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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

In re ABBIGAIL A. et al., Persons Coming
Under the Juvenile Court Law.

SACRAMENTO COUNTY
DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Plaintiff and Appellant,

v.

JOSEPH A. et al.,

Defendants and Respondents.

C074264

(Super. Ct. Nos.
JD232871 & JD232872)

OPINION ON REMAND

After a combined hearing in May 2013 (Welf. & Inst. Code, §§ 355, 358),¹ the juvenile court found that minors Abbigail A. (born in 2008) and Justin A. (born in 2007)

¹ Undesignated statutory references are to the Welfare and Institutions Code.

were subject to its jurisdiction (the bases for which are not pertinent to this appeal). It placed the minors in the custody of their maternal grandmother. At a prehearing status conference, it directed the Sacramento County Department of Health and Human Services (DHHS) to take active efforts to enroll the minors in the tribe of their paternal great-aunt and great-grandmother (the Cherokee Nation of Oklahoma, which had stated the minors were not members but were eligible for membership) even though the minors' biological and presumed father Joseph A. was not yet enrolled as a tribe member.

The basis for this directive was the provision in rule 5.482(c) of the California Rules of Court² that includes this duty among the active efforts an agency must make on behalf of minors who are *eligible* for tribal membership but who are *not* "Indian children" as defined in the federal Indian Child Welfare Act (ICWA) and state law.³ The definition

² Undesignated rule references are to the California Rules of Court.

³ Rule 5.482(c) states, "If after notice has been provided as required by federal and state law a tribe responds indicating that the child is eligible for membership if certain steps are followed, the court must proceed *as if the child is an Indian child* and direct the appropriate individual or agency to provide active efforts under rule 5.484(c) to secure tribal membership for the child." (Italics added.)

We note by contrast that rule 5.484(c) states, "In addition to any other required findings to place *an Indian child* with someone other than a parent or Indian custodian, or to terminate parental rights, the court must find that active efforts have been made, in any proceeding listed in rule 5.480, to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and must find that these efforts were unsuccessful.

"(1) The court must consider whether active efforts were made in a manner consistent with the prevailing social and cultural conditions and way of life of *the Indian child's tribe*.

"(2) Efforts to provide services must include pursuit of any steps necessary to secure tribal membership for a child if the child is eligible for membership in a given tribe, as well as attempts to use the available resources of extended family members, the tribe, tribal and other Indian social service agencies, and individual Indian caregivers. "

(Italics added.)

of “Indian children” in the ICWA and state law requires that minors be either (a) members of a tribe themselves or (b) biological children of *members* of a tribe and eligible for tribal membership. (25 U.S.C. § 1903(4); Welf. & Inst. Code, § 224.1, subd. (a) [the ICWA definition of “Indian child” will apply under state law (hereafter § 224.1(a))].)

DHHS appealed (§ 395),⁴ challenging the validity of *both* rule 5.482(c) and rule 5.484(c) on various grounds. It contended federal law preempts the extension of services in the two rules to minors who are not Indian children under the ICWA; the rules are inconsistent with the definition of Indian children entitled to ICWA protections under section 224.1(a); and the rules are also inconsistent with the active efforts required under section 361.7.

In our original opinion, we agreed with DHHS on its second point, finding that *both* rules are inconsistent with the legislative definition of the class of protected Indian children. We therefore concluded the Judicial Council lacked authority to expand the definition. We reversed the judgment with directions to enter a new judgment that does not provide the minors with any of the protections for an Indian child under the ICWA or state law, until such time that Joseph A. or the minors have in fact become enrolled members of the Cherokee Nation of Oklahoma.

The Supreme Court granted review, and affirmed our decision. (*In re Abbigail A.* (2016) 1 Cal.5th 83 (*Abbigail A.*)). It agreed rule 5.482(c) represented an unauthorized expansion of the reach of the ICWA and state law to non-Indian minors. However, the Supreme Court pointed out that the duties imposed under rule 5.484(c) *were* in fact

The juvenile court cited this rule as a basis for its order, and the parties have litigated the validity of this rule as well. We will return to the contrast between the two rules in the text.

⁴ Preparation of the record and briefing was completed in March 2014.

limited to Indian children (a distinction that the briefing of the parties led us to overlook), and therefore it was consistent with state law. (*Abbigail A.*, at p. 88.) It therefore reversed our holding on that point and otherwise affirmed, but “remanded for further proceedings consistent with this opinion.” (*Id.* at p. 97.)

