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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

(Placer)

In re J.P. et al., Persons Coming Under the Juvenile
Court Law.

C078735

PLACER COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

(Super. Ct. Nos. 53-003082,
53-003083, 53-003169)

Plaintiff and Respondent,

v.

LARRY W.,

Defendant and Appellant.

In re J.P. et al., Persons Coming Under the Juvenile
Court Law.

C079093

PLACER COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

(Super. Ct. Nos. 53-003082,
53-003083, 53-003169)

Plaintiff and Respondent,

v.

LISA P.,

Defendant and Appellant.

Lisa P. (mother) and Larry W. (father) appeal from the juvenile court's order terminating their parental rights. (Welf. & Inst. Code, § 366.26.)¹ Both parents contend the trial court erred by finding the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) did not apply.² While this appeal was pending, and after the conclusion of briefing, counsel for respondent Placer County Department of Health and Human Services (the Department) informed this court that mother had died. Accordingly, mother's death causes her appeal to become moot. We will dismiss mother's appeal (case No. C079093) as moot. (*In re A.Z.* (2010) 190 Cal.App.4th 1177, 1181.) In father's appeal (case No. C078735) we shall vacate the order terminating parental rights and remand for further proceedings under the ICWA as to father.

FACTUAL AND PROCEDURAL BACKGROUND

Since the parents do not attack the order terminating parental rights on the merits, we recount the facts briefly.

On June 10, 2014, the Department filed a section 300 petition as to minors S.P. (age 11), D.P. (age 8), J.P. (age 6), and A.P. (age 3), alleging: Mother suffered from untreated methamphetamine abuse and mental health issues. A transient roommate of mother's had molested S.P. and J.P. Mother continued to allow adults she barely knew (including drug abusers and a registered sex offender) to come and go on her premises and have contact with the minors. Mother had let the minors go unsupervised outside the

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

² Mother's appeal (case No. C079093) and father's appeal (case No. C078735) were consolidated, for purposes of oral argument and decision only, by order of this court. Father's opening brief joins in mother's ICWA argument and raises no separate issues.

house for hours at a time. Larry W., the alleged father of D.P. and J.P., was incarcerated. The whereabouts of the other minors' alleged fathers were unknown.³

The detention report stated that there had been a prior dependency proceeding in 2010 involving all four minors. Mother received services that included drug testing, residential substance abuse treatment, psychotropic medication assessment, individual counseling, and parenting classes. After successfully completing services, mother regained custody of the minors.

According to the detention report, mother advised the social worker that the minors were not registered with a tribe. Mother subsequently claimed she had Native American heritage, but could not specify a tribe. The report stated that the ICWA's applicability was "unknown."

At the detention hearing on June 13, 2014, mother and the alleged fathers were not present. The juvenile court ordered the minors detained and set a pretrial conference as to jurisdiction and disposition for June 18, 2014.

The minute order of the detention hearing asserts that the juvenile court found the ICWA did not apply. However, the reporter's transcript of the hearing does not show any such finding.⁴

At the pretrial conference on June 18, 2014, mother and Frederick R., the biological father of S.P., were present. The juvenile court reappointed Rebecca Bowman,

³ S.P.'s biological father, Frederick R., came forward promptly and asked for placement. The juvenile court placed S.P. with Frederick R. and subsequently dismissed the dependency as to her. S.P. is not a party to these appeals.

⁴ The juvenile court stated at the hearing that it would "adopt the written findings and orders made today as part of the record." Those orders do not contain any express statement that the ICWA does not apply.

who had previously represented mother, as her counsel, and also appointed counsel for Frederick R.

During this hearing, the juvenile court stated: “There was a previous finding that the [ICWA] does not apply in this matter. So I don’t think we need to make that inquiry.”⁵ Attorney Bowman did not dispute that statement.

On the date of the pretrial hearing, however, Attorney Bowman filed an ICWA-020 form (-020 form) stating that mother claimed “Navaho [*sic*]” and/or “Cherokee” ancestry “as stated on record.” The reporter’s transcript does not show that this claim was stated at the hearing, but the minute order for the hearing reflects the claim.

