

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re JAMES D. et al., Persons Coming
Under the Juvenile Court Law.

SOLANO COUNTY DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

MARY F.,

Defendant and Appellant.

A133545

(Solano County
Super. Ct. Nos. J40976, J40977)

Mary F., the mother of William D. and James D., appeals from dispositional findings and orders, challenging only compliance issues under the federal Indian Child Welfare Act (ICWA). She seeks conditional reversal of the disposition orders and striking of the “ICWA inapplicability” finding because of the following alleged compliance errors: (1) defective notice; (2) unauthorized finding that ICWA was inapplicable; and (3) error in proceeding with disposition hearing. We affirm.

I. FACTUAL BACKGROUND

On July 30, 2012, this court denied Mary F.’s petition for writ review of a juvenile court order terminating reunification services and setting a permanent plan selection and implementation hearing pursuant to Welfare and Institutions Code¹ section 366.26.

¹ All further statutory references are to the Welfare and Institutions Code.

(*Mary F. v. Superior Court* (July 30, 2012, A135556) [nonpub. opn.].) The *Mary F.* opinion sets forth the following pertinent facts: “On September 19, 2011, the juvenile court sustained a juvenile dependency petition as amended as to William D. (born Sept. 2008) and James D. (born July 2010). The court found true allegations under section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling). Specifically, the court found that the alleged father, Joseph D., and petitioner were arrested for child endangerment after leaving the minors at a church nursery and disappearing for two hours, and were unable to provide ongoing care and supervision due to the subsequent incarceration. At that time James D. had an infected bug bite and rash on his leg that required immediate hospitalization, and the parents knew or reasonably should have known that his condition required medical attention and that delay in seeking it placed him at a substantial risk of physical harm. This state of affairs placed *both* minors at a substantial risk of serious physical harm.”

Meanwhile, respondent Solano County Department of Health and Social Services (Department) began taking action to comply with the ICWA. The maternal grandmother had told the social worker that there was Native American ancestry on Mary F.’s father’s side of the family. Mary F. reported that her paternal grandfather, George F., was Cherokee and filed a parental notification of Indian status stating that he was born on a reservation in North Carolina. On August 8, 2011, the Department filed a notice of child custody proceeding for Indian child and mailed it to the Bureau of Indian Affairs (BIA) and three federally recognized Cherokee tribes. The form reported that Mary F. claimed that her grandfather, George F., was Cherokee.

At the contested jurisdiction hearing, counsel for the Department noted that no responses had been received from the tribes. The court recognized that the “ICWA still may apply and we’re within the 60-day notice period.” In the findings and order after the jurisdiction hearing, the court indicated that notice had been properly provided under the ICWA.

The disposition report recommended reunification services for Mary F. with discretion to the Department to return the minors to her under a family maintenance plan.

As to Joseph D., no services were recommended unless he was determined to be a presumed father. The report also proposed that the court make a finding that the ICWA did not apply. The reporting social worker noted that the Department had received notices from the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee Indians and the Cherokee Nation, stating that the minors were not eligible for membership.

Both parents submitted on the report and recommendations of the Department. Joseph D. noticed his appeal on October 25, 2011; Mary F. on October 27, 2011.

Return receipts and response to the August 2011 ICWA notices were subsequently filed with the juvenile court.² Thereafter the Department faxed corrected notices to each tribe in April and May 2012 that included the maternal great grandfather's birthplace, and filed the notice and responses. All Cherokee tribes affirmed their determination that neither minor was an Indian child under the ICWA. On June 26, 2012, the juvenile court conducted an ICWA compliance hearing, reviewed the submitted document and concluded that the ICWA did not apply.

II. DISCUSSION

A. *Legal Framework*

The ICWA entitles an Indian tribe³ to intervene at any point in a state dependency action if the minor subject to the proceedings qualifies as an Indian child.⁴ (25 U.S.C. § 1911(c).) The tribe has exclusive authority to determine tribal membership or eligibility for membership. (§ 224.3, subd. (e)(1).)

² We grant the Department's request for judicial notice of ICWA compliance documents and a certified copy of an order demonstrating that the juvenile court held an ICWA compliance hearing.

³ An "Indian tribe" is "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians" (25 U.S.C. § 1903(8).)

⁴ An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) 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).)

A tribe's right to intervene requires that it have notice of the proceedings. Actual notice to the tribe is required both as to the proceedings and the right to intervene. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1265.) Where "the court, a social worker, or probation officer knows or has reason to know that an Indian child is involved, any notice sent in an Indian child custody proceeding under this code shall be sent to . . . the minor's tribe . . ." (§ 224.2, subd. (a).) Notice shall be sent by certified or registered mail, return receipt requested. (*Id.*, subd. (a)(1).) "Notice to the tribe shall be [given] to the tribal chairperson, unless the tribe has designated another agent for service." (*Id.*, subd. (a)(2).) Agents designated by tribes to accept ICWA service are published periodically in the Federal Register. (See 25 C.F.R. § 23.12 (2012).) Notice must be given on the form designated for that purpose, currently *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030). (Cal. Rules of Court, rule 5.481(b)(1).)

The juvenile court may determine that the ICWA is not applicable if (1) proper and adequate notice has been provided; and (2) neither a tribe nor the BIA has provided a determinative response within 60 days after receiving notice. (§ 224.3, subd. (e)(3).) Further, no proceeding other than a detention hearing may be held "until at least 10 days after receipt of notice" by the tribe or BIA. (§ 224.2, subd. (d).)

