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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re H.W. et al., Persons Coming Under  
the Juvenile Court Law.

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

M.T.,

Defendant and Appellant.

E063582

(Super.Ct.Nos. J251068, J251069,  
J251070)

OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B.  
Marshall, Judge. Affirmed.

Tiffany Gilmartin, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Jean-Rene Basle, County Counsel, and Adam E. Ebright and Dawn M. Messer,  
Deputy County Counsel, for Plaintiff and Respondent.

M.T. (mother) appeals from an order terminating her parental rights to three of her children. Her only appellate contention is that the notice given to Indian tribes under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) was defective because it did not list the children's great-great-great-grandfather, who was supposedly the source of their Indian ancestry. There is a split of authority as to whether an ICWA notice has to include information about a great-great-great-grandfather. Thus, we will assume, without deciding, that the notice was defective. We will hold that, even if so, the error was harmless because the relevant tribe was able to determine, based solely on the information that was in the notice, that the children were not members or eligible for membership.

## I

### PROCEDURAL BACKGROUND

In July 2013, the mother gave birth to twins, Hh.W. (a girl) and Hm.W. (a boy). They were born prematurely, at 26 or 28 weeks. The mother tested positive for methamphetamine at the time of the birth. When interviewed, she admitted that she was currently (though intermittently) using methamphetamine and marijuana. She had a criminal history spanning 2004 through 2013, featuring some 23 charges, including robbery, battery, possession of cocaine for sale, and child endangerment, eventuating in four misdemeanor convictions.

In 2005, an older child had been removed from the mother's custody; the mother had failed to reunify with that child, who was therefore in a permanent placement.

Based on these facts, San Bernardino County Children and Family Services (Department) detained the twins in the hospital. It also detained their sister R.W., then aged nine months, and placed her with a non-relative extended family member. It filed dependency petitions as to all three children.

The man whom the mother named as the father denied paternity. At the detention hearing, at his request, he was declared a non-party.

In October 2013, at the jurisdictional/dispositional hearing, the mother submitted on the social worker's reports. The juvenile court found that it had jurisdiction based on failure to protect (Welf. & Inst. Code, § 300, subd. (b)) and abuse of a sibling (*id.*, § 300, subd. (j)). It formally removed the children from the mother's custody, and it ordered the mother to participate in reunification services.

As a result of the mother's drug use and their own prematurity, the twins suffered from serious health and developmental problems. At some point, they were diagnosed as having cerebral palsy. They were not discharged from the hospital until November 2013, when they were placed in a foster home for children with special health care needs.

In October 2014, at the 12-month review hearing, the juvenile court terminated reunification services and set a permanency planning hearing pursuant to Welfare and Institutions Code section 366.26 (section 366.26).

In March 2015, at the section 366.26 hearing, the juvenile court terminated parental rights.

## II

### THE ICWA NOTICE

#### A. *Additional Factual and Procedural Background.*

According to the detention report, the maternal grandmother “reported that her great-grandfather, Uray Bolim, was a Blackfoot Indian.”

Similarly, at the detention hearing, the maternal grandmother<sup>1</sup> stated that her great-grandfather was a Blackfoot Indian named “Ray Bolin.”

In September 2013, the Department sent Judicial Council form ICWA-030, which is intended to comply with ICWA notice requirements, to the Secretary of the Interior, the Bureau of Indian Affairs, and the Blackfeet Tribe of Montana (Blackfeet Tribe or the tribe), as well as to 24 Chippewa tribes. (See <<http://www.childsworld.ca.gov/Res/pdf/alphatribe.pdf>>, as of Jan. 4, 2016.)<sup>2</sup>

The notice included information regarding the children and the children’s parents, grandparents, and great-grandparents (or else it stated that the information was unknown

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<sup>1</sup> The reporter’s transcript indicates that the person who was speaking was “Ms. T[.]” According to the clerk’s minute order, both the mother and the maternal grandmother were at the hearing. They had the same last name, so either of them could have been “Ms. T.”

Both sides, however, have represented to this court that it was the maternal grandmother who said “*my* great grandfather” was a Blackfoot Indian. (Emphasis added.) We accept this as tantamount to a stipulation.

<sup>2</sup> The notice stated that the children might be members or eligible to be members of the Blackfeet or Chippewa tribes. The record, however, does not include any evidence that they had any Chippewa ancestry.

or unavailable). Thus, it listed the maternal grandparents, Tammy T. and Michael T., and stated that Tammy T. was a Blackfoot. It also listed the maternal great-grandparents, Betty T., David T., Janice J. and Thomas M., and stated that Betty T. was a Blackfoot. It did not list any great-great-grandparents or great-great-great-grandparents; it did not list Uray Bolim, Ray Bolin, or any variant of those names.

