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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re K.H., a Person Coming Under the  
Juvenile Court Law.

ALAMEDA COUNTY SOCIAL  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

DENISE H.,

Defendant and Appellant.

A135809

(Alameda County  
Super. Ct. No. HJ11015647)

Appellant Denise H. (Mother) is the biological mother of K.H., who has been a dependent of the court since October 2010 when he was less than three months old. Mother’s parental rights were terminated under Welfare and Institutions Code section 366.26 on April 13, 2012.<sup>1</sup>

A late notice of appeal was filed on Mother’s behalf on June 20, 2012. The Alameda County Social Services Agency (Agency) moved to dismiss the appeal as having been filed beyond the 60-day period provided in Rule 8.406(a).<sup>2</sup> We now consider whether the presence of issues under the Indian Child Welfare Act (ICWA) (25

<sup>1</sup> Undesignated statutory references are to the Welfare and Institutions Code.

<sup>2</sup> All rule references are to the California Rules of Court.

U.S.C. § 1901 et seq.) in the underlying appeal gives us the power to allow the late-filed appeal to go forward. We conclude it does not and accordingly dismiss the appeal.

### **BACKGROUND**

On September 27, 2010, Denise H. (Mother) took her baby boy, K.H., to the hospital because he had stopped moving his left leg a few days earlier. K.H., who was less than three months old, was found to have a broken leg. Further examination and x-rays showed he had suffered more than a dozen fractures of both legs and several ribs, which were in various stages of healing.

K.H. was initially detained on September 28, 2010, and placed in foster care for the next year, except for some periods with his maternal grandmother. K.H.'s parents received reunification services, but services were terminated on September 1, 2011 due to the parents' lack of progress.

A year after initial detention K.H. was placed in the home of a nonrelative extended family member with the hope this would become a permanent placement. But in April 2012 the foster parents separated and were no longer willing to continue custody of K.H. In the meantime a younger brother, David, had been born to K.H.'s parents, and he was also subject to dependency proceedings.

Another couple stepped forward to take K.H. into their home in anticipation of adopting him. Their home had already been approved for adoption through a home study. The couple were also willing to adopt David if that became necessary as a result of the dependency process.

A hearing to terminate parental rights under section 366.26 was originally scheduled for December 15, 2011. It was continued several times and finally was conducted on March 16 and April 13, 2012. On April 13, 2012, both parents' parental rights were terminated and adoption was selected as the permanent plan for K.H. At that exact time the placement in the extended family home was falling apart; K.H. was transferred to his current home on April 18, 2012.

Mother filed a notice of appeal on June 20, 2012—eight days after the expiration of the 60-day filing deadline under rule 8.406(a). The clerk of the superior court

nevertheless filed the notice and the record was prepared. We appointed counsel for Mother and issued an order to show cause (OSC) why the appeal should not be dismissed. The OSC was returnable September 6, 2012; instead, on that date Mother's counsel filed a request for additional time to file his response. On September 14, 2012, the Agency filed a motion to dismiss the appeal as untimely, and alternatively an opposition to an extension of time for Mother's counsel to file his response to the OSC (Motion to Dismiss).

On October 1, 2012, Mother's counsel filed a combined response to this court's order to show cause and opposition to respondent's motion to dismiss the appeal as untimely (Combined Response).<sup>3</sup> On October 12, 2012, the Agency filed an opposition to appellant's Combined Response. Briefing on the late filing issue is therefore complete.

The Agency's Motion to Dismiss explained that when an appeal was not filed by the June 12 deadline, the Agency took action to proceed with the adoption of K.H. The adoption is now scheduled to be finalized on November 17, 2012. (Motion to Dismiss p. 6; Exh. C p. 2; Exh. D, p. 2.) The same date is celebrated as Adoption Day in Alameda County, with festivities for adopted children and their families. (Exh. D to Motion to Dismiss, p. 2.) K.H.'s adoptive family had planned to finalize the adoption on Adoption Day and had also organized a family celebration of the adoption for that date. (Exh. D, p. 2.) A social worker's declaration filed by the Agency suggests it would disappoint K.H. and his adoptive family if the adoption is not finalized as scheduled, and that it will place greater stress on K.H. and the adoptive family. (Exh. D, p. 2.)

Mother's Combined Response includes a declaration from her trial counsel indicating that he simply miscalculated the due date for the notice of appeal. He and Mother had agreed immediately after the April 13 hearing that an appeal would be filed,

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<sup>3</sup> On October 10 we granted Mother's motion to strike the original Combined Response and substitute an amended version.

but he let the deadline pass without filing it. (Declaration of Michael Dias dated September 20, 2012, attached to Combined Response.)

