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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re T.G., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JAMES G.,

Defendant and Appellant.

D059959

(Super. Ct. No. J516899B)

APPEAL from an order of the Superior Court of San Diego County, Carol
Isackson, Judge. Dismissed.

James G. (Father) appeals a postpermanency planning review hearing order concerning contact and visitation between Father and his minor son, T.G. Father alleges the court erred by failing to comply with Indian Child Welfare Act (ICWA) inquiry and notice requirements. (25 U.S.C. § 1901 et seq.) Father asks this court to remand the

matter to the juvenile court for the limited purpose of ensuring compliance with ICWA. We dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

T.G. and his biological sister, P.G.,¹ entered the dependency system in October 2007, after Father's arrest for molesting a minor.² T.G. and P.G. were released to their mother (Mother)³ under a voluntary services agreement, but in November 2007, P.G. was again taken into protective custody after she was physically abused by Mother's boyfriend. The San Diego County Health and Human Services Agency (the Agency) detained T.G. a second time in October 2009, also as a result of physical abuse by Mother's boyfriend.

In its detention report, the Agency requested the court find ICWA does not apply because there was no reason to know T.G. was or may be an Indian child. Mother stated her father may be of Cherokee descent, but she and T.G. both reported they were not enrolled or registered with any Indian tribe, did not have a tribal identification card, had not lived on a tribal reservation, and had not received services from any tribe. The juvenile court noted that ICWA was found not to apply in P.G.'s case, ordered Mother to complete the ICWA forms, and deferred findings on applicability of ICWA.

¹ P.G.'s dependency was terminated in December 2008.

² Father is serving a prison sentence for convictions including lewd and lascivious sexual acts with children.

³ Mother is not a party to this appeal, and has not appealed the juvenile court's ICWA findings.

Mother's ICWA-020 Parental Notification of Indian Status form suggested she may have "Cherokee and/or Blackfoot" ancestry. Mother later reported her father was of Cherokee descent and members of her family had lived on tribal lands in Oklahoma and Arkansas. Mother did not know whether Father had American Indian heritage.

After further investigation, the Agency again asked the court to find notice under the ICWA was not necessary because T.G. and P.G. share biological parents, P.G. had been determined not to be an Indian child and, in addition to the information she had provided in P.G.'s dependency case, Mother could provide no information supporting her claim of Indian ancestry. The juvenile court continued the disposition hearing because Father's ICWA information had not been received, and ordered the Agency to file an addendum regarding the applicability of ICWA after contacting Father's prison counselor concerning any Indian heritage.

Father completed an ICWA-030 Notice of Child Custody Proceeding for Indian Child form in which he answered "unknown" to all questions regarding his Indian heritage. Father did not know whether T.G. was eligible for membership in an Indian tribe or whether Father's parents, grandparents or great-grandparents had Indian ancestry, and Father reported most of these relatives were either deceased or their whereabouts were unknown. Father provided no tribal names; was unable to provide any identifying information about his parents or grandparents, including their dates or places of birth; denied any family members had lived on tribal land; and denied T.G.'s paternal aunts had tribal affiliations. The court once again deferred a finding on the applicability of ICWA.

At the continued March 2010 disposition hearing, Father claimed heritage in the "Hawk" Tribe and the juvenile court ordered the Agency to investigate. In its June 2010 addendum report, the Agency reported the Hawk Tribe was not a federally recognized tribe. The court found the Agency had made a reasonable inquiry into whether ICWA notice was required, there was no reason to know T.G. was an Indian child, and ICWA did not apply. The court also ordered Mother to provide names and addresses for T.G.'s maternal and paternal relatives.⁴ T.G. was declared a dependent and placed in foster care.

At the 12-month review hearing in December 2010, the court terminated Mother's reunification services, found T.G. was not adoptable and ordered another planned permanent living arrangement at San Pasqual Academy. At T.G.'s June 2, 2011, postpermanency planning hearing,⁵ the court ordered the Agency to arrange for Father to send letters to T.G., and to explore the possibility of visitation between T.G. and Father.