In October 2013, the Department filed proofs of mailing, return receipts, and all responses received up to that point.<sup>3</sup> None of the tribes that responded asserted that the children were members or eligible for membership. The Blackfeet Tribe in particular responded that the mother, the father, the mother's mother, and one of the mother's grandmothers were not "listed . . . on the tribal rolls," and "[t]herefore [each] child is not an 'Indian child' as defined by the Indian Child Welfare Act . . . ."

In November 2013, the trial court found: "ICWA does not apply. No further notice required." (Capitalization altered.)

B. *Legal Background.*

The mother contends that the notice was defective because it did not list the maternal great-great-great-grandfather.<sup>4</sup>

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<sup>3</sup> Three responses received later were filed in November 2013, before the juvenile court had yet made any ICWA finding.

<sup>4</sup> The mother seems confused about the exact relationship involved. At times, she refers to Bolim as the "maternal great-grandfather." However, she also refers to him as "the maternal great, great grandfather."

*[footnote continued on next page]*

“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.* (2012) 55 Cal.4th 30, 48.) An “Indian child” must be “either (a) a member of an Indian tribe or (b) . . . eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe . . . .” (25 U.S.C. § 1903(4); accord, Welf. & Inst. Code, § 224.1, subds. (a)(1), (a)(2).)

Under ICWA, whenever “the court knows or has reason to know that an Indian child is involved,” notice of the proceedings must be given to the relevant tribe or tribes. (25 U.S.C. § 1912(a); accord, Welf. & Inst. Code, § 224.2, subd. (a); Cal. Rules of Court, rule 5.481(b)(1).) “[T]he juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.” [Citation.]” (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989.)

“The purpose of the ICWA notice provisions is to enable the tribe . . . to investigate and determine whether the child is in fact an Indian child. [Citation.] Notice given under ICWA must therefore contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child’s eligibility for membership. [Citations.]” (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576 [Fourth Dist., Div. Two].) “It is essential to provide the Indian tribe with all available

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*[footnote continued from previous page]*

As the mother herself states, the “[m]aternal grandmother[] . . . told the court that her maternal great grandfather . . . was Blackfeet Indian.” That would make him the children’s great-great-great-grandfather.

information about the child's ancestors, especially the one with the alleged Indian heritage. [Citation.]" (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.)

25 Code of Federal Regulations section 23.11(b) (2014) provides that "[i]n order to establish tribal identity, it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors *including, but not limited to*, the information delineated at paragraph (d)(1) through (4) of this section." (25 C.F.R. § 23.11(b), italics added.)

25 Code of Federal Regulations section 23.11(d)(3) (2104) then provides that an ICWA "[n]otice . . . shall include the following information, if known: [¶] . . . [¶] . . . All names . . . 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." (25 C.F.R. § 23.11(d)(3), italics added.)

Welfare and Institutions Code section 224.2, subdivision (a)(5)(C) tracks 25 Code of Federal Regulations section 23.11(d)(3). Thus, it requires an ICWA notice to include information regarding "the Indian child's biological parents, grandparents, and great-grandparents . . . , and any other identifying information, if known." (Welf. & Inst. Code, § 224.2, subd. (a)(5)(C).) However, there is no state law requiring, as does 25 Code of Federal Regulations section 23.11(b), "as much information as is known."

““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.)

““The notice requirements serve the interests of the Indian tribes “irrespective of the position of the parents” and cannot be waived by the parent. [Citation.]’ [Citation.] Thus, ‘where the notice requirements of the Act were violated and the parents did not raise that claim in a timely fashion, the waiver doctrine cannot be invoked to bar consideration of the notice error on appeal.’ [Citation.]” (*In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231-232 [Fourth Dist., Div. Two].)

“A notice violation under ICWA is subject to harmless error analysis. [Citation.] ‘An appellant seeking reversal for lack of proper ICWA notice must show a reasonable probability that he or she would have obtained a more favorable result in the absence of the error.’ [Citation.]” (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 715.)

The Department argues that an ICWA notice need only include information about parents, grandparents, and great-grandparents. There is a split in the case law on this issue.

