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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re A.J., a Person Coming Under the  
Juvenile Court Law.

HUMBOLDT COUNTY DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

E.J.,

Defendant and Appellant.

A141849

(Humboldt County  
Super. Ct. No. JV130022)

E.J. (mother) appeals from an order terminating her parental rights to her son, A.J. She contends that her parental rights were wrongly terminated because the Humboldt County Department of Health and Human Services (the Department) and the Humboldt County Juvenile Court failed to comply with the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). We conditionally reverse the order terminating mother’s parental rights and remand for the limited purpose of compliance with the ICWA-related duties of inquiry and notice.

**I. FACTUAL BACKGROUND**

A.J. was born in January 2013 and was taken into protective custody by the Department the following day. The baby came to the Department’s attention following a referral alleging that, moments after he was born, mother and J.L. (father) became

physically violent with each other in the baby's presence. Mother reported a history of mental health issues and admitted that she was not currently taking her medication. Mother also reported using cigarettes and marijuana during her pregnancy. Both parents were homeless and were unable to provide adequate care for the baby.

On January 28, 2013, the Department filed a petition alleging, pursuant to Welfare and Institutions Code<sup>1</sup> section 300, subdivision (b), that A.J. was at substantial risk of suffering continued emotional and physical harm due to the on-going domestic violence between his mother and father. The social worker prepared a detention report recommending that, upon discharge from the hospital, the baby should be placed in foster care pending further court order. The social worker also reported that the mother "may have Cherokee tribal affiliation and the father reported that he may have tribal affiliation with the Hoopa and the Yurok Tribes." The report indicates that the social worker interviewed the paternal grandmother regarding the relationship between mother and father, but did not ask the paternal grandmother about possible Native American ancestry.

At the detention hearing on January 29, 2013, the court found that prima facie evidence supported the allegations in the Department's section 300 petition. A.J. was detained and placed in a foster home. The parents were permitted twice weekly supervised visits with A.J. at the Department's discretion.

A few days after the detention hearing, mother filed an ICWA-020 form, "Parental Notification of Indian Status" indicating that she "may have Indian ancestry," through the Cherokee tribe. Father also filed an ICWA-020 form indicating that he may have Indian ancestry through the Branham band of the Hoopa tribe. Father later explained that his Hoopa family members were not related by blood.

The Department sent an ICWA-030 form, "Notice of Child Custody Proceeding for Indian Child" to three Cherokee tribes, the Bureau of Indian Affairs (BIA) and the Department of the Interior. The ICWA-030 form stated that no information was available concerning father's biological mother, father, grandmother, or grandfather. No

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

ICWA-030 form was sent to the Yurok tribe. The responses from the Cherokee tribes indicated that A.J. was not a member of any of the tribes and not eligible for membership.

On February 26, 2013, at a jurisdictional hearing, the court sustained the first amended petition and scheduled a dispositional hearing. At the dispositional hearing on April 30, 2013, the court found there would be a substantial danger to the health or safety of A.J. if he were returned to his parent's care and that there was no reasonable means to protect A.J. without removing him from the physical custody of his parents. The court ordered family reunification services for mother and father and scheduled a six-month review hearing.

The parents struggled to engage in reunification services. Although they found temporary housing at the Rescue Mission (the shelter), by June 2013 they were both homeless again. Mother admitted to using Vicodin pills and marijuana, but refused to submit to mandatory drug testing at the shelter. Father was expelled from the shelter because of anger issues and uncontrolled rage. Both parents struggled to maintain their personal hygiene and were disheveled in appearance during their visits with A.J. In addition, the Department began receiving reports from law enforcement, relatives and service providers of domestic violence incidents between mother and father.

At the contested six-month review hearing conducted on December 31, 2013, both parents testified as to their efforts to participate in reunification services. The court did not ask either parent about Native American ancestry, but admitted into evidence the social worker's report stating that the Cherokee tribes did not recognize A.J. as a member. At the conclusion of the hearing, the court found that the ICWA did not apply. The court also ordered family reunification services terminated and scheduled a section 366.26 hearing.

An adoption assessment concluded A.J. was adoptable and that adoption by his foster parents would be in his best interests. The assessment further found that the foster parents, identified as the prospective adoptive parents, understood the responsibilities of adoption and were committed to providing A.J. with a safe, stable and loving home.

