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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| In re S.W. et al., Persons Coming Under the Juvenile Court Law. | |
| RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>S.W.,<br><br>Defendant and Appellant. | E056227<br><br>(Super.Ct.No. INJ021573)<br><br>**OPINION** |

APPEAL from the Superior Court of Riverside County. Lawrence P. Best, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Matthew I. Thue, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, and Carole A. Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

S.W. (the father) appeals from an order terminating parental rights to his infant children, S.W. (S.W. or the child) and B.G. His sole appellate contention is that proper notice was not given as required by the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and related federal and state law. We will hold that the trial court could reasonably find that the notice that was given was proper. Accordingly, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2010, S.W. was born prematurely. The mother, T.G., tested positive for methamphetamine. She admitted smoking methamphetamine while pregnant. As a result, the Riverside County Department of Public Social Services (the Department) detained S.W. and filed a dependency petition with regard to her.[1]

The father was an only child. His mother "had substance abuse issues," so he had been raised by his paternal aunts. When first interviewed, he denied having any Native American ancestry. About two weeks later, however, he told a social worker "he believed there was Cherokee ancestry on his mother's side of the family . . . ." However, "he was unable to provide any additional information."

The father also filed a "Parental Notification of Indian Status" (ICWA-020) form, signed under penalty of perjury, stating "I may have Indian ancestry[:] Cherokee."

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[1] Two half siblings, with the same mother but different fathers, were also subjects of the petition. They are not involved in this appeal.

In October 2010, the Department attempted to give notice pursuant to ICWA. The notice listed the name of the child as S.G. (using the mother's surname) rather than S.W. (using the father's surname).[2] It included the names of both the father and the mother, as well as other required information about them. However, with regard to grandparents and other, more remote ancestors, it said only, "No information available." A social worker who prepared the notice stated that she "wasn't able to contact father."

It is undisputed that the notice was properly addressed and mailed. It is also undisputed that it was sent to all appropriate tribes and other persons. No tribe responded that the child was a member or eligible for membership. Two tribes affirmatively disclaimed any interest in the case.

In November 2010, at the jurisdictional/dispositional hearing as to S.W., the juvenile court found that proper notice pursuant to ICWA had been given, that S.W. was not an Indian child, and that ICWA did not apply. It further found jurisdiction over S.W. based on failure to protect. (Welf. & Inst. Code, § 300, subd. (b).) It formally removed

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[2] The original petition had likewise listed the child as S.G. The detention report had listed her as S.W., but the jurisdictional/dispositional report once again listed her as S.G. At the jurisdictional hearing, the juvenile court found that the child's true name was S.G.

In June 2011, a report filed in connection with the six-month review hearing included a copy of the child's birth certificate, which listed her as S.W. The social worker pointed this out and asked the court "to change the child['s] . . . name on record . . . ." Accordingly, at the six-month review hearing, the juvenile court found that the child's true name was S.W.

her from both parents' custody, and it ordered that they be provided with reunification services.

In July 2011, the mother gave birth to B.G. Because the mother was still using methamphetamine, the Department detained B.G. and filed a dependency petition as to him.

In August 2011, the father was interviewed again, and once again, he denied having any Indian ancestry. He filed a new ICWA-020 form, once again signed under penalty of perjury, this time stating that he had no Indian ancestry.

Later in August 2011, at a six-month review hearing regarding S.W., the juvenile court terminated reunification services and set a hearing pursuant to Welfare and Institutions Code section 366.26.

In September 2011, at the jurisdictional/dispositional hearing as to B.G., the juvenile court found jurisdiction over B.G. based on failure to protect. (Welf. & Inst. Code, § 300, subd. (b).) It also found that B.G. was not an Indian child and that ICWA did not apply. It denied reunification services and set a section 366.26 hearing.

In March 2012, at the section 366.26 hearing, the juvenile court found that both children were adoptable and that there was no applicable exception to termination. Accordingly, it terminated parental rights.

II

THE ICWA NOTICE WAS PROPER

"Congress enacted ICWA to further the federal policy '"that, where possible, an Indian child should remain in the Indian community . . . ."' [Citation.]" (*In re W.B., Jr.* (2012) 55 Cal.4th 30, 48.) "In certain respects, California's Indian child custody framework sets forth greater protections for Indian children, their tribes and parents than ICWA. [Citations.] Both federal and state law expressly provide that if a state or federal law provides a higher level of protection to the rights of the parent or Indian guardian of an Indian child, the higher standard shall prevail. [Citations.]" (*In re Jack C.* (2011) 192 Cal.App.4th 967, 977.)