The jurisdiction/disposition report asserted that the ICWA did not apply because (1) during the 2010 dependency proceeding, two alleged fathers (David A. and Larry W.) had claimed Indian heritage, but ICWA notice and inquiry had shown that the minors were ineligible for enrollment in any tribe, and (2) Frederick R. did not claim Indian heritage. The report did not mention mother’s current claim of Navajo and Cherokee heritage. It also did not state that mother had been asked about the subject since her equivocal remarks at the time of the detention report.

At the jurisdiction/disposition hearing on September 9, 2014, mother, Larry W., and Frederick R. submitted on jurisdiction and disposition. The juvenile court denied reunification services to mother (§ 361.5, subd. (b)(13)) and Larry W. (§ 361.5, subd. (a)), and scheduled a section 366.26 hearing. County counsel asked whether the court

⁵ The record does not show what “previous finding” the court had in mind. However, as we shall explain, the court may have been referring to the 2010 proceeding, in which that finding was made. If so, the court erred because that finding pertained only to Larry W. and another alleged father.

had made the finding that the ICWA does not apply; the court stated: “I did. Thank you.”⁶ Attorney Bowman did not offer argument on that point.

On October 16, 2014, mother filed a *Marsden* motion to remove Bowman as her appointed counsel. The juvenile court granted the motion and appointed new counsel for mother.

The juvenile court held a contested section 366.26 hearing on February 24, 2015. Mother did not raise any ICWA argument. The juvenile court terminated mother’s and Larry W.’s parental rights, ordered the minors to remain in the home of Frederick R., where they had been placed, and chose a permanent plan of adoption by Frederick R. and his wife.

DISCUSSION

Father contends the juvenile court erred reversibly by finding the ICWA inapplicable, because the court was required to order ICWA notice and inquiry as to mother’s claim of Navajo and/or Cherokee ancestry but failed to do so. The department disagrees. We agree with father.

When the juvenile court knows or has reason to know that a child involved in a dependency proceeding is an Indian child, the ICWA requires that notice of the proceedings be given to any federally recognized Indian tribe of which the child might be a member or eligible for membership. (25 U.S.C. §§ 1903(8), 1912(a); *In re Robert A.* (2007) 147 Cal.App.4th 982, 989 (*Robert A.*)) A mere suggestion of Indian ancestry is sufficient to trigger the notice requirement. (*Robert A.*, at p. 989.) Notice requirements are construed strictly. (*Ibid.*)

⁶ Since the court had not made any such finding up to then during the jurisdiction/disposition hearing, the court may have been referring to its finding at the pretrial conference.

Section 224.3, subdivision (a) imposes “an affirmative and continuing duty to inquire” whether a child is or may be an Indian child. Notice must include all of the following information, if known: the child’s name, birthplace, and birth date; the name of the tribe in which the child is enrolled or may be eligible for membership; names and addresses (including former addresses) of the child’s parents, grandparents, and great-grandparents, and other identifying information; and a copy of the dependency petition. (25 C.F.R. § 23.11(d)(1)-(4) (2015); § 224.2, subd. (a)(5)(A)-(D); *In re D.W.* (2011) 193 Cal.App.4th 413, 417; *In re Mary G.* (2007) 151 Cal.App.4th 184, 209.)

A non-Indian parent may raise an ICWA claim on behalf of the other biological parent. (See *In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339-340; *In re Riva M.* (1991) 235 Cal.App.3d 403, 411, fn. 6.)

Because the ICWA’s primary purpose is to protect and preserve Indian tribes, a parent does not forfeit a claim of ICWA notice violation by failing to raise it in the juvenile court. (*In re J.T.* (2007) 154 Cal.App.4th 986, 991 (*J.T.*); *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 783, fn. 1 (*Nicole K.*); *In re Marinna J.* (2001) 90 Cal.App.4th 731, 738-739 (*Marinna J.*.)