DISCUSSION

Father appeals the juvenile court's June 2, 2011, order (June 2 order) but does not challenge the court's order to arrange for Father to send letters to T.G. and to explore the possibility of visitation between T.G. and Father. Instead, Father contends this matter

⁴ There is no indication in the record Mother provided this information.

⁵ During this hearing the court also addressed Father's *Marsden* claim (*People v. Marsden* (1970) 2 Cal.3d 118), and determined Father's claim concerned only representation provided by his criminal attorney.

must be remanded to the juvenile court solely because the Agency did not comply with ICWA notice provisions.⁶

"ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes and families by establishing certain minimum federal standards in juvenile dependency cases." (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538.) An Indian child is defined as "any unmarried person who is under age eighteen and 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).)

Whenever the court "knows or has reason to know that an Indian child is involved" in a child custody proceeding, ICWA imposes a duty to give the Indian child's tribe notice of the pending proceedings and provides the tribe a right to intervene. (25 U.S.C. § 1912(a); Welf. & Inst. Code,⁷ §§ 224.2, subd. (a), 224.3, subd. (d).) ICWA notice requirements are meant to ensure the child's Indian tribe will have the opportunity to intervene and assert its rights in the proceedings. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.)

⁶ T.C. is now 17 years old and will be 18 years old in April 2012, at which time dependency jurisdiction of the juvenile court will terminate. We are perplexed that at this stage of the proceedings counsel for Father seeks remand to the juvenile court for compliance with ICWA notice requirements.

⁷ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

A. *The June 2 Order Is Not Cognizable on Appeal*

This court does not have appellate jurisdiction to consider Father's appeal because the June 2 order did not affect T.G.'s status. A parent from whose custody a child was removed⁸ may challenge the lack of ICWA compliance. (25 U.S.C. § 1914; Cal. Rules of Court, rule⁹ 5.486(a).) ICWA issues cannot be waived by an untimely appeal (*In re B.R.* (2009) 176 Cal.App.4th 773, 779); may be raised for the first time on appeal (*In re Z.N.* (2009) 181 Cal.App.4th 282, 296-297; *In re A.B.* (2008) 164 Cal.App.4th 832, 839, fn. 4); and may be based on an order other than the order in which ICWA was addressed. (*In re I.G.* (2005) 133 Cal.App.4th 1246, 1251; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 252, 259-260.)

However, ICWA's substantive provisions apply only to proceedings "which affect the minor's status," such as "the minor's placement in adoption and foster care and . . . termination of parental rights" (*In re Holly B.* (2009) 172 Cal.App.4th 1261, 1266; 25 U.S.C. §§ 1903(1), 1912(a); see generally *In re Z.W.* (2011) 194 Cal.App.4th 54, 56, 63-64 [termination of parental rights]; *In re B.R.*, *supra*, 176 Cal.App.4th at pp. 778-779

⁸ Although Father did not have physical custody of T.G. at the time T.G. was removed from Mother's custody, under ICWA, "custody" is generally understood to signify either physical or legal custody. (*People v K.M.O. (In re J.O.)* (Colo. 2007) 170 P.3d 840, 841-842; *In re Adoption of Child of Indian Heritage* (N.J. 1988) 543 A.2d 925, 937-938; *D.J. v. P.C.* (Alaska 2001) 36 P.3d 663, 670; *In re Welfare of W.R. and A.R.* (Minn. 1986) 379 N.W.2d 544, 549; *In re Adoption of Baade* (S.D. 1990) 462 N.W.2d 485, 490; *Morrow v. Winslow* (Okla. 1996) 94 F.3d 1386, 1393-1394; but see *In re Adoption of Baby Boy L.* (Kan. 1982) 643 P.2d 168, 175-176 [suggesting "custody" under 25 U.S.C. § 1914 means physical control]; *In Interest of S.A.M.* (Mo. 1986) 703 S.W.2d 603, 608 [25 U.S.C. § 1912(f) requires physical custody].)