"ICWA requires that when a court knows or has reason to know that an Indian child is involved in a dependency matter, it must ensure that notice is given to the relevant tribe or tribes. [Citation.]" (*In re J.O.* (2009) 178 Cal.App.4th 139, 154.) ICWA defines an "Indian child" as an "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).) However, "[t]he juvenile court '"needs only a suggestion of Indian ancestry to trigger the notice requirement."' [Citation.]" (*In re J.M.* (2012) 206 Cal.App.4th 375, 380.)

"Under the implementing federal regulation, the required ICWA notices must include '[a]ll names *known*, and current and former addresses of the Indian child's

biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information.' [Citation.] California law requires that the notices contain substantially the same data, including ' any other identifying information, *if known*.' [Citation.]" (*In re C.B.* (2010) 190 Cal.App.4th 102, 140, first italics added, some other italics omitted.)

Under state law implementing ICWA, "[t]he court [and the] county welfare department . . . have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . has been[] filed is or may be an Indian child . . . ." (Welf. & Inst. Code, § 224.3, subd. (a); see also Cal. Rules of Court, rule 5.481(a).) "If the court [or] social worker . . . 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, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members . . . ." (Welf. & Inst. Code, § 224.3, subd. (c).)

"'The [trial] court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings. [Citation.] We review the trial court's findings for substantial evidence. [Citation.]' [Citation.]" (*In re Christian P*. (2012) 208 Cal.App.4th 437, 451.)

"A deficiency in notice may be harmless when it can be said that, if proper notice had been given, the child would not have been found to be an Indian child and ICWA would not have applied. [Citations.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1530.)

Here, the Department does not dispute that, based on the father's statement that "there was Cherokee ancestry on his mother's side of the family," it had a duty to give ICWA notice. The key issue is whether the notice that the Department gave was adequate.

The father argues that the notice was inadequate because it identified the child as S.G. rather than S.W. It appears, however, that at that point in her young life, she was known as S.G. Both the original petition and the jurisdictional/dispositional report had listed her as S.G. Moreover, at the jurisdictional hearing, the juvenile court found that her true name was S.G. The father was present at the jurisdictional hearing, along with his appointed counsel, but did not object.

The name a person actually uses is controlling over the name listed on his or her birth certificate. (Code Civ. Proc., § 1279.5, subd. (a); *In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 646, fn. 1; 83 Ops.Cal.Atty.Gen. 136 (2000).) Moreover, a child's parents have the right to determine the child's name, unless they disagree. (*Marriage of Schiffman*, at pp. 645-646.) Here, the child was called S.G., and the father evidently concurred with calling her S.G. Accordingly, at least as of the date of the ICWA notice, her name *was* S.G. (See *Donald J. v. Evna M.* (1978) 81 Cal.App.3d 929, 937 ["where a child has used a particular surname for a substantial period of time without objection by

either natural parent, the court . . . should exercise its power to change the child's surname reluctantly"].)

Separately and alternatively, this asserted error was harmless. Under the circumstances of this case, the child's name was irrelevant to the determination of whether she was an Indian child. Because the father could not trace his ancestry to any particular Cherokee tribe, there was no possibility that the child had already been enrolled in any tribe, under any name. To determine her Indian status, a tribe would have to look to the names of her ancestors. The notice, however, did include the correct names of both parents. Moreover, for the reasons we will discuss below, it was not required to include the names of any more distant ancestors. The child's name did not add any potentially useful information to the notice.

The father also argues that the notice was inadequate because it did not include any information about the child's grandparents. The Department, however, was required to include this information in the notice only if it was available. (25 C.F.R. § 23.11, subds. (a), (d)(3); Welf. & Inst. Code, § 224.2, subd. (a)(5)(C).) The record shows that, when the father first told the social worker that he believed he had Cherokee ancestry, "he was unable to provide any additional information." Moreover, in the course of preparing the notice, the social worker tried to contact the father again but was unable to do so. This is substantial evidence that the social worker did inquire about the child's Indian ancestry but was unable to obtain any additional information.

The father responds, "[I]t is beyond reason to interpret this . . . as establishing that [the] father did not even know his mother's name." "We are not entitled to discount evidence '"unless it is physically impossible or inherently improbable and such inherent improbability plainly appears." [Citation.]' [Citation.]" (*California Sportfishing Protection Alliance v. State Water Resources Control Bd.* (2008) 160 Cal.App.4th 1625, 1640.) Due to his mother's "substance abuse issues," the father had been raised by his paternal aunts; it is conceivable that he did not know her true name. It is also possible that he simply was not forthcoming with the social worker. Moreover, even assuming that the social worker failed to ask the father for his mother's name in the first interview, it is clear that she tried to contact him again but was unable to do so. There is no requirement that a social worker gather all of the information relevant to ICWA notice in any single interview. There is substantial evidence that the social worker fulfilled her duty of inquiry.

