However, an assessment of D. T. indicated he lacked learning and social skills in several areas. Nonetheless, D. T.'s therapist reported there was no evidence that he had attachment issues or any other impediment to adoption. Both minors were scheduled to receive counseling once an adoptive home was identified to assist them in making the transition to a new home. At the section 366.26 hearing, both parents submitted the matter without argument. In addition, appellant and the father stipulated that the court could utilize the social worker's proposed recommendations, findings, and orders. The juvenile court found the minors adoptable and terminated parental rights.

DISCUSSION

I

Appellant has Waived her Challenge to the Finding of Adoptability

Appellant contends the juvenile court's finding of adoptability was not supported by substantial evidence. We conclude appellant has waived this claim.

At the section 366.26 hearing, appellant submitted the matter without argument and stipulated to the social worker's proposed recommendations, findings, and orders. Appellate courts have distinguished a submission on the social worker's report from a submission on the social worker's recommendations. By submitting on a report, the party "permit[s] the court to decide an issue on a limited and uncontested record." (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589.) In such cases, "the

court must nevertheless weigh evidence, make appropriate evidentiary findings and apply relevant law to determine whether the case has been proved. [Citation.]" (*Ibid.*) In such case, the party does not waive, for purposes of appeal, a challenge to the sufficiency of the evidence to support the juvenile court's findings and orders. (*Ibid.*)

However, "'submitting on the recommendation' constitute[s] acquiescence in or yielding to the social worker's recommended findings and orders, as distinguished from mere submission on the report itself." (*In re Richard K.*, *supra*, 25 Cal.App.4th at p. 589.) "[A] submittal on a social worker's recommendation dispels any challenge to and, in essence, endorses the court's issuance of the recommended findings and orders. Consequently, a parent who submits on a recommendation waives his or her right to contest the juvenile court's decision if it coincides with the social worker's recommendation. [Citation.]" (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 813.) "He who consents to an act is not wronged by it. [Citation.]" (*Richard K.*, at p. 590.)

In re Brian P. (2002) 99 Cal.App.4th 616 (*Brian P.*), relied on by appellant, does not dictate a contrary conclusion. In that case, the appellate court held: "When the merits are *contested*, a parent is not required to object to the social service agency's failure to carry its burden of proof on the question of adoptability. [Citations.]" (*Id.* at p. 623, italics added.)

Unlike in *Brian P.*, here, the merits were *not* contested. Moreover, appellant stipulated to the court's findings and orders. She may not now be heard to complain about the very findings and orders she stipulated to before the juvenile court. Consequently, we conclude her claim is frivolous.

II

The Juvenile Court Failed to Obtain Sufficient Information to Comply with the ICWA

Appellant contends the juvenile court erred by failing to ensure compliance with the notice provisions of the ICWA. We agree that the notice provided was insufficient.

In 1978, Congress passed the ICWA, which is designed "to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children 'in . . . homes which will reflect the unique values of Indian culture, . . .'" (*In re Levi U.* (2000) 78 Cal.App.4th 191, 195; 25 U.S.C. § 1902; *Mississippi Choctaw v. Holyfield* (1989) 490 U.S. 30 [104 L.Ed.2d 29].)

Among the procedural safeguards included in the ICWA is a provision for notice, which states in part: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt

requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).)

In addition, ICWA notice must include the following information, if known: the name of the child; the child's birth date and birthplace; the name of the tribe in which the child is enrolled or may be eligible for enrollment; names of the child's mother, father, grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases, as well as their birth dates, places of birth and death, tribal enrollment numbers, and current and former addresses; and a copy of the petition. (25 C.F.R. § 23.11(a) & (d); 25 U.S.C. § 1952.)

"Determination of tribal membership or eligibility for membership is made exclusively by the tribe." (Cal. Rules of Court, rule 1439(g).)[4] The Indian status of a child need not be certain or conclusive to trigger the ICWA's notice requirements. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.) In the present matter, under a section entitled "INDIAN CHILD WELFARE ACT STATUS," the social worker's report stated: "Notices have been sent. SEE NOTICES." The record contains notices to the BIA and the three federally-recognized Cherokee tribes on form "SOC 319." There are no other ICWA notices in the record.