Mother's appellate counsel acknowledges the notice of appeal was filed beyond the 60-day deadline. (Combined Response p. 6.) He claims, however, that the presence of issues under the ICWA requires us to excuse the late filing. He contends this is true because (1) the federal statutory rights of Native American tribes are implicated and those rights cannot be forfeited by Mother's late filing; (2) Mother's due process right to counsel extends through the filing of the notice of appeal, and she was denied effective assistance of counsel by the late filing; and (3) a remedy of constructive filing should be allowed in this case.

### **DISCUSSION**

There is no question but that in an ordinary case the correct disposition would be to dismiss the appeal. Rule 8.406(a) requires filing the notice of appeal within 60 days, and the rule is jurisdictional. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-670; *In re Cynthia C.* (1997) 58 Cal.App.4th 1479, 1488; *Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1454.) Rule 8.406(c) provides: "Except as provided in rule 8.66,<sup>4</sup> no court may extend the time to file a notice of appeal. The superior court clerk must mark a late notice of appeal 'Received [date] but not filed,' notify the party that the notice was not filed because it was late, and send a copy of the marked notice of appeal to the district appellate project." Mother claims, however, this rule should not be applied in this case because of the involvement of ICWA notice claims.

#### **I. Facts Underlying the ICWA Claims**

At the onset of the case, both parents claimed Native American ancestry. Father reported that he and his uncle both were "registered to the Cherokee Tribe." Mother reported "Cherokee, Chippewa, and Blackfoot ancestry."

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<sup>4</sup> Rule 8.66 provides for late filing in the event of earthquake or other emergency.

The Agency responded by sending ICWA notices to three tribes (Cherokee Nation, Bad River Band of Lake Superior Tribe of Chippewa Indians, and Blackfeet Tribe) in late 2010 and early 2011. The Cherokee and Chippewa tribes responded that K.H. was not eligible for membership, and there was proof that the Blackfeet received the notice. On June 2, 2011, the court found K.H. was not an Indian child and ICWA did not apply.

A second round of notices was sent on October 7, 2011, to 41 tribes to supplement the family history information and to make sure all tribes were notified. All of the tribes notified either determined that K.H. was not an Indian child of their tribe, or else they failed to respond to the notices. No tribe indicated that K.H. would be eligible for membership.

In January 2012 Mother advised the Agency that her great aunt Alberta had additional information about her Native American ancestry. The Agency Alberta who provided further information about K.H.'s great great great great grandmother, Lucinda (aka Lula) Pennington Rowe (aka Riddle, aka Wells), who was thought to be a Cherokee with a Dawes Roll number.<sup>5</sup> From Alberta's information, Kathleen MacIntyre, the Agency employee charged with ICWA compliance, constructed a family tree tracing K.H.'s ancestry back to Lucinda Pennington Rowe.

On January 27, 2012, MacIntyre sent that family tree, including Lucinda Pennington Rowe's Dawes Roll number (M275026573), along with other information regarding K.H.'s maternal ancestry, to the three recognized Cherokee tribes: the Eastern Band of Cherokee Indians of North Carolina, the Cherokee Nation of Oklahoma (Cherokee Nation), and the United Keetoowah Band of Cherokee Indians in Oklahoma. (68 Fed.Reg. 68180.) She also sent the information to the Bureau of Indian Affairs (BIA).

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<sup>5</sup> The Final Rolls of Citizens and Freedmen of the Five Civilized Tribes (Dawes Roll) is a list of Native Americans which is used by various tribes to establish Native American ancestry.

At a continued hearing on February 8, 2012, Mother's counsel objected to the adequacy of the ICWA notices, without specifying any manner in which they were defective. The matter was twice continued to allow the Indian tribes to respond and to follow up on additional information provided by Mother, which continued to trickle in. All three tribes eventually responded that K.H. did not meet tribal requirements to be considered a member of or eligible for membership in those tribes.

At the hearings on March 16 and April 13, 2012, Mother's trial counsel examined MacIntyre at length about the ICWA notices, ultimately claiming noncompliance, but not based on a claim that the notice did not actually reach the tribes or that it omitted information possessed by the Agency. Instead he criticized the Agency for not fulfilling its duty of inquiry under section 224.3, subdivision (c), by obtaining birth and death dates and certificates and sending them to the Cherokee Nation, which he claimed required such information to determine tribal citizenship. He essentially argued that the Agency was required to do genealogical research to try to substantiate K.H.'s Indian ancestry.<sup>6</sup>

He also argued, without any supporting testimony or other evidence, that the Cherokee Nation is unique among tribes in that it does not require a quantum of blood relation for membership; therefore, any allegation of Cherokee ancestry should trigger a more rigorous duty of investigation for the Agency. He pointed to two specific sentences in the Cherokee Nation's response: "This determination is based on the above listed information exactly as provided by you. Any incorrect or omitted family documentation could invalidate this determination."