B. *Standard of Review*

Where there is an established lack of compliance with ICWA inquiry and notice requirements, courts may conditionally reverse dependency orders and direct the juvenile court to exact compliance with these mandates. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467; *In re Miracle M.* (2008) 160 Cal.App.4th 834, 848; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 705.) With this limited reversal approach for defective notice, if no Indian tribe chooses to intervene, the juvenile court is directed to reinstate the judgment. (*In re Francisco W.*, *supra*, 139 Cal.App.4th at p. 705.) Other courts have affirmed and remanded with orders to comply with the ICWA, and if it is determined that the act applies, the parents are entitled to petition the juvenile court to invalidate any orders that violate the ICWA. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 187-188; *In re Brooke C.* (2005) 127 Cal.App.4th 377, 386.) In any event, we review the juvenile

court's ICWA findings for substantial evidence. (*In re Hunter W.*, *supra*, 200 Cal.App.4th at p. 1467.)

C. Analysis

Mary F. asserts that the ICWA notices the Department sent in August 2011 were defective. She also asserts violations of the 60-day rule (§ 224.3, subd. (e)(3)) and the 10-day rule (§ 224.2, subd. (d)).

Mary F. first contends the notices failed to include important information about her grandfather, including his status as Cherokee Indian. The August 2011 notices as well as the subsequent notices faxed in the spring of 2012 indicated in the “[a]dditional information” field that Mary F. reported her grandfather was 100 percent Cherokee. However, the notices also indicated “[n]o information available” for “[t]ribe or band” on the field for “Mother’s Biological Grandfather.” Not all deficiencies in ICWA notices are prejudicial, and technical compliance with the requirements of the ICWA may not be required where there is substantial compliance. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1531.) Here, the information about George F.’s Cherokee ancestry was included on the forms; the placement of the information on the notice was insignificant and the form overall substantially complied on that point. (See *id.* at pp. 1531-1532.)

Mary F. also complains that the August 2011 notices omit the fact that George F. lived in New Jersey at some point, but these notices (as well as the subsequent notices) correctly show that her father, George F.’s son, was born in Trenton, New Jersey. From this the tribes could readily infer that George F. lived in New Jersey at some point in his life.

Further, she points out that the August 2011 notices had no information about George F.’s birthplace. However, the corrected notices state that his birthplace was North Carolina. After receiving the corrected notices, the tribes responded that the children were not Indian, and thus the omission of George F.’s birthplace on the August 2011 notices was harmless.

Mary F. also maintains the notices were defective because they were not addressed to the individual listed as designated agents for service, and one notice was sent to a

different street address than listed in the Federal Register. The list in effect at the time of the August 5, 2011 notice is found in 76 Federal Register 30438-30490 (May 25, 2011).

Notices should be correctly addressed, she argues, to ensure that the recipient is the person “trained and authorized” to make decisions with respect to the child’s membership or eligibility for membership, and also whether the tribe will participate in the dependency proceeding, citing *In re J.T.* (2007) 154 Cal.App.4th 986, 993-994.

Here, it is significant that all tribes responded in the spring of 2012 after having received the corrected notice. Mary F. notes that the notice to the Cherokee Nation was addressed to “ICWA Representative,” not to “Linda Woodward, Director of Children and Family Services” as set forth in the Federal Register. The responses from the Cherokee Nation were on letterhead from the Office of the Chief, submitted by Christopher Ex (first response) and Lisa Chenoweth (second response), both followed by “Indian Child Welfare [¶] Cherokee Nation.” It is apparent that appropriately informed persons from the Office of the Chief responded and any address error was not prejudicial to the tribes. “Requiring literal compliance solely by reference to the names and addresses listed in the last published Federal Register would exalt form over substance.” (*In re N.M.* (2008) 161 Cal.App.4th 253, 268.)

Mary F. claims a similar problem with the addressee in the notice to the United Keetoowah Band of Cherokee Indians. Ella Mae Worley, the tribal treasurer and a member of the tribal council of the United Keetoowah Band of Cherokee Indians in Oklahoma, responded to both notices, on letterhead from the tribe’s enrollment office. Again, it is apparent an appropriately informed person responded.

Finally, Mary F. denounces the addressee and address for the letter to the Eastern Band of Cherokee Indians, but obviously the notice found its way to the correct person because the respondent is the very person she claims should have been the addressee.

We conclude that the Department substantially complied with the ICWA notice requirements, and any defects in the notices were not prejudicial to the tribes. The juvenile court’s findings on June 26, 2012, following an ICWA compliance hearing, that

the Department made diligent efforts to comply with the ICWA and the act did not apply to these proceedings, are supported by substantial evidence.

Regarding the 60-day wait to determine the ICWA is inapplicable, any error was harmless. The record shows that the juvenile court found the ICWA inapplicable at the disposition hearing. The social worker reported that the Department had received responses from the three recognized Cherokee tribes, each stating that the children were not eligible for membership, although the return receipts had not been filed with the court. In any event, as we stated above, the second finding of nonapplicability made in June 2012, after corrected notices had been faxed, and after a second round of responses had been received from the tribes, is backed by substantial evidence. Likewise, given substantial compliance with the notice requirements and the legitimate finding of nonapplicability, any noncompliance with the 10-day rule with respect to conducting the disposition hearing is likewise harmless. The 10-day requirement is not jurisdictional, and thus it is subject to harmless error analysis. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408-1410.)

III. DISPOSITION

We affirm the disposition orders.

Reardon, J.

We concur:

Ruvolo, P.J.

Rivera, J.