On April 30, 2014, at a contested section 366.26 hearing, the court found A.J. was adoptable, determined that a permanent plan of adoption was appropriate, and ordered mother and father’s parental rights terminated.

On May 14, 2014, mother filed a timely notice of appeal, seeking relief from the orders terminating her parental rights.

## II. DISCUSSION

### **The Department Failed to Satisfy Its ICWA-Related Duties of Inquiry and Notice**

Mother contends that the Department and the juvenile court failed to satisfy the inquiry and notice requirements of the ICWA and related state law. We agree.

We begin by discussing our standard of review and the applicable law. We review the juvenile court’s determination that ICWA is inapplicable for substantial evidence, which requires us to review “factual findings in the light most favorable to the . . . order” and to “indulge in all legitimate and reasonable inferences to uphold [it].” (*In re H.B.* (2008) 161 Cal.App.4th 115, 119, 120.) An order “is not supported by substantial evidence,” however, “if it is based solely upon unreasonable inferences, speculation[,] or conjecture.” (*Id.* at p. 120.) “Deficiencies in ICWA inquiry and notice may be deemed harmless error when, even if proper notice had been given, the child would not have been found to be an Indian child.” (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.)

The purpose of ICWA is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes.” (25 U.S.C. § 1902.) “ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource.” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) To further these goals, tribes are entitled to take jurisdiction over or intervene in state dependency proceedings. (25 U.S.C. § 1911(a) & (c).) “Of course, [a] tribe’s right to assert jurisdiction over [a] proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending.” (*In re Junious M.* (1983) 144 Cal.App.3d 786, 790–791.) ICWA therefore requires notice “where the [juvenile] court knows or has reason to know that an Indian

child is involved.” (25 U.S.C. § 1912(a); see § 224.2; Cal. Rules of Court,<sup>2</sup> rule 5.481(b).)

In addition, state law imposes on both the juvenile court and the county welfare department “an affirmative duty to inquire whether a dependent child is or may be an Indian child.” (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; § 224.3, subd. (a); rule 5.481(a).) If the department or the court “knows or has reason to know that an Indian child is involved, the social worker . . . is required to make further inquiry regarding the possible Indian status of the child” to facilitate the provision of notice. (§ 224.3, subd. (c); see also *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200.) An “Indian child” is any unmarried minor who “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).) Among the circumstances that “may provide reason to know that the child is an Indian child” is when a relative provides information “suggesting the child is a member of a tribe or eligible for membership in a tribe.” (§ 224.3, subd. (b)(1); see also rule 5.481(a)(5).)

With these standards and principles in mind, we turn to the parties’ specific claims.

**A. Mother has not waived her ICWA claims.**

The Department argues that mother has waived her ICWA claims by failing to object below or to appeal from court findings made on April 30, 2013 and December 31, 2013 that ICWA did not apply. As a preliminary matter, the record shows that the court did not make any findings regarding ICWA until the six-month review hearing on December 31, 2013. At the six-month review hearing the court found that ICWA did not apply.

Regardless of mother’s failure to raise the ICWA issue sooner, “it would be contrary to [ICWA’s] terms . . . to conclude . . . that parental inaction could excuse the

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<sup>2</sup> Unless otherwise noted, all further rule references are to the California Rules of Court.

failure of the juvenile court to ensure that notice . . . was provided to the Indian tribe[s] named in the proceeding.” (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 736–739 [parents did not waive claim where they reported heritage in particular tribe, but no notice ever sent]; see, e.g., *In re B.R.* (2009) 176 Cal.App.4th 773, 779; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 251, 259–261.) We conclude that parental inaction does not waive a claim that the duty of inquiry was unfulfilled, because that duty also protects tribes’ interests in receiving notice. (See *In re S.B.* (2005) 130 Cal.App.4th 1148, 1160.) We conclude that mother has not waived her ICWA-related claims, and we therefore turn to consider the merits of her claims.