On June 18, 2014, before the jurisdiction/disposition hearing, mother gave notice through an -020 form that she claimed Navajo and/or Cherokee ancestry. That was sufficient to trigger the duty of notice and inquiry under the ICWA. (*Robert A., supra*, 147 Cal.App.4th at p. 989.)

The jurisdiction/disposition report asserted that the ICWA did not apply, but did not discuss mother’s claim or explain why it could be disregarded. The report relied only

on negative findings as to alleged fathers Larry W. and David A. in the 2010 proceeding, and on Frederick R.'s disavowal of Indian ancestry.⁷

The juvenile court, in turn, made its ICWA finding without addressing the claim raised on mother's -020 form. If the court thought the applicability of the ICWA had been conclusively resolved in the 2010 proceeding, the court was mistaken. When new information was put forward in this proceeding, the court and the Department had a duty to follow up on it, even if mother had failed to present that information in the prior proceeding. (See *J.T.*, *supra*, 154 Cal.App.4th at p. 991; *Nicole K.*, *supra*, 146 Cal.App.4th at p. 783, fn. 1; *Marinna J.*, *supra*, 90 Cal.App.4th at pp. 738-739.) The record does not show that any attempt was made to give notice under the ICWA as required.

The Department raises a number of arguments why ICWA notice was not required, or why the failure to give notice, if error, was harmless. We are not persuaded.

The Department asserts that mother failed to raise the claim in the 2010 proceeding, failed to name any specific tribe in the present proceeding before June 18, 2014, failed to challenge the juvenile court's repeated statements that the ICWA did not apply, and failed to "make or sign" any statement in her own name declaring her Indian ancestry. The first three assertions amount to an argument that mother forfeited the ICWA claim, which fails because the main purpose of the ICWA is to protect the interests of the tribes, not those of the parents. (*J.T.*, *supra*, 154 Cal.App.4th at p. 991; *Nicole K.*, *supra*, 146 Cal.App.4th at p. 783, fn. 1; *Marinna J.*, *supra*, 90 Cal.App.4th at pp. 738-739.) However, the last point requires more discussion.

⁷ The record of the 2010 ICWA proceedings contains an ICWA-030 form that shows Larry W. claimed Cherokee ancestry, but does not show that mother claimed Indian ancestry.

The Department asserts that the -020 form filed by Attorney Bowman on June 18, 2014, alleging mother's "Navaho [*sic*]" and/or Cherokee ancestry, has no "evidentiary value" and should be disregarded. The Department reasons (1) mother did not sign the form; (2) Bowman did not know of her own personal knowledge that mother might have Indian ancestry; (3) Bowman's "speculation that the information regarding the mother's connection to the Navaho (*sic*) and Cherokee tribes was in the record is incorrect[;] [i]t was in fact the biological fathers who were claiming Navajo and Cherokee heritage"; (4) Bowman was replaced by another attorney on October 14, 2014; and (5) Bowman and her successor "ignored this ostensible notification of Indian heritage for the entire balance of the proceedings lasting over eight months from the date of [Bowman's] sworn statement," as did the social worker, the juvenile court, and mother herself. The Department concludes that we should infer Attorney Bowman was simply mistaken in her recollection of the prior proceeding when she filed the -020 form, as her failure to follow up on the matter suggests. We reject the Department's argument because it depends on speculation, fails to cite apposite authority, and attempts to shift the blame for the court's and the Department's failure to perform their duty under the ICWA onto others.

The Department does not cite authority holding that the juvenile court and the Department could properly disregard an -020 form attesting to mother's possible Indian ancestry because mother did not personally sign the form, or that mother's counsel could not properly file the form unless counsel had "personal knowledge" supporting mother's claim, and we know of no authority that could support these propositions. Counsel's unstated thoughts are irrelevant to whether the -020 form imposed a duty of ICWA notice and inquiry on the court and the Department. Whether mother or counsel followed up on the matter is also irrelevant, because it was the court's and the Department's duty to do

so, not that of mother or counsel.⁸ And the question whether the -020 form had “evidentiary value” is a red herring: The duty of ICWA notice and inquiry is triggered by whether the court and the Department have “reason to know” the child is an Indian child (Cal. Rules of Court, rule 5.481(a)(4)), not by whether the information that gives them reason to know would be admissible under the Evidence Code.