⁹ All further rule references are to the California Rules of Court.

[termination of parental rights]; *In re I.G., supra*, 133 Cal.App.4th at pp. 1248, 1251 [order denying rehearing of placement order]; *Dwayne P. v. Superior Court, supra*, 103 Cal.App.4th at pp. 251, 258-260 [writ petition from termination of services and setting § 366.26 hearing]; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1262, 1267 [placing child in out-of-home care].)

Father appeals an order directing the Agency to explore contact and visitation between T.G. and Father. In *In re Holly B., supra*, 172 Cal.App.4th 1261, the Third District Court of Appeal concluded an ICWA notice issue was not cognizable on a parent's appeal from an order modifying an earlier order for a psychological evaluation, because "failure to comply with the ICWA notice provisions has no impact upon" the order the parent appealed, and ICWA notice requirements apply only to orders affecting the dependent's status. (*In re Holly B., supra*, at pp. 1266-1267.)

The only issue before this court is the propriety of the June 2 order exploring the possibility of communication and visitation. The ICWA issue therefore is not cognizable on this appeal because the June 2 order was not an Indian child custody proceeding within the meaning of ICWA.

B. There Was No Reason to Know T.G. Is an Indian Child

Even if the June 2 order were appealable, there was no reason to know T.G. is an Indian child. The Agency and court have "an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child." (§ 224.3, subd. (a); rule 5.481(a).) If circumstances indicate a child *may be* an Indian child, the Agency has a duty to further inquire regarding the child's possible Indian status. (Rule 5.481(a); § 224.3, subd. (c).)

The duty to notice arises only when there is a *reason to know* an Indian child *is* involved in proceedings "affecting the status of the Indian child." (Rules 5.480(1), 5.481(b); § 224.3, subd. (d).) Thus, the duty to notice is triggered by a higher "standard of certainty" than is the duty to inquire. (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200.) The duty to notice requires the Indian child's tribe be given notice of the pending proceedings and provided a right to intervene. (*In re Shane G., supra*, 166 Cal.App.4th at p. 1538; §§ 224.2, subd. (a), 224.3, subd. (d).)¹⁰

"The circumstances under which a dependency court has reason to know a child is an Indian child . . . include, as relevant here, where '[t]he child or a person having an interest in the child, . . . *informs or otherwise provides information suggesting that the child is an Indian child . . .*'" (*In re J.D.* (2010) 189 Cal.App.4th 118, 124; rule 5.481(a)(5); § 224.3, subd. (b)(1)-(3).) Notably, rule 5.481(a)(5), and section 224.3, subdivision (b)(1) through (3), require that someone "*provides information suggesting,*" which implies some minimal level of informative content, beyond a bare suggestion. "[A] claim that a parent, and thus the child, 'may' have Native American heritage is insufficient to trigger ICWA notice requirements if the claim is not accompanied by other information that would reasonably suggest the minor has Indian ancestry." (*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1516.)

¹⁰ Notice must be given to the Bureau of Indian Affairs (BIA) if there is reason to know the child is Indian and the specific identity or location of the tribe cannot be determined. (25 U.S.C. § 1912(a); *In re E.W.* (2009) 170 Cal.App.4th 396, 403.)

Father's ICWA-030 form revealed no information suggesting he has Native American heritage, and Father was unable to provide even basic information about his parents or grandparents, including their dates and places of birth. "If the notice duty is triggered under ICWA, the notice to a tribe must include a wide range of information about relatives, including grandparents and great-grandparents, to enable the tribe to properly identify the children's Indian ancestry." (*In re J.D.*, *supra*, 189 Cal.App.4th at p. 124.)