**B. The Department Failed to Send Notice to the Yurok Tribe and Sent an Incomplete Notice to the Cherokee Tribes.**

In the detention report, the social worker indicated that father had reported tribal affiliation with the Hoopa and the Yurok tribes. This information was sufficient to trigger the Department’s duty to inquire further and to provide notice. (*In re Damian C.* (2009) 178 Cal.App.4th 192, 199 (*Damian C.*) [information that minor’s great-grandfather “was Yaqui or Navajo” triggered those duties].)

Inexplicably, the Department argues that “information from [father] subsequently established the possible connection was with only the Hoopa Tribe.” There is no evidence in the record that father disavowed his connection to the Yurok tribe at any point in these proceedings. According to information in the jurisdiction report, filed February 26, 2013, and the disposition report, filed April 30, 2013, father clarified that his connection to the Hoopa tribe was only by marriage, but he did not elaborate further on his affiliation with the Yurok tribe. To the extent the Department is suggesting that father had the burden to provide additional information regarding his connection to the Yurok tribe, it is incorrect: the information provided was sufficient to trigger the duties of further inquiry and notice. (*Damian C.*, *supra*, 178 Cal.App.4th at p. 199.) Those duties were not fulfilled with regard to providing notice to the Yurok tribe.

The Department did send an ICWA-030 form to three Cherokee tribes, the BIA and the Department of the Interior. The form stated that no information was available

concerning father's biological mother, father, grandmother, or grandfather. In addition, the form did not contain any notice of father's affiliation with the Yurok tribe.

In providing notice, “[i]t is essential to provide the Indian tribe with all available information about the child’s ancestors, especially the ones with the alleged Indian heritage.” (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.) Notice must include, if known, the names of the child’s grandparents and great-grandparents, including maiden, married and former names or aliases, as well as their birth dates, places of birth and death, tribal enrollment numbers, current and former addresses, and other identifying information. (25 C.F.R. § 23.11(a) & (d)(3); 25 U.S.C. § 1952.) “The burden is on the [Department] to obtain all possible information about the minor’s potential Indian background and provide that information to the relevant tribe or, if the tribe is unknown, to the BIA. [Citation.]” (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630.) Notice is meaningless if it fails to provide the very information that might assist the tribes and the BIA in making a determination as to whether the child involved in the proceedings is an Indian child. (*In re D.T.* (2003) 113 Cal.App.4th 1449, 1455.)

In this case, the record indicates that the social worker interviewed father’s biological mother (paternal grandmother) on at least one occasion. The social worker did not, however, include any information about the paternal grandmother in the ICWA-030 form sent to the tribes and the BIA. Also, the social worker failed to indicate on the form that father claimed affiliation with the Yurok tribe. Finally, there is no evidence that the social worker asked the paternal grandmother about any affiliation with the Yurok tribe or inquired as to the whereabouts of the paternal grandfather or great-grandparents. The social worker’s affirmative duty to inquire whether A.J. might have Native American ancestry mandates that she interview extended family members regarding the information required for the ICWA notice. (*In re D.T., supra*, 113 Cal.App.4th 1449; see also rule 5.481(a)(4).) Here, the social worker not only failed to make the necessary inquiries, but also failed to include the limited information she did have on the form sent to the Cherokee tribes and the BIA. On this record, we conclude the Department did not fulfill its ICWA-related duties of inquiry and notice. A juvenile court’s finding that ICWA

does not apply cannot stand without proof of proper notice. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 246.) We therefore conditionally reverse the order terminating mother's parental rights and remand for compliance with the applicable inquiry and notice requirements. (See *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1432–1433, 1437–1438.)

### **III. DISPOSITION**

The order terminating mother's parental rights is conditionally reversed. The matter is remanded to the juvenile court with directions to vacate its finding that ICWA does not apply and to order the Department to further inquire into father's Indian heritage and to provide all required notices. If, after proper inquiry and notice, no tribe determines that A.J. is an Indian child within the meaning of ICWA, the court shall reinstate the order terminating mother's parental rights. If A.J. is determined to be an Indian child within the meaning of ICWA, the court shall proceed in compliance with ICWA and related state requirements. In all other respects, the order terminating mother's parental rights is affirmed.

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Bolanos, J.\*

We concur:

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Reardon, Acting P.J.

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Rivera, J.

\* Judge of the San Francisco City and County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.