*In re C.B.* (2010) 190 Cal.App.4th 102 [Sixth Dist.] held that the ICWA notice was inadequate because it did not include information about the children’s great-great-grandfather, who may have been Indian. (*Id.* at p. 147.) It explained: “““[T]o establish

tribal identity, it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors.” (25 C.F.R. § 23.11(b) (2003))’ [Citation.]” (*Ibid.*)

*In re S.E.* (2013) 217 Cal.App.4th 610 [Second Dist., Div. Four] likewise held that the ICWA notice was inadequate because it did not include information about the children's great-great-grandfather. (*Id.* at pp. 615-616.) The social services agency argued “that it ha[d] no obligation to include information about ancestors as remote as great-great-grandparents in ICWA notices, as evidenced by the fact that there is no designated space for such ancestors on the ICWA notice forms promulgated by the Judicial Council of California.” (*Id.* at p. 615.) The court disagreed; it stated that “[w]here the information was known, its inclusion was required regardless of the lack of a preprinted line on the Judicial Council form asking for it.” (*Id.* at pp. 615-616.)

Meanwhile, *In re J.M.* (2012) 206 Cal.App.4th 375 [Second Dist., Div. Eight] held that an ICWA notice does *not* have to include information about great-great-grandparents. (*Id.* at pp. 380-381.) It interpreted 25 Code of Federal Regulations section 23.11(b) “to mean that notice must include, but is not limited to, the names, birthdates, places of birth and death, and tribal enrollment numbers *of parents, grandparents and great-grandparents*, and that additional identifying information *about these ancestors* must be given if known. We do not interpret this regulation to override the provision that notice is required to include information about ancestors no more remote than the dependent child's great-grandparents.” (*In re J.M., supra*, 206 Cal.App.4th at p. 381, italics added.)

*J.M.* noted *C.B.*, but distinguished it on the ground that there, “[t]he omitted great-great-grandparent . . . might have provided a crucial missing link to the origin of the family’s Indian heritage . . . . [Citation.] In this case, there is no indication that the names of the omitted great-great-grandparents would have provided any additional insight into the children’s possible . . . Indian heritage.” (*In re J.M.*, *supra*, 206 Cal.App.4th at pp. 382-383.) Thus, the court at least implied that, when information about a great-great-grandparent is necessary for a meaningful review of the tribe’s records, it might have to be included.

Because the law on the issue is unsettled, we will assume, without deciding, that an ICWA notice must include information about known potentially Indian ancestors, even beyond great-grandparents. Even if so, however, in this case, the failure to include such information was harmless.

The only tribe entitled to notice was the Blackfeet Tribe. Even though the Department also sent notice to 24 Chippewa tribes, there is no evidence in the record that the children had any Chippewa ancestry.

The Blackfeet Tribe responded that the mother, the mother’s mother and one of the mother’s grandmothers were not “listed . . . on the tribal rolls,” and “[t]herefore [each] child is not an ‘Indian child’ as defined by the Indian Child Welfare Act . . . .” It did not mention any of the other ancestors who were listed in the notice. This implicitly but necessarily meant that, even if the tribe had known that the great-great-great-grandfather

was a Blackfoot, it still would have found the children ineligible for membership because they did not have a parent or grandparent listed on the tribal rolls.<sup>5</sup>

Here, the notice listed maternal grandmother Tammy T. and identified her as a Blackfoot. It also listed maternal great-grandmother Betty T. and identified her as a Blackfoot. It is not reasonably likely that, even if the notice had listed the maternal great-great-great-grandfather and had identified him as a Blackfoot, the tribe's response would have been any different.

### III

#### DISPOSITION

The order appealed from is affirmed.

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<sup>5</sup> The Department has asked us to take judicial notice that, under the constitution of the Blackfeet Tribe, any person born after 1962 must be at least one-quarter Blackfoot to be eligible for membership. We decline to do so.

We do not have the authority to determine whether the children were or were not eligible for tribal membership. (*In re Junious M.* (1983) 144 Cal.App.3d 786, 792-794.) “Each Indian tribe has sole authority to determine its membership criteria, and to decide who meets those criteria. [Citation.] . . . ’ [Citation.]” (*D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 207.) ““A tribe’s determination that the child is or is not a member of or eligible for membership in the tribe is conclusive.”” [Citation.]” (*In re Robert A.*, *supra*, 147 Cal.App.4th at p. 988.) This would be true even if the determination was (or, at least, appeared to us to be) in conflict with the tribe’s own constitution.

For these reasons, the tribe’s actual determination that the children were not members or eligible for membership is highly relevant, but the tribe’s constitutional standards for making that determination are irrelevant. (But see *In re J.M.*, *supra*, 206 Cal.App.4th at p. 382.) However, we do note that those standards were consistent with the actual determination.

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RAMIREZ  
P. J.

We concur:

MILLER  
J.

CODRINGTON  
J.