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

In re BRAXTON P., a Person Coming  
Under the Juvenile Court Law.

KERN COUNTY DEPARTMENT OF  
HUMAN SERVICES,

Plaintiff and Respondent,

v.

JEREMIAH P.,

Defendant and Appellant.

F064353

(Super. Ct. No. JD125507)

**OPINION**

**THE COURT\***

APPEAL from orders of the Superior Court of Kern County. Robert J. Anspach and Louie L. Vega, Judges.†

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant.

Theresa A. Goldner, County Counsel, and Elizabeth M. Giesick, Deputy County Counsel, for Plaintiff and Respondent.

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\* Before Cornell, Acting P.J., Gomes, J., and Poochigian, J.

† Judge Anspach presided over the disposition hearing. Judge Vega presided over the hearing on the termination of appellant’s parental rights.

## INTRODUCTION

Jeremiah P., father, appeals from the juvenile court's judgment pursuant to Welfare and Institutions Code section 366.26 terminating his parental rights to Braxton P.<sup>1</sup> Father argues that the Kern County Department of Human Services (department) failed to make a proper inquiry of his child's Indian ancestry pursuant to the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). We reject father's contention and affirm the juvenile court's judgment.

## FACTS AND PROCEEDINGS

### *Procedural Overview*

Braxton and his sister were placed in protective custody based on allegations that father sexually molested the sister in November 2010.<sup>2</sup> A disposition hearing was conducted on April 11, 2011. Father was refusing to take a sexual abuse class. The juvenile court found Braxton and his sister to be dependent children and ordered their removal from both parents. The court found clear and convincing evidence of substantial danger to both children should they remain in their parents' custody and that there was no reasonable means to protect them without their removal from the parents' custody.

Father appealed these orders on April 13, 2011. Father asserted that there was insufficient evidence to support the juvenile court's orders. Father did not raise a challenge based on any notice deficiencies involving the ICWA. On November 30, 2011, we issued an opinion affirming the orders of the juvenile court.

At the six-month review hearing on October 11, 2011, the juvenile court found the parents had failed to participate regularly and to make substantial progress in their

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

<sup>2</sup> Braxton's mother and sister are not parties to this appeal.

reunification plans. The court found the parents had made only minimal progress toward alleviating the issues leading to the children's dependency and ordered the termination of reunification services and set the matter for a section 366.26 hearing.

The department determined that Braxton was generally adoptable and noted that it would not be detrimental to him to terminate father's parental rights. At the conclusion of the termination hearing on February 8, 2012, the juvenile court found it was likely Braxton would be adopted and terminated father's parental rights. Father filed a timely notice of appeal.

### ***ICWA Notices***

The initiation of ICWA notice began when mother noted in a document executed on November 22, 2010, that her mother indicated they may have some Indian heritage. At a hearing on the same date, mother indicated through counsel that she learned from her mother that she may have Cherokee heritage. Father signed a form indicating that he had Indian ancestry but the tribal affiliation was known only by his mother.

The department sent notices to the United Keetoowah Band of Cherokee Indians, the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, the Secretary of the Interior, the Bureau of Indian Affairs (BIA), and to both parents. Mother's biological mother, one grandmother and one grandfather were identified as possibly being Cherokee. One grandmother, J.M., did not have a complete birthdate listed with question marks in place of the year of her birth and her state of birth being Arkansas or Oklahoma.

The United Keetoowah Band of Cherokee Indians replied in December 2010 that there was no evidence that Braxton was descended from their tribe. The Eastern Band of Cherokee Indians replied in January 2011 that Braxton was not an Indian Child as defined by the tribe. The Cherokee Nation wrote in January 2011 that mother's

biological grandmother, J.M., did not have a middle name, maiden name, or complete date of birth and invited the department to provide further information.

On January 20, 2011, the department wrote a letter setting forth J.M.'s year of birth and that her more complete name was M.J.M., nee M. This information was sent to the Cherokee Nation, but not to the other two Cherokee tribes. The information was also sent to the Choctaw Nation of Oklahoma, the Jena Band of Choctaw Indians, the Mississippi Band of Choctaw Indians, the Secretary of the Interior, the BIA, and to both parents.<sup>3</sup>

On March 3, 2011, the department sent a third notice to the Choctaw Nation of Oklahoma, the Mississippi Band of Choctaw Indians, the Secretary of the Interior, the BIA, and to both parents. On February 24, 2011, the Choctaw Nation of Oklahoma wrote that it was unable to establish Indian heritage for Braxton. On April 8, 2011, the Mississippi Band of Choctaw Indians wrote that neither Braxton nor the listed family members are enrolled members of the tribe and they are not eligible to apply for enrollment with the tribe. At the April 11, 2011 disposition hearing, the juvenile court found the ICWA did not apply.