Finally, the father argues that the social worker failed to inquire of his paternal aunts. However, the social worker does not appear to have had any contact information for these aunts until May 2011, when one of them phoned her to discuss placement. In August 2011, the other aunt likewise phoned. Meanwhile, in November 2010, the juvenile court had already found that S.W. was not an Indian child and that ICWA did not apply. Moreover, in August 2011, the father stated that he had no Indian ancestry and filed a new ICWA-020 form so stating under penalty of perjury. On this record, the

social worker was not required to pose additional — and most likely fruitless — inquiries to the paternal aunts.

As the Department points out, *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514 is nearly on point. There, the father stated, "'My great grandfather was Indian. I don't know if he was part of a tribe or not.'" (*Id*. at p. 1518.) He filled out a "Parental Notification of Indian Status" form stating that he might have Indian ancestry. (*Ibid*.) Three weeks later, however, he filled out a second "Parental Notification of Indian Status" form stating that he had no Indian ancestry. The father's counsel conceded that the father had "retracted" his claim of Indian ancestry. (*Id*. at p. 1519.) The juvenile court therefore held that the child was not an Indian child. (*Ibid*.)

The appellate court affirmed, stating: "In a juvenile dependency proceeding, 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. Here, the assertion that there was a 'possibility' the great-grandfather of the minor's father 'was Indian,' without more, was too vague and speculative to require ICWA notice . . . . [Citation.] This is particularly so in this case because the minor's father, who made the assertion, later retracted it, telling the juvenile court that he 'didn't actually have [Indian ancestry].'" (*In re Jeremiah G.*, *supra*, 172 Cal.App.4th at p. 1516.)

In *Jeremiah G.*, the father specified a particular Indian ancestor, but could not specify a tribe; here, the father specified a particular tribe (or tribal group), but could not

specify an Indian ancestor. Thereafter, like the father in *Jeremiah G.*, the father retracted his claim of Indian ancestry. The father concedes that *Jeremiah G.* "does appear to hold that a parent's recantation of a claim of Indian ancestry allows a dependency case to proceed [without] ICWA notice." We conclude that, after the father's recantation, neither the court nor the social worker knew or had reason to know that the children might be Indian children. (See Welf. & Inst. Code, § 224.3, subd. (c).)

The father argues that the Department forfeited a claim that he recanted by failing to raise it below. However, it is the father who is arguing, for the first time on appeal, that the Department failed to satisfy its ICWA duties. Thus, the Department had no reason to raise this argument below.

The father also argues that *Jeremiah G.* is at odds with *In re Gabriel G.* (2012) 206 Cal.App.4th 1160. In *Gabriel G.*, the father's attorney filed an ICWA-020 form stating "that the paternal grandfather, Gasper G., 'is or was a member' of a 'Cherokee' tribe." (*Id*. at p. 1163.) However, the form was unsigned. (*Ibid*.) Later, the social worker reported that, in an interview, the father had stated that he had no Indian heritage. (*Id*. at p. 1164.)

The appellate court stated: "[T]he social worker[] . . . did not provide any specifics regarding the inquiry he made of father as to his Indian heritage. For example, the social worker did not state whether he limited his inquiry to father's registration in a federally recognized tribe or inquired about the registration status of father's relatives. Nor did the social worker state whether he specifically asked father to elaborate on the

information provided in the ICWA-020 form or to explain any discrepancy between its contents and father's statement to the social worker. On the record before us, we cannot discern whether father meant to convey that while he was not a registered member of a Cherokee tribe, his own father was registered." (*In re Gabriel G.*, *supra*, 206 Cal.App.4th at p. 1167.) Here, by contrast, we are not looking at a vague, oral hearsay recantation made under unknown circumstances. Rather, we have a written statement, under oath, filed by the father's attorney, definitively stating that the father had no Indian ancestry. Thus, *Jeremiah G.*, not *Gabriel G.*, is controlling.

Finally, the father argues that, in recanting, he may have relied on the tribes' responses (or lack of responses) to the Department's assertedly inadequate notice. This is sheer speculation. If he had some familial information that he had Indian ancestry, the Department's notice would seem to be no reason to recant, particularly as he is claiming that the notice was inadequate and as one tribe did not respond at all. At a minimum, absent affirmative evidence that the Department did, in fact, influence the father's recantation, the juvenile court could reasonably conclude that the recantation was genuine.

We therefore conclude that the juvenile court could properly find that the notice requirements of ICWA and all related federal and state law were satisfied.

III

DISPOSITION

The order appealed from is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.