Although the notice forms included notification of the pendency of the proceedings and an advisement of the right to

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[4] All further rule references are to the California Rules of Court unless otherwise indicated.

intervene, they provided scant information to assist the BIA and the tribes in making a determination as to whether the minors were Indian children. In fact, other than the names, birth dates, and birthplaces of the minors and their parents, no information was provided to assist the tribes in making this determination.

We are cognizant that appellant informed the juvenile court she did not have information going "back to 1900 with names, birth dates, and birth places of ancestors." However, the notices failed to include information already known to the social worker, such as appellant's married name, the parents' current addresses, the names of the minors' grandparents, and that the claimed tribal affiliation was Cherokee. All of this information was contained in the social worker's dispositional report.

Moreover, the social worker's affirmative duty to inquire whether the minors might be Indian children mandated, at a minimum, that she make some inquiry regarding the additional information required to be included in the ICWA notice. (See rule 1439(d).) The record does not disclose any inquiry of the father after he informed the court at the detention hearing that he had Cherokee heritage. And it cannot be implied from the fact that appellant could not trace her ancestors back to 1900 that she could provide no additional information about her parents or grandparents. Although the court instructed the parents to provide the social worker with "any and all information that you have or can reasonably give" regarding

Indian ancestry, there is nothing in the record to indicate that the parents were ever told, specifically, what information was relevant to this inquiry. The father's attorney stated as much when he informed the juvenile court: "I don't know what information the social worker needs for the father . . . ."

"[O]ne of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child involved in the proceedings is an Indian child. [Citation.]" (*In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 470.) Notice is meaningless if no information is provided to assist the tribes and the BIA in making this determination. With only the names, birth dates and birthplaces of the minors and the parents, it is little wonder the responses received were that the information was insufficient to make a determination or that the minors were not registered or eligible to register. Consequently, we conclude the notice provided was insufficient. As the tribes and the BIA were deprived of any meaningful opportunity to determine whether the minors were Indian children, the error was prejudicial.

III

Other ICWA Issues

Appellant raises a laundry list of other claims regarding the adequacy of the ICWA notice in this case. She asserts that counsel for the social services agency "substantially misled the court" when it said the "Cherokee Indian Nation" had been noticed and had declined to participate in the proceedings. We reject her claim as unsubstantiated that this statement misled

the court. We reach the same conclusion regarding her claim that the response from the tribe that was read to the court "was apparently taken out of context" because it was not a complete sentence.

Similarly, we reject appellant's claim that there was error because the record does not reflect "the court ever actually considered the [ICWA] notices and return receipts." (Italics and bold omitted.) Because there is nothing in the record to indicate the court did not consider these documents, we find this claim meritless.

We are also unpursuaded that the notice to the United Keetoowah Band of Cherokee Indians was somehow inadequate because it was addressed to the "United Keetoowah Band-ICWA." Likewise, we discern no significance in the fact that the signatures on the return receipts do not "appear to be that of the tribal chairman."

Nor is it significant that the social services agency failed to provide the court with a copy of the responses from the tribe or the BIA. Neither the ICWA nor rule 1439 requires the social services agency to file with the juvenile court copies of the responses from the tribes. (*In re L. B.* (2003) 110 Cal.App.4th 1420, 1425, fn. 3.)

We need not resolve appellant's claims that the social services agency failed to attach the petition to the notices (25 C.F.R. § 23.11(d)(4)), that the notices were not addressed to the tribal chairman or other agent designated for service (rule 1439(f)(2)), and that some of the notices were sent to addresses

other than those designated in the federal register (66 Fed.Reg. 65725 (Dec. 20, 2001), 64 Fed.Reg. 11490 (Mar. 9, 1999)). As we remand the matter for proper notice in compliance with the ICWA, we note only that these are additional requirements for proper notice.

DISPOSITION

The order terminating parental rights is vacated, and the matter is remanded to the juvenile court with directions to order the social services agency to make proper inquiry and to comply with the notice provisions of the ICWA. If after proper inquiry and notice, the BIA or a tribe determines that the minors are Indian children as defined by the ICWA, the juvenile court is ordered to conduct a new section 366.26 hearing in conformity with all provisions of the ICWA. If, on the other hand, no response is received or the tribes and the BIA determine that the minors are not Indian children, all previous findings and orders shall be reinstated.

In all other respects, the orders are affirmed.

ROBIE, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.