The Department relies on *In re Hunter W.* (2011) 200 Cal.App.4th 1454, *In re J.D.* (2010) 189 Cal.App.4th 118, *In re O.K.* (2003) 106 Cal.App.4th 152, and *In re Levi U.* (2000) 78 Cal.App.4th 191 to support the proposition that mother’s -020 form was insufficient to trigger ICWA notice requirements. The Department’s reliance is misplaced. In the cited cases, no notice was required because no tribe was named. (*In re Hunter W.*, *supra*, 200 Cal.App.4th at p. 1467; *In re J.D.*, *supra*, 189 Cal.App.4th at p. 123; *In re O.K.*, *supra*, 106 Cal.App.4th at pp. 154, 157; *In re Levi U.*, *supra*, 78 Cal.App.4th at p. 198.) Here, the -020 form named two tribes.

⁸ The Department cites *In re S.B.* (2005) 130 Cal.App.4th 1148, without a specific page citation, for the proposition that mother’s counsel had the “responsibility to raise prompt objection the [*sic*] the juvenile court to any deficiency in the notice procedures or lack of notice.” Since the Department fails to show where the opinion states this proposition, we could simply disregard the point on the ground that the Department has cited no authority for it.

In any event, *In re S.B.* is distinguishable. There, the social worker gave ICWA notice to the Bureau of Indian Affairs after receiving information from the maternal grandmother that the child might have Indian ancestry, and a tribe ultimately intervened in the proceeding. (*In re S.B.*, *supra*, 130 Cal.App.4th at p. 1155.) The mother, who brought the appeal, failed to raise an ICWA claim or objection on her own behalf below until a section 366.26 hearing was pending. (*In re S.B.*, at p. 1159.) The appellate court held that mother had “waive[d]” her own rights as to the ICWA, but not that she had waived the tribe’s rights. (*Id.* at pp. 1159-1160.) Here, no ICWA notice and inquiry occurred because the juvenile court and the Department erroneously disregarded mother’s -020 form.

Lastly, the Department cites *In re C.Y.* (2012) 208 Cal.App.4th 34 and *In re Aaron R.* (2005) 130 Cal.App.4th 697 to support the proposition that the social worker did not need to investigate the matter further after “mother’s nebulous statement of June 11, 2014” (in which she claimed possible Indian ancestry, but did not name a tribe) because mother had failed to claim Indian ancestry during the previous dependency proceeding. Again, the Department’s reliance is misplaced. It was the -020 form filed on June 18, 2014, which unequivocally imposed a duty under the ICWA on the social worker and the juvenile court, regardless of what had gone before. Furthermore, in both *In re C.Y.* and *In re Aaron R.*, as in the other cases the Department relies on, no tribe was ever identified. (*In re C.Y.*, *supra*, 208 Cal.App.4th at pp. 37-39; *In re Aaron R.*, *supra*, 130 Cal.App.4th at pp. 707-708.)

The Department asserts that any error in failing to perform ICWA notice and inquiry was harmless because the parents cannot show that a different result would obtain if notice were properly given. This assertion begs the question. Until notice is properly given, we cannot know whether a different result will obtain.

In any event, as the Department admits, there is no authority holding that the failure to give ICWA notice, where required, can be harmless error. On the contrary, it is settled that such error compels reversal and remand for further proceedings under the ICWA. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 187; *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 855-856.)

DISPOSITION

The orders terminating father’s parental rights to minors D.P. and J.P. are vacated. The matter is remanded with directions to the juvenile court to provide notice under the ICWA to the tribes named in mother’s -020 form. If the children prove to be Indian children, the court is directed to proceed in accordance with the ICWA. If the children

prove not to be Indian children, the court is directed to reinstate the orders terminating father's parental rights. Mother's appeal is dismissed as moot.

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

MAURO, J.