Additionally, Father did not identify a federally recognized tribe in which his ancestors may have been members. Father first claimed heritage in the "Hawk" Tribe at the March 2010 disposition hearing. The Agency investigated and reported the Hawk Tribe was not federally recognized. When a parent cannot "even identify the tribe the family may have had connections to," the information may be considered "too vague, attenuated and speculative" to provide a reason to know the child is an Indian child. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1468; *In re J.D.*, *supra*, 189 Cal.App.4th at p. 125; *In re O.K.* (2003) 106 Cal.App.4th 152, 157.) Generally, when our courts have enforced ICWA notice provisions, a specific tribe has been identified. (See, e.g., *In re B.R.*, *supra*, 176 Cal.App.4th at p. 777 [one-quarter ancestry in a federally recognized Indian tribe]; *In re Alice M.*, *supra*, 161 Cal.App.4th at p. 1198 [Apache and/or Navajo]; *In re Mary G.* (2007) 151 Cal.App.4th 184, 210 [Cherokee and Kumeyaay]; *In re Robert A.* (2007) 147 Cal.App.4th 982, 985 [Cherokee]; *In re Merrick V.* (2004) 122 Cal.App.4th 235, 243, 246 [Yaqui]; *In re Karla C.* (2003) 113 Cal.App.4th 166, 172 [Blackfeet]; *In re*

Nikki R. (2003) 106 Cal.App.4th 844, 847 [Cherokee]; *In re Christopher I.* (2003) 106 Cal.App.4th 533, 561, 566 [Pima]; *Dwayne P. v. Superior Court, supra*, 103 Cal.App.4th at pp. 252, 260-261 [Cherokee]; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 464-465 [Chukchansi Indian and Indian/Alaskan]; *In re Kahlen W., supra*, 233 Cal.App.3d at p. 1420 [Miwok].) A few decisions have required ICWA notice when there was merely a suggestion the child may have Native American ancestry. (See, e.g., *In re I.G., supra*, 133 Cal.App.4th at p.1251 ["part Native American"]; *In re Antoinette* (2002) 104 Cal.App.4th 1401 [Native American ancestry]; see also *In re Levi U.* (2000) 78 Cal.App.4th 191, 194-196 [affirmed where notice had been sent to BIA based on allegation parent "might have Indian ancestry"].)

Father argues that "[i]n an abundance of caution, the juvenile court and the Agency had a duty to notice the Mohawk Tribe" because its name is similar to "Hawk." However, Father "cite[s] no authority supporting [his] novel contention that an agency must investigate any possible affiliation of a tribe which is not federally recognized." (*In re K.P.* (2009) 175 Cal.App.4th 1, 5.)

The Agency also conducted an inquiry into Mother's alleged Indian heritage, which revealed T.G. and P.G. are full biological siblings and ICWA was found not to be applicable in P.G.'s dependency case. Furthermore, Mother could provide no information concerning her alleged Indian heritage in addition to that which she had provided in P.G.'s case. Father surmises that perhaps the Agency and trial court did not comply with their duty of inquiry in P.G.'s dependency proceedings. However, a trial court's findings as to whether proper notice was given under ICWA are reviewed for substantial

evidence; Father provides no information that would cause us to question ICWA compliance in P.G.'s case. (See, e.g, *In re S.B.* (2005) 130 Cal.App.4th 1148, 1161; *In re E.H.* (2006) 141 Cal.App.4th 1330, 1334.) In the absence of any evidence to the contrary, we presume "official duty has been regularly performed." (Evid. Code, § 664; see also *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430.)

The juvenile court could have reasonably found the limited information provided by Mother did not provide a reason to know T.G. is an Indian child, even if the court did not consider the ICWA finding in P.G.'s case. Mother stated her father may be of Cherokee descent, but reported she was not enrolled or registered with any Indian tribe, had not lived on a tribal reservation, and had not received services from any tribe. In *In re Z.N., supra*, 181 Cal.App.4th at page 298, the mother believed "one of her grandmothers 'was Cherokee' and another 'part Apache' . . . , yet [she] also reported that she herself was not registered and did 'not believe her mother established any affiliation.' " The court in *In re Z.N.* held this information insufficient to suggest the children may have Indian heritage. (*Ibid.*)

The juvenile court found the Agency had conducted a reasonable inquiry to determine whether ICWA notice was required, and there was no reason to know T.G. was an Indian child. We conclude there is substantial evidence to support the court's finding there was no further duty of inquiry or notice under ICWA, because the evidence is too indefinite to provide a reason to know T.G. may have Indian heritage.