It is not apparent what further proceedings are necessary at this point; however, as the remittitur ball is now in our court, we will reiterate our prior opinion (as the Supreme Court’s opinion does not include the background facts) with a more succinct Discussion (in light of the controlling holding in *Abbigail A.*). We therefore reverse and remand again with directions to enter a new judgment that does not provide the minors with any of the protections for an Indian child under the ICWA or state law, until such time that Joseph A. or the minors have in fact become enrolled members of the Cherokee Nation of Oklahoma (a status that two years later apparently still has not been resolved (*Abbigail A.*, *supra*, 1 Cal.5th at p. 96, fn. 2)).

FACTUAL AND PROCEDURAL BACKGROUND

In light of the issue on appeal, there is only a limited amount of background we need to add to the introduction. In March 2012, mother Jamie S.⁵ had agreed to informal supervision from DHHS. In August 2012, she signed authorization for her mother to be the voluntary caretaker of the minors. DHHS filed the instant petitions in December 2012.

At the initial hearing (§ 319), Jamie S. disclaimed any Indian heritage and stated her belief that Joseph A. did not have any Indian heritage as well. However, the father appeared at a January 2013 status conference, where he informed the court that he believed he was the biological father of the minors and his maternal grandmother was an

⁵ Appellate counsel for Jamie S. notified us that she would not be filing a respondent’s brief on her client’s behalf (who was indifferent to the application of ICWA protections in these proceedings).

Indian; he provided the name and address of his maternal aunt, who was a registered member of the tribe and kept track of the family tree, as a person who was better informed on the issue. The juvenile court determined at this time that Joseph A. was the biological and presumed father of the minors.

The Cherokee Nation of Oklahoma sent a letter to DHHS in late January 2013 that confirmed the minors were descendants of tribal members (Joseph A.'s maternal grandmother; his mother, unlike his aunt, had never enrolled) and eligible for tribal membership, but neither the minors nor Joseph A. were enrolled members.⁶ The Cherokee Nation declined to intervene in the proceedings unless Joseph A. or the minors completed the application forms that it had enclosed. The tribe also "recommended" the application of ICWA protections to the minors from the outset of the proceedings in order to avoid any delays if Joseph A. or the minors became enrolled members.

On the basis of this letter, DHHS argued at the February 2013 status conference that the juvenile court should not apply ICWA protections because the minors were not Indian children. Counsel for Joseph A. stated that he intended to apply for tribal membership. The juvenile court expressed its intent to treat the minors as if they were Indian children in order to prevent relitigation in the event they or their father were to become tribal members, inviting DHHS to file a "reconsideration" brief as to whether the juvenile court was precluded as a matter of law from proceeding in this manner. Shortly afterward, the Cherokee Nation of Oklahoma sent a followup letter noting that it had not received any completed application forms and enclosing new ones.

At the March 2013 status conference, the juvenile court directed counsel to make reasonable efforts to enroll Joseph A. and the minors in the tribe. DHHS noted that in an

⁶ The United Keetoowah Band of Cherokee Indians in Oklahoma and the Eastern Band of Cherokee Indians notified DHHS that the minors were not descendants of any member of their tribes.

abundance of caution it was scheduling an Indian tribal expert for the combined hearing (jurisdiction/disposition) in the event it was necessary. The juvenile court then continued the proceedings.

At the April 2013 status conference, the juvenile court concluded it was required to treat the eligible minors as Indian children under rules 5.482(c) and 5.484(c)(2) and denied DHHS's motion for reconsideration. It therefore directed DHHS to take active efforts to enroll the minors, authorizing it to release their birth certificates to the tribe as part of the application process. Joseph A. noted that he had sent the necessary documents to the tribe for his own enrollment and was awaiting his enrollment number.