At the conclusion of the hearing the court found that K.H. is not an Indian child and that ICWA does not apply. It also terminated both parents' parental rights and ordered finalization of adoption as the permanent plan for K.H.<sup>7</sup>

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<sup>6</sup> He also argued that the responses received from the tribes did not conclusively establish that K.H. was not an Indian child under section 224.3, subdivision (e)(1).

<sup>7</sup> The only other issue at the contested hearing was that K.H. was at that point in transition between the extended relative's home and another home where the success of the placement had not yet been established. Mother's counsel argued there was no need

## II. ICWA Issues as Exempting Mother from the Requirement of Timely Appeal

Mother's first argument is that the presence of ICWA notice issues precludes application of rule 8.406(a) because ICWA itself is intended to promote the " 'stability and security of Indian tribes and families' " as well as to protect the interests of Indian children who are members of or eligible for membership in those tribes. (*In re Z.N.* (2009) 181 Cal.App.4th 282, 297.) Because of the tribal interests at stake, Mother argues that her own failure by inaction to perfect a timely appeal cannot result in dismissal.

Mother cites one of this Division's cases, *In re Z.N.*, *supra*, 181 Cal.App.4th 282, 296-297, for the proposition that "an appellate challenge based on a lack of compliance with the ICWA's notice requirements cannot be forfeited on appeal by a parent's failure to object to the notice at trial." (Combined Response p. 8.) Neither *In re Z.N.*, however, nor any of the other cases cited by Mother held that a late notice of appeal could be excused based on the presence of ICWA issues. Instead they held that the failure to raise an ICWA notice issue in the trial court would not result in forfeiture of the issue on appeal. (See also, e.g., *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1195; *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1435; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 738-739.)

The rule precluding appellate review of issues not raised in the trial court is a jurisprudential limit on the scope of appellate review grounded in principles akin to waiver and estoppel. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal § 400, pp. 458-459.) Courts are at liberty to address issues not raised below in their discretion. (*In re Luis F.* (2009) 177 Cal.App.4th 176, 184.) The rule is different, however, when the court lacks jurisdiction, as in the case of a late-filed notice of appeal. The ICWA does not confer jurisdiction on a court that would not otherwise have jurisdiction.

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to "rush" the termination of parental rights. The Agency and K.H.'s attorney argued that an adoptive home need not have been even identified before termination of parental rights, so long as the child had been found to be adoptable. (§ 366.26, subd. (c)(1).) Here the child was adoptable and was being placed with a family who was also willing to adopt both siblings.

(*Slone v. Inyo County Juvenile Court* (1991) 230 Cal.App.3d 263, 267.) Since the timely filing of a notice of appeal is required for this court to obtain jurisdiction, we find ourselves without jurisdiction to permit the appeal to go forward.

Moreover, the specific ICWA issue raised below does not implicate the same concerns that led to the rule of non-forfeiture in *In re Z.N.*, *supra*, 181 Cal.App.4th 282, and similar cases. The underlying theory in those cases was that the parents, by failing to raise an ICWA issue in the trial court, could not properly be deemed to have waived the *tribe's* rights under the ICWA. (*In re Marinna J.*, *supra*, 90 Cal.App.4th 731, 739.)

The rule is otherwise, however, when an aspect of ICWA other than lack of notice has been violated. (*In re Marinna J.*, *supra*, 90 Cal.App.4th at p. 739, fn. 3.) The normal rule of forfeiture on appeal of such issues should be followed so long as “the tribe has been notified and given an opportunity to participate in the proceedings. If the tribe chooses not to intervene, then it is not unreasonable to expect that the tribe itself can be deemed to have waived any defects in the proceedings.” (*Ibid.*) In our decision in *In re Z.N.*, *supra*, 181 Cal.App.4th 282, there was also a *failure* to notify the potentially affected tribes, not simply an allegation of a deficient investigation.

Mother cites *In re Alice M.*, *supra*, 161 Cal.App.4th 1189, in support of the notion that a claim of *deficient* notice also results in addressing the issue on the merits on appeal, even if it was not raised in the trial court. But *Alice M.* also involved a question whether the appropriate tribes had received *actual* notice of the proceeding because the wrong person had been served with notice at the wrong address and not all potentially affected tribes had been notified. (*Id.* at p. 1201.)

A case more closely on point is *In re Pedro N.* (1995) 35 Cal.App.4th 183, 185, 189-190, where the mother appealed after termination of parental rights (§ 366.26). There as in our case, ICWA issues had been raised, and the error under ICWA, if any, had been made at a disposition hearing in July 1992. (*Id.* at pp. 188-189.) That order was not appealed, but the mother attempted to raise ICWA issues on appeal from the order terminating parental rights, which occurred some two years later. The Fifth District held the ICWA issues were not timely raised because no appeal was taken at the time the

ICWA issues were determined in juvenile court. (*Id.* at p. 189.) In so holding it addressed an issue very close to the one before us, namely the mother’s claim that ICWA “preempt[ed] California law which would characterize her ICWA challenge as untimely.” (*Id.* at p. 190.) *Pedro N.* concluded “Congress did not intend to preempt, in the case of appellate review, state law requiring timely notices of appeal from a parent who appeared in the underlying proceedings and who had knowledge of the applicability of the ICWA.” (*Ibid.*) Under the circumstances here presented, we believe the timely filing of a notice of appeal was jurisdictional and is not affected by the presence of an ICWA issue.

### **III. Due Process Right to Counsel as Precluding Application of Rule 8.406(a)**

Mother’s next claim is that she had a due process right to counsel in the filing of the notice of appeal, and her counsel’s negligent allowance of the appeal period to lapse was ineffective assistance of counsel remediable by allowing the appeal to proceed.

A parent’s interest in the care, custody and control of his or her child is a fundamental liberty interest such that the right to counsel in dependency proceedings where termination of parental rights may result is protected by due process, as well as by statute. (§ 317; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1407.) The due process right to counsel in dependency proceedings, however, has not been extended to rectify the late filing of a notice of appeal. (*In re A.M.* (1989) 216 Cal.App.3d 319, 322; *In re Ricky H.* (1992) 10 Cal.App.4th 552, 559-560; *In re Issac J.* (1992) 4 Cal.App.4th 525, 534.)

Again, Mother tells us that the rule must be reconsidered in light of the ICWA issues in this case. She not only points to the tribes’ interest in identifying and maintaining tribal ties with Indian children, but also argues that K.H.’s own stability would be served by allowing this appeal to go forward because one of the tribes—if it were to determine that K.H. was an Indian child—could intervene at any time in the proceedings, including after termination of parental rights. (25 U.S.C. §§ 1911(c), 1914; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472-473; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1426.)

Again we question whether the issue in this case can correctly be characterized as an “ICWA notice” issue, or whether it is more properly regarded as an “ICWA inquiry”

issue. Since all three Cherokee tribes and the BIA have received actual notice of the proceedings and have determined that K.H. is not an Indian child, we see no meaningful threat to K.H.'s stability in dismissing Mother's appeal, especially since adoption proceedings are expected to be finalized within a month.

#### **IV. Doctrine of Constructive Filing**

In her final argument Mother contends that the appropriate "remedy" for the late filed notice of appeal would be to apply the "constructive filing" rule applicable to criminal cases. (*In re Benoit* (1973) 10 Cal.3d 72, 81-84.) But even in criminal cases the constructive filing rule applies only to incarcerated litigants and requires diligence by the defendant. (*Id.* at pp. 86-89.) Here we have no reason to believe Mother herself attempted at any time to ensure that a timely notice was filed.

More to the point, we rejected the same argument in *In re A.M.*, *supra*, 216 Cal.App.3d at p. 322 due to the "paramount importance" of the child in stability and finality, as well as for the reason that "[a]doption proceedings could be jeopardized if the finality of a judgment [terminating parental rights] were uncertain." Indeed, Mother acknowledges the rule of constructive filing has not been extended to cases involving termination of parental rights. (See *In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1254; *In re Ricky H.*, *supra*, 10 Cal.App.4th at pp. 559-560; *Issac J.*, *supra*, 4 Cal.App.4th at p. 534.)

Under Mother's proposed rule, appeals from orders terminating parental rights could be filed at virtually any time, so long as any sort of ICWA issue was involved and the parent notified the attorney within the appeal period that he or she wanted to file an appeal. Such a rule would inject further uncertainty and delay into a system already plagued by such problems. At this point in the proceedings the court's focus must be on the child's need for finality and permanency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307-308; *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 868.) And in the context of this case, for the reasons already discussed, we see no reason why the presence of potential ICWA issues calls for an exceptional result. There appears to be no issue that the

potentially affected tribes did not receive actual notice of the proceedings and therefore no reason to prolong the process based on their hypothetical but unasserted rights.

**DISPOSITION**

The Agency's motion to dismiss the appeal is granted. The order to show cause is discharged, and the appeal is ordered dismissed. This order shall be final as to this court forthwith.

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Richman, J.

We concur:

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Kline, P.J.

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Lambden, J.