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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re DESTINY C. et al., Persons Coming Under the Juvenile Court Law.	B207957 (Los Angeles County Super. Ct. No. CK71639)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.B., etc., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Marilyn Mackel, Juvenile Court Referee. Affirmed.

Christopher Blake, under appointment of the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Denise M. Hippach, County Counsel, for Plaintiff and Respondent.

INTRODUCTION

S.B., also known as S.S., mother of nine-year-old Destiny C., and seven-year-old Dominique C. appeals from the disposition order of the juvenile court. She contends that the court erred by not ensuring proper notification pursuant to the Indian Child Welfare Act (ICWA) (Welf. & Inst. Code, § 224 et seq.).[1] We hold, based on the procedural posture of this case, that the ICWA notice requirements have not been triggered. Accordingly, the order is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The Department of Children and Family Services (the Department) detained the children in February 2008 and filed a petition based on mother's allegations that father, Jorge C., physically abused the children. Mother filed a notification with the juvenile court indicating she may have Shoshone Indian ancestry. The court ordered the Department to notify the Shoshone Tribe and the Department of the Interior.

In advance of the jurisdictional hearing, the Department learned that mother had asked the children to lie about their father abusing them and that it was mother who behaved in a manner that was extremely abusive to the girls. The Department recommended that the children be released to father as it was in their best interest. Accordingly, the court ordered the girls released to father. After the court dismissed the petition, the Department filed an amended petition containing the allegation that mother had failed to protect the children and had been emotionally abusive. (§ 300, subd. (b).)

At the jurisdiction hearing in May 2008, the juvenile court sustained the allegation against mother and declared the children dependents of the court. (§ 300, subd. (b).) The court detained the children from mother's custody and placed them in father's home. Accordingly, the court ordered reunification

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

services for mother and family maintenance services for father. The children remain in father's custody. Mother appeals.

CONTENTIONS

Appellant contends that unlike the federal statute, the California version contains an absolute obligation on the part of the Department to inquire of and notify the child's tribe irrespective of the placement plans for the child.

DISCUSSION

ICWA protects the interests of Indian children and promotes the stability and security of Indian children and Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency proceedings. (25 U.S.C. §§ 1902, 1903(1) & 1911(c).) Toward that end, both the California and federal ICWA statutes mandate that the social welfare agency notify the child's tribe "[w]hen a dependency court has reason to know the *proceeding* involves an Indian child . . . ." (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 383, italics added.)

The question in this case is whether this requirement of tribal notice is triggered. The answer is the same under the California or the federal statute: Section 224.3 of the California ICWA, reads, "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 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings . . . *if the child is at risk of entering foster care or is in foster care*." (§ 224.3, subd. (a), italics added; accord, 25 U.S.C. § 1912 (a).)[2]

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[2] 25 United States Code section 1912, subdivision (a) reads in relevant 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 . . . . *No foster care placement or termination of parental rights proceeding shall be held until at least*

Additionally, section 224.2, governing the contents and time of notification, requires notice to be sent "in an Indian child custody proceeding under this code . . . ." (§ 224.2, subd. (a).) An "Indian child custody proceeding" is defined in California as "a 'child custody proceeding' within the meaning of Section 1903 of the Indian Child Welfare Act," and includes a voluntary or involuntary proceeding that may result in an Indian child's "temporary or long-term foster care or guardianship placement, termination of parental rights, preadoptive placement after termination of parental rights, or adoptive placement." (§ 224.1, subd. (c).)[3] Turning to 25 United States Code section 1903(1), it defines an Indian "child custody proceeding" as "(i) 'foster care placement' . . . [¶] (ii) 'termination of parental rights' . . . [¶] (iii) 'preadoptive placement' . . . and [¶] (iv) 'adoptive placement' . . . ." (See also Cal. Rules of Court, rule 5.481 [declaring continuing duty to inquire on "party seeking a foster-care placement, guardianship, conservatorship, custody placement under Family Code section 3041, declaration freeing a child from the custody or control of one or both parents, termination of parental rights, or adoption]; Fam. Code, § 177, subd. (a) [custody proceedings]; Prob. Code, § 1459.5, subd. (b) [guardianship and conservatorship proceedings]; 25 U.S.C. § 1912(a) [No proceeding to place the child in foster care or to terminate parental rights may be held until at least 10 days after the tribe or Department of the Interior has received notice].)[4]

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ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . ." (Italics added.)

[3] Section 224.1, subdivision (c) continues, " 'Indian child custody proceeding' does not include a voluntary foster care or guardianship placement if the parent or Indian custodian retains the right to have the child returned upon demand."

[4] 25 United States Code section 1903, subdivision (1) reads: "For the purposes of this chapter, except as may be specifically provided otherwise, the

Synthesized, the California and federal ICWA expect inquiry and notice to the child's tribe only when the child is either (A) "at risk of entering foster care or is in foster care" (§ 224.3, subd. (a)), or (B) is in an Indian child custody proceeding, i.e., in a proceeding where the child may be placed in temporary or long-term foster care or guardianship, or adoptive placement, or where the parental rights may be terminated. (§ 224.1, subd. (c); 25 U.S.C. § 1903(1).) Courts requiring inquiry of and notice to the tribe have involved children who were removed from their parents' custody and placed in foster care. (See e.g., *In re Shane G*. (2008) 166 Cal.App.4th 1532; *Justin L. v. Superior Court* (2008) 165 Cal.App.4th 1406; *In re A.B.* (2008) 164 Cal.App.4th 832; *In re Rayna N*. (2008) 163 Cal.App.4th 262; *In re Alice M*. (2008) 161 Cal.App.4th 1189.)

Here, the proceeding is not an "Indian child custody proceeding" as that phrase is defined by the California and federal statutes. The children are neither currently at risk of nor at present in temporary or long-term foster care, a guardianship, or in any potential adoptive placement; they have been placed with their father. Nor are they at risk of entering any of these placements at the moment because father is not offending. At the time the juvenile court ordered the Department to send notice to the Shoshone tribes, the children had been detained

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term--(1) 'child custody proceeding' shall mean and include--[¶] (i) 'foster care placement' which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; [¶] (ii) 'termination of parental rights' which shall mean any action resulting in the termination of the parent-child relationship; [¶] (iii) 'preadoptive placement' which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and [¶] (iv) 'adoptive placement' which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."

from both parents. Once the court placed the children with father, the Department no longer had any formal obligation to notify the tribes.

Appellant argues that the children "may be removed at any time," and the California version of ICWA, which affords greater protection to Indian children and Indian tribes than does the federal statute, indicates that placement of the child with a biological parent does not relieve the Department of the duty to comply with notice requirements. As authority, she quotes from section 224, subdivision (a)(2) which reads in relevant part: "It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, *regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding* . . . ." (Italics added.) Appellant overlooks subdivision (a)(1) of section 224, which also reads, "The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and other applicable law *designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered*, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture . . . ." (Italics added.) Destiny and Dominique are not in an out-of-home placement.

More important, these cited legislative findings and declarations are a statement of policy and do not accord substantive rights. The rights and duties are found in the later sections of the California ICWA, and with particular relevance to this case, sections 224.2, subdivision (a)(1) and 224.3, subdivision (a) described above.

Our conclusion here does not prejudice the rights or interests of Destiny and Dominique. Should father behave in a manner that triggers the filing of a petition naming him, or should the juvenile court remove the children from

father's custody to place them in foster care, then the Department's formal notification obligation will arise.

DISPOSITION

The order appealed from is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.