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<sup>3</sup> The disposition hearing was continued on February 22, 2011, for the department to receive replies from the tribes. At that hearing, a representative of the department explained to the court that mother's family stated they may have Choctaw ancestry. The Jena Band of Choctaw Indians and the Cherokee Nation replied that Braxton was not eligible for tribe membership. The department was still waiting to hear from the other two Choctaw tribes.

## ICWA

Father argues the ICWA notice was insufficient as a matter of law because two subsequent notices adding information about one maternal great-grandmother was not given to the Eastern Band of Cherokee Indians or to the United Keetoowah Band of Cherokee Indians. For the first time in this action, father challenges the court's findings on April 11, 2011, that the ICWA did not apply in this case. Respondent concedes the additional information concerning one maternal grandmother did not reach two Cherokee tribes, but contends the court's ruling concerning the ICWA has long been final and father cannot complain at this late stage that the ICWA has been violated. We agree with respondent.

In *In re Pedro N.* (1995) 35 Cal.App.4th 183 at pp. 185, 189 (*Pedro N.*), we held that a parent who fails to timely challenge a juvenile court's action regarding the ICWA is foreclosed from raising the ICWA notice issues in a subsequent appeal once the court's ruling is final. The proper time to raise such issues is after the disposition hearing. The juvenile court's rulings and findings at the disposition hearing are appealable upon a timely notice of appeal. We noted in *Pedro N.* that the parent there was represented by counsel and failed to appeal the juvenile court's orders from the disposition hearing. (*Pedro N.*, *supra*, 35 Cal.App.4th at pp. 189-190.)

In the instant action, the juvenile court's ICWA finding was made at the disposition hearing on April 11, 2011. Father never challenged the department's proposed order that the ICWA was not applicable to this case. Father was notified in court of his right to file a writ proceeding for review in this court of the juvenile court's rulings. Father filed a writ with this court, but failed to raise any defects with ICWA notices as an issue. Father failed to seek review by the juvenile court of its ICWA ruling

by a section 388 petition.<sup>4</sup> Father did not assert at the termination hearing that the ICWA was still applicable to this case. Father waited to challenge the adequacy of the ICWA notice for Braxton until he filed his appeal from the ruling at the section 366.26 hearing on February 8, 2012, terminating his parental rights.

Father was represented by counsel throughout these proceedings. Father and his counsel lodged no objection to the juvenile court's finding that the ICWA did not apply.

The juvenile court's dispositional findings and orders on April 11, 2011, are final and no longer subject to attack by father. (*Pedro N.*, *supra*, 35 Cal.App.4th at pp. 185, 189-191.) Although father was entitled to file a writ pursuant to sections 366.26, subdivision (l) and 395 from the disposition orders issued on April 11, 2011, he filed a writ that did not raise any issue pertinent to the ICWA. Our holding in *Pedro N.* is fully applicable here. Father waited until now to object and by his prior silence has forfeited his right to complain in this appeal.

To the extent father relies on a case such as *In re Marinna J.* (2001) 90 Cal.App.4th 731, 737-739, which disagreed with our *Pedro N.* holding on the theory it is inconsistent with the protections and procedures afforded by the ICWA to the interests of Indian Tribes, we are not persuaded (see also *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 783-785 and *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413-1414). We decline father's implied invitation to revisit our holding in *Pedro N.*

We further note that we do not foreclose a tribe's rights under ICWA due to a parent's appellate forfeiture or waiver. (*Pedro N.*, *supra*, 35 Cal.App.4th at p. 185, 189-190; see *In re Desiree F.* (2000) 83 Cal.App.4th 460, 477-478 [wherein we reversed denial of tribe's motion to intervene after final order terminating parental rights and

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<sup>4</sup> Father did file a petition on January 31, 2012, pursuant to section 388, to modify the juvenile court's order terminating his reunification services. Father's petition did not allege any defects with the department's notices pursuant to the ICWA.

invalidated actions dating back to outset of dependency and taken in violation of ICWA].) In so ruling, we held we were addressing only the rights of the parent to a heightened evidentiary standard for removal and termination, not those of the tribe (*Pedro N.*, *supra*, 35 Cal.App.4th at p. 191), or, for that matter, the rights of the child. As a result, we conclude father has forfeited his personal right to complain of any ICWA violation.

Finally, father contends we should consider ICWA notice issues on this appeal as a matter of fairness, citing *In re Gerardo A.* (2004) 119 Cal.App.4th 988. But unlike the father in *Gerardo A.*, who raised his ICWA challenge at the first opportunity after learning of the mother's claim of Indian heritage and the court's ruling, father here had an opportunity to raise the ICWA issues at earlier stages of the proceedings and failed to do so. Father received all three ICWA notices, did not object to any deficiencies in notice, and has not been deprived of due process.

#### **DISPOSITION**

The judgment of the juvenile court is affirmed.