C. We Will Not Consider Postjudgment Evidence

In Father's appellate brief it is suggested Father "might have" meant Mohawk when he claimed Indian ancestry in the Hawk Tribe. The suggestion of what Father might have intended, to the extent it can be characterized as "evidence," is postjudgment evidence. In the four and one-half years this family has been involved in dependency proceedings, the *possibility* Father may have intended to identify the Mohawk Tribe was never presented to the juvenile court. A similar situation was addressed in *People ex rel. J.C.R.* (Colo. 2011) 259 P.3d 1279, 1283. There, the mother revealed possible Indian ancestry to her attorney just before filing her appeal. The court held it was not necessary to remand the proceedings to require ICWA notice, because "no record evidence suggesting that the children might be Indian children was ever presented to or became known" to the court, and therefore the court had no reason to know the children were Indian children. (*Id.* at p. 1282.)

In *In re K.P.*, the appellate court refused to consider evidence, presented for the first time on appeal, of an Internet site purportedly indicating that mother's tribe "was affiliated with a federally recognized Indian tribe." (*In re K.P.*, *supra*, 175 Cal.App.4th at p. 5.) The court explained, "[t]he notice provisions of the ICWA are triggered 'where the [juvenile] court knows or has reason to know that an Indian child is involved.'" (*Ibid.*, quoting *In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 469.) Furthermore, "resolution of the evidentiary question of adequacy of the notices sent is properly a function of the juvenile court" (*In re Holly B.*, *supra*, 172 Cal.App.4th at p. 1267.) "Making the

appellate court the trier of fact is not the solution." (*In re Nikki R.*, *supra*, 106 Cal.App.4th at pp. 852-853.)

D. Any Error Is Harmless

Even if the court and the Agency did not adequately discharge their duty of inquiry or notice under ICWA, Father has not shown "a miscarriage of justice." When there has been "no offer of proof or other affirmative assertion of Indian heritage on appeal, a miscarriage of justice has not been established and reversal is not required." (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1388.)

The allegation Father "might have" meant "Mohawk" appears to be the speculation of Father's appellate counsel, based on similarity of the names "Hawk" and "Mohawk." If Father himself had identified the Mohawk Tribe, his appellate counsel certainly would have brought that information to our attention. (*In re S.B.*, *supra*, 130 Cal.App.4th at p. 1160.) Aside from this unsworn allegation, there is no suggestion remand to the juvenile court for further inquiry would produce any additional information providing a reason to know T.G. is an Indian child. (See *In re I.W.* (2009) 180 Cal.App.4th 1517, 1531; see also *In re Miracle M.* (2008) 160 Cal.App.4th 834, 847.) "At a minimum, the parent must explain on what basis he is now claiming heritage in the particular tribe." (*In re Joseph P.* (2006) 140 Cal.App.4th 1524, 1531.) Father's remedy is a section 388 motion to allow the juvenile court to consider the new information he asks us to consider. (*In re Joseph P.*, at pp. 1531-1532.) "Simply naming a tribe alone, however, in our view would not amount to changed circumstances or new evidence when the parent previously stated he did not know his tribal heritage." (*Id.* at p. 1531.)

Father's request to remand the matter to the juvenile court for the limited purpose of ensuring compliance with ICWA is denied and his appeal is dismissed.

DISPOSITION

The appeal is dismissed.

McDONALD, J.

I CONCUR:

McCONNELL, P. J.

I CONCUR IN THE RESULT:

HALLER, J.