At the May 2013 combined hearing, Joseph A. noted at the outset that his tribal application was stalled because the tribe wanted a state-certified copy of his mother's birth certificate rather than the one he had submitted, and because an update to the tribe's registration system had prevented access for six weeks. The juvenile court then received testimony from an ICWA expert who noted the tribe would not act on the membership applications of the minors until Joseph A. was enrolled. (§ 224.6.) The court sustained the allegations of the petitions; it also made findings pursuant to the ICWA by clear and convincing evidence (incorporating the Indian expert's testimony) that continued parental custody of the minors would likely result in serious emotional or physical damage (§ 361, subd. (c)(6)), that reasonable efforts had been made to prevent the breakup of an Indian family (§ 361, subd. (d) & § 361.7, subd. (a)), and that the placement of the minors met the preferences of the ICWA (§ 361.31). The court set review hearings (§ 366.21, subs. (e) & (f)) for November 2013 and February 2014.

DISCUSSION

The interpretation of statutes and court rules is a question of law that we review de novo. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 81; *California*

Court Reporters Assn. v. Judicial Council of California (1995) 39 Cal.App.4th 15, 22 (*Court Reporters*).

Under our state charter, the Judicial Council is authorized to adopt rules of court that are “not . . . inconsistent with statute.” (Cal. Const., art VI, § 6, subd. (d).) A rule of court inconsistent with legislative *intent* is invalid even absent an express legislative prohibition on the promulgation of a rule on the subject, and a rule can also be inconsistent even though it can operate harmoniously with a statute. (*Court Reporters, supra*, 39 Cal.App.4th at pp. 23, 25-26 [rejecting Judicial Council’s claims to the contrary]; *id.* at p. 22 [Judicial Council’s rulemaking authority subordinate to Legislature]; accord, *In re Robin M.* (1978) 21 Cal.3d 337, 346; cf. *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011 [courts not bound by Judicial Council’s interpretation of statute].)

In 2006, the Legislature incorporated the provisions of the ICWA into California law. (Stats. 2006, ch. 838, §1, pp. 6535-6536 [summarizing changes].) This was intended to facilitate increased compliance. (*Abbigail A., supra*, 1 Cal.5th at p. 91; *In re W.B.* (2012) 55 Cal.4th 30, 52 (*W.B.*)). As part of this process, it added section 224.1. Section 224.1(a) provides, “As used in this division [(§ 200 et seq.)], unless the [statutory] context requires otherwise, the term[] . . . ‘Indian child’ . . . shall be defined as provided in [title 25 United States Code] Section 1903 of the [ICWA].”

Abbigail A. concluded that “Nothing in the [2006 legislation’s] language or history demonstrates the Legislature intended to apply [the] ICWA’s requirements to, or require membership applications be made on behalf of, children who are not Indian children as defined in [the] ICWA. . . . Rule 5.482(c) is inconsistent with those statutes, and with the

Legislature’s intent, and thus [is] invalid.” (*Abbigail A.*, *supra*, 1 Cal.5th at p. 93.)⁷

It did not find any of Joseph A.’s arguments to the contrary to be persuasive, which we do not need to repeat here. (*Id.* at pp. 93-96.)

However, it observed that we had treated rule 5.484(c) “as essentially identical,” reflecting both the trial court’s ruling and the treatment in the briefs of the parties in this court and in the Supreme Court, when “[i]n fact, rule 5.484(c)(2) justifies separate consideration.” (*Abbigail A.*, *supra*, 1 Cal.5th at p. 96.) As it politely pointed out, “Unlike rule 5.492(c), which directs the juvenile court to proceed in certain cases ‘as if’ a child were an Indian child, rule 5.494(c)(2) speaks only to the court’s obligations in a case involving an ‘Indian child’ as defined by law. Read in this manner, according to its plain language, the rule is not inconsistent with any state statute implementing [the] ICWA.” (*Abbigail A.*, at p. 96.)

DHHS did not claim that the application of rule 5.482(c) to the combined hearing was prejudicial with respect to either the jurisdictional or dispositional findings. It asked only that we reverse the judgment and remand with directions to enter a new judgment that omits any duty to comply with the ICWA in subsequent proceedings. We shall make that our disposition.

DISPOSITION

The judgment is reversed with directions to enter a new judgment that does not direct the application of ICWA provisions to the minors, until such time as they may

⁷ In reaching this conclusion, the Supreme Court referenced *In re Jack C.* (2011) 192 Cal.App.4th 967, which applied rule 5.482(c), and concluded that the opinion “should not, in view of our decision, be read as authority on” the validity of the rule under state law. (*Abbigail A.*, *supra*, 1 Cal.5th at p. 96, fn. 3.)

qualify as Indian children under the ICWA and California definitions of the class.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

HOCH, J.