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

In re FRANCISCO H., JR., a Person  
Coming Under the Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

FRANCISCO H., SR.,

Defendant and Appellant.

F067469

(Super. Ct. No. 11CEJ300099-3)

**OPINION**

**THE COURT\***

APPEAL from orders of the Superior Court of Fresno County. Mary D. Dolas,  
Commissioner.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kevin Briggs, County Counsel, William G. Smith, Deputy County Counsel, for  
Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Franson, J., and Oakley, J.†

† Judge of the Superior Court of Madera County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

## INTRODUCTION

Francisco H., father, appeals from the juvenile court's orders pursuant to Welfare and Institutions Code section 366.26 terminating his parental rights to Francisco H., Jr.<sup>1</sup> Father argues that the Fresno County Department of Social 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.S. § 1901 et seq.). We reject father's contentions and affirm the juvