

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 TWO

In re K.M. et al., Persons Coming Under
the Juvenile Court Law.

HUMBOLDT COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

RICHARD M.,

Defendant and Appellant.

A140742

(Humboldt County Super. Ct.
Nos. JV130120-1, JV130120-2,
JV130120-3)

Richard M. is the presumed father of three young children for whom the Humboldt County Department of Health and Human Services (the Department) filed a juvenile dependency petition pursuant to Welfare and Institutions Code¹ section 300. Richard informed the Department that he is an enrolled member of the Hoopa Valley Tribe and that he has ancestors who were members of the Yurok Tribe, including a grandmother who is a member of the Yurok tribal council. Pursuant to the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.), the Department provided notice of the dependency proceeding to the Hoopa Valley Tribe, but provided no notice to the Yurok Tribe.

¹ Unless indicated otherwise, further statutory references are to the Welfare and Institutions Code.

Richard appeals from the juvenile court's order declaring the three children to be dependents of the court, arguing that the Department and the court failed to comply with ICWA notice requirements and that the court failed to comply with placement preference requirements applicable to Indian children. We agree with Richard that failure to provide notice to the Yurok Tribe requires conditional reversal, but we find no failure to comply with placement preference requirements.

BACKGROUND

Richard is the presumed father of four- and five-year-old sons and a three-year-old daughter. Shortly after the birth of each of the children, he executed declarations of paternity. Before the proceedings at issue, the children had been living with their mother. Richard was incarcerated in San Quentin State Prison and remained in custody throughout the proceedings.

On August 8, 2013, the Department filed a juvenile dependency petition pursuant to Welfare and Institutions Code section 300 for Richard's three children. The petition alleged failure to protect the children (§ 300, subd. (b)): "b-1: The mother's has been inability [*sic*] or unwilling to adequately supervise or protect her children. The children were found near a busy street, unattended. This places the children at substantial risk of suffering serious harm. [¶] b-2: The mother's [*sic*] has been unable to provide her children a safe living environment. The family's home was littered with hazards for the young children. This places the children at substantial risk of suffering serious harm." Forms filed with the petition for each of the children indicated that they may have Indian ancestry.

On August 9, 2013, the Department filed a detention report stating that police officers had found the two boys, very dirty and without shoes, playing unattended in a culvert near the street. The officers observed debris "all over the floor" of the mother's apartment, with glass on the floor of one bedroom and standing water in the hallway. Because the mother had outstanding warrants, one for felony child abuse or neglect, the police arrested her. The children were placed in local foster homes.

On August 9, 2013, at a hearing at which Richard was not represented, the court ordered continued detention of the children. At this point Richard was the alleged father and the court ordered that he submit a statement regarding paternity. The court also ordered Richard and the mother to complete forms for notification of Indian status.

On August 16, 2013, the Department filed an amended juvenile dependency petition. This petition made an additional section 300, subdivision (b) allegation: “b-3: The mother has unaddressed substance abuse and mental health issues. The mother admitted herself into Humboldt County Mental Health PES Unit in March of 2013 for auditory hallucinations and methamphetamine use. The mother continues to display symptoms of mental health and/or substance abuse issues.” For each of the three children, an ICWA-010(A) form accompanied the amended petition. The forms stated that the two boys may have Indian ancestry and either are or may be members of the Hoopa Valley Tribe, or may be eligible for membership. The form for Richard’s daughter indicated only that she may have Indian ancestry.

The Department filed a jurisdiction report on August 28, 2013. It stated that Richard “is a Hoopa Valley Tribal member. The children may be eligible for enrollment. An ICWA[-]030 [form] has been sent to the Hoopa Valley Tribe for each child.” A copy of the jurisdiction report was sent by certified mail to the Hoopa Valley Tribe on August 16, 2013. Neither the ICWA-030 forms to which the report refers nor proof that they were actually sent to the Hoopa Valley Tribe appear in the clerk’s transcript before us.

The court held a contested jurisdiction hearing on August 28, 2013. Richard was neither present nor represented. The court sustained the amended petition in each child’s case. Richard’s two sons were given a placement separate from the daughter because the Department could not find a placement that would take all three.

On August 29, 2013, JV-505 forms signed by Richard were filed with the court. In these forms Richard stated that he believed himself to be the father of the children and requested that the court find him to be the presumed father. An ICWA-020 form, filled out by Richard, and received by the Department on August 19, 2013, was also filed. On

that form, Richard stated that he is or might be a member, or eligible for membership in, the Hupa Band of the Hoopa Valley Tribe. He also stated that he had ancestors who were members of the Hoopa Valley and Yurok Tribes.

At a hearing on September 10, 2013, the court appointed counsel to represent Richard. Disposition was continued to October 1, 2013.

The Department filed separate ICWA-030 forms for each child on September 13, 2013. The forms noticed the disposition hearing on September 10, 2013 to the parents, Hoopa Valley Tribe, the Sacramento Area Director of the Bureau of Indian Affairs (BIA), and the Secretary of the Interior. The forms stated that Richard had indicated that he is or may be a member of the Hoopa Valley Tribe. They also stated that no information was available concerning the children's grandparents and great-grandparents. The certification of mailing is dated September 11, 2013, with the Hoopa Valley Tribe listed as a recipient. The ICWA-030 forms did not mention, nor were they sent to, the Yurok Tribe.

On September 19, 2013, the court granted an ex parte application from the Department for the appointment of Angela Sundberg as an Indian expert "to receive case information and discuss it with the persons necessary for her report," which was required for the disposition hearing.

On October 1, 2013, Richard was represented and the court ordered that his status be elevated to that of presumed father.

On October 2, 2013, new ICWA-020 forms from Richard were filed. These forms provided a Hoopa Valley Tribe enrollment number for Richard and stated that his paternal grandmother is a council member of the Yurok Tribe.

A disposition report filed by the Department on November 20, 2013 (but internally bearing the date September 10, 2013, and with signatures dated September 5, 2013), stated that the children "are eligible for enrollment in the Hoopa Valley Tribe as the alleged father, is an enrolled member. [The social worker] will continue to work with the tribe and the mother to have the children become enrolled members." The report also stated that "SSA Dee Dee Kornman conducted a Family Finding Search to identify,

locate and notify the children's adult relatives." The disposition report was sent by certified mail to the Hoopa Valley Tribe on September 6, 2013.

An addendum disposition report was also filed on November 20, 2013, in order to update recommended findings and orders and include a declaration from Sundberg. She stated that she had not interviewed Richard "due to unknown addresses and/or contact information or unreturned phone calls." Concerning ICWA, Sundberg stated, "The . . . children may be eligible for enrollment for the Hoopa Valley Tribe if paternity is established for Richard ICWA notice was sent to Hoopa Valley Tribe, [the parents], the Secretary of the Interior, and the [BIA]." She stated: "In my interview with Karrie Colegrove, Hoopa Valley Tribe Social Worker, she has stated that the . . . children are not in tribally approved homes. There are paternal relatives that are able and willing to care for the children in which the children do not have a relationship with [*sic*]. The Hoopa Tribal social workers . . . hope that [the Department] will look into these relative[s] while the ongoing paternity issue is established."²

The court held a disputed disposition hearing on November 20, 2013, at which Richard was represented. The court declared the children to be dependents of the court. It ordered that care, custody, and control of the children be vested with the Department and authorized placement in "a suitable foster care home." It also authorized placement "in the home of a suitable relative or non-relative extended family member." It ordered reunification services for the parents. The court found that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of a possible Indian family, to which the [ICWA] may or may not apply, and that

² There was no actual ongoing paternity dispute. A report from the court appointed special advocate stated: "[A]ccording to the Delivered Service Logs dated August 7, 2013, the mother stated to Social Workers that there are two possible fathers for [the two boys]. According to the same Delivered Service Logs, when the Social Worker asked the mother about paternity of the children, the mother named Richard . . . and another gentleman and said that she did not want the children enrolled in the tribe because a paternity test has not been conducted for the fathers. According to the Social Worker, the mother has since retracted her statement and the Department has decided that the paternity test is not needed because the father signed a POPS form for each child."

these efforts were unsuccessful. [¶] As to any child to which the [ICWA] may apply, the Court finds by clear and convincing evidence, and based upon the evidence of a qualified expert witness, that continued custody by the Indian parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

Richard timely filed a notice of appeal on January 9, 2014.

DISCUSSION

I. Reversal Is Required Because The Yurok Tribe Received No ICWA Notice.

“The ICWA is designed to protect the interests of Indian children, and to promote the stability and security of Indian tribes and families. It sets forth the manner in which a tribe may obtain jurisdiction over proceedings involving the custody of an Indian child, and the manner in which a tribe may intervene in state court proceedings involving child custody. When the dependency court has reason to believe a child is an Indian child within the meaning of [ICWA], notice on a prescribed form must be given to the proper tribe or [BIA], and the notice must be sent by registered mail, return receipt requested.” (*In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.)

“ [T]o satisfy the notice provisions of the [ICWA] and to provide a proper record for the juvenile court and appellate courts, [a social service agency] should follow a two-step procedure’ of sending proper notice to all possible tribal affiliations and filing with the court copies of the notices, the return receipts and any correspondence from the tribes.” (*In re L.B.* (2003) 110 Cal.App.4th 1420, 1425, fn. 3, quoting *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739–740, fn. 4.) This judicial guideline is now a requirement of California law: “Proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing” (§ 224.2, subd. (c).)

“ ‘Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies. Specifically, the tribe has the right to obtain jurisdiction over the proceedings by transfer to the tribal court or may intervene in the

state court proceedings. Without notice, these important rights granted by the Act would become meaningless.’ ” (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396.)

“[F]ederal and state law require that the notice sent to the potentially concerned tribes include ‘available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; places of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data.’ [Citations.] To fulfill its responsibility, the [Department] has an affirmative and continuing duty to inquire about, and if possible obtain, this information. [Citations.] Thus, a social worker who knows or has reason to know the child is Indian ‘is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2’ (§ 224.3, subd. (c).) That information ‘shall include’ ‘[a]ll names known of the Indian child’s biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.’ (§ 224.2, subd. (a)(5)(C).) Because of their critical importance, ICWA’s notice requirements are strictly construed.” (*In re A.G., supra*, 204 Cal.App.4th at pp. 1396-1397.)

“Notice under the ICWA must, of course, contain enough information to constitute meaningful notice.” (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) “[T]o establish tribal identity, it is necessary to provide as much information as is known on the Indian child’s direct lineal ancestors.” (25 C.F.R. § 23.11(b).) Moreover, an ICWA notice must include, if known, (1) the name, birthplace, and birth date of the Indian child; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child’s parents, grandparents, great-grandparents and other identifying information; and (4) a copy of the dependency petition. (25 C.F.R. § 23.11(d); see also § 224.2(a) [specifying these and additional requirements].) California Rules of Court, rule 5.481(a)(4) imposes an affirmative duty on social service

agencies to interview the extended family to ascertain the required information. If the ICWA notice fails to provide information available to a social service agency that is necessary for the tribe to make a determination that a minor is an Indian child, the notice does not satisfy ICWA requirements. (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630 [“Notice is meaningless if no information or insufficient information is presented to the tribe to make that determination”].)

If information available to the agency indicates that a juvenile may be eligible for membership in more than one tribe, notice must be provided to *all* tribes: “Notice shall be sent to all tribes of which the child may be a member or eligible for membership, until the court makes a determination as to which tribe is the child’s tribe in accordance with subdivision (d) of Section 224.1, after which notice need only be sent to the tribe determined to be the Indian child’s tribe.” (§ 224.2, subd. (a)(3).)

Here, the ICWA-030 notices state that no information is available concerning any relatives other than Richard and the mother. There is no indication in the record of any effort to interview Richard, the mother, or any other family member to gather information about potential Indian ancestors. The Department did not send updated ICWA-030 notices after Richard provided an enrollment number with the Hoopa Valley Tribe, nor did the Department send an ICWA-030 notice to the Yurok Tribe after Richard indicated that he had ancestors in the Yurok Tribe and later stated that his grandmother is a member of the Yurok tribal council. Although Hoopa Valley Tribe social workers had been contacted and their help sought in enrolling the children with that tribe, the record contains no determination by the Tribe that Richard is actually an enrolled member or that the children are actually eligible for enrollment. Most importantly, the Yurok Tribe was never provided notice and never had an opportunity to determine whether the children were eligible for enrollment or the Tribe should intervene in the case.

The Department does not contest that it was required by ICWA to provide adequate notice to the Yurok Tribe. Instead, it is the Department’s position that any error in providing notice to the Yurok tribe was harmless because the children are ineligible for membership in the Yurok Tribe. It argues that because Richard is a member of the

Hoopa Valley Tribe and the enrollment ordinances of the Yurok Tribe preclude dual tribal membership, the children are not eligible for enrollment in the Yurok Tribe. Even if the Department is correct that the children are not eligible for enrollment in the Yurok Tribe if Richard is a member of the Hoopa Valley Tribe, there is no evidence of Richard's enrollment in the Hoopa Valley Tribe other than Richard's representations on ICWA-020 forms. There is no evidence concerning Richard's degree of certainty about those representations or the manner in which he came to have what he believes to be a Hoopa Valley Tribe enrollment number. There is no evidence that the enrollment number provided by Richard is valid. Such questions might have been resolved had the Department bothered to interview Richard concerning his Indian ancestry, as it had an affirmative duty to do. We will not rely on Richard's representations when the Department manifestly failed to exercise due diligence and the record contains no communication from the Hoopa Valley Tribe regarding Richard's membership or the children's eligibility.³

Whatever Yurok Tribe enrollment ordinances provide, there is insufficient evidence in the record for us to determine how they apply here. In any case, where there is potential membership in multiple tribes, it is neither for the Department nor for us to make the initial determination of which tribe the child may be a member. That is, initially, a matter for the tribes, after receiving notice. (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576 ["Notice given under ICWA must . . . contain enough information

³ The Department states in its brief that "the Tribe confirmed his status as an enrolled member." In support of this alleged fact, the brief cites the Department's disposition report that simply states: "[The children] are eligible for enrollment in the Hoopa Valley Tribe as the alleged father, is an enrolled member." This conclusory statement is not a showing that the Tribe confirmed Richard's enrollment or the children's eligibility for enrollment. That tribal social workers were assisting with enrollment of the children is not a determination that the children were actually enrollable.

If the Department received any response from the Tribe concerning Richard's membership or the children's eligibility, then the Department had a duty to file that response with the court. (§ 224.2, subd. (c).) No tribal responses are in the record before us.

to permit the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership.”] If the child is eligible for membership in multiple tribes, the matter then becomes one for the juvenile court. (§§ 224.2, subd. (a)(3), 224.1, subd. (e).) Neither the Hoopa Valley Tribe nor the Yurok Tribe has made such a determination and we will not weigh in where they have not.

The Department failed to interview Richard concerning his Indian ancestry so that full information could be provided to *all* of the tribes in which the children might be eligible for membership. Most significantly, the Department failed to provide notice to the Yurok Tribe, depriving the Tribe of the opportunity to determine whether the children were eligible for enrollment and whether to intervene. Such failures in meeting ICWA notice requirements require us to reverse and remand. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 472 [“The failure to provide the necessary notice requires this court to invalidate actions taken in violation of the ICWA and remand the case unless the tribe has participated in or expressly indicated no interest in the proceedings”]; accord, *In re I.G.* (2005) 133 Cal.App.4th 1246, 1252.)

II. *The Department And Juvenile Court Did Not Violate Placement Preference Provisions.*

In making a foster care or guardianship placement of an Indian child, preference is to be given to placement with the following, in descending priority order: “[a] member of the child’s extended family”; “[a] foster home licensed, approved, or specified by the child’s tribe”; “[a]n Indian foster home licensed or approved by an authorized non-Indian licensing authority”; “[a]n institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs.” (§ 361.31, subd. (b).)

In this case, the court did not disturb the placement of the children in two foster homes (one for the boys and one for the girl) that apparently did not qualify for preference.⁴ However, there is no evidence that a suitable placement that would qualify

⁴ The Hoopa Valley Tribe told Sundberg that the foster homes in which the children were placed were not approved by the Tribe. There is no evidence in the record

for preference was available. Sundberg stated that paternal relatives were able and willing to care for the children and that tribal social workers “will look into these relative[s].” This indicates that the suitability of a placement with paternal relatives had not yet been determined. The CASA report, dated two days before the November 20, 2013 disposition hearing, noted that “the Department is contacting paternal family members to find someone who would be a suitable placement for all three children.” The court’s disposition order authorized placement “in the home of a suitable relative or non-relative extended family member.” (§ 361.31, subd. (b).)

The court’s disposition order did not violate the placement preference provision because efforts to find a placement that would have preference were ongoing, there was no evidence that any placement that could be given preference was available and suitable, and the court’s order authorized placement with a suitable relative, should the Department determine that such a placement is available. There is no evidence that the Department and juvenile court ignored or failed to seek placements that could be given preference. There is no evidence that the juvenile court made a placement decision even though another suitable placement was available that had higher preference priority. Most importantly, it appears that the Department complied with section 361.31, subdivision (g): “Any person or court involved in the placement of an Indian child shall use the services of the Indian child’s tribe, whenever available through the tribe, in seeking to secure placement within the order of placement preference established in this section and in the supervision of the placement.”

III. Remand

This case provides occasion for us *yet again* to note that “[n]oncompliance with ICWA has been a continuing problem in juvenile dependency proceedings conducted in this state, and, by not adhering to this legal requirement, we do a disservice to those vulnerable minors whose welfare we are statutorily mandated to protect.” (*In re I.G.*,

that the foster homes met any of the other criteria that would qualify them for placement preference.

supra, 133 Cal.App.4th at p. 1254; observation repeated in *In re A.G.*, *supra*, 204 Cal.App.4th at p. 1401.) As we observed one year ago: “Despite extensive case law and many other writings on the subject, dependency courts and social services departments continue to ignore the dictates of the act” (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 700.)

This case presents difficulty because although we must reverse for failure to provide notice to the Yurok tribe, the passage of time since the disposition hearing means that circumstances may have changed substantially.⁵ Accordingly, although we reverse and remand, we give the juvenile court considerable discretion in reinstating the disposition order of November 20, 2013.

DISPOSITION

The disposition orders for the three minors, dated November 20, 2013, are reversed. The cases are remanded to the juvenile court to determine, after inquiry and notice to the parties, including the Hoopa Valley and Yurok Tribes, whether additional ICWA notice is required by current circumstances. If the juvenile court determines that current circumstances require no additional ICWA notice, then the disposition orders shall be reinstated. Otherwise, the Department must provide ICWA notice containing complete and accurate information, to the extent it may be reasonably ascertained, about paternal relatives to both the Hoopa Valley and Yurok Tribes. If a tribe intervenes after receiving proper notice, the court shall proceed in accordance with ICWA. If no tribe intervenes after receiving proper notice, the disposition orders shall be reinstated.

⁵ For example, the children may have been reunited with their mother and/or Richard, or the children may have been placed with a paternal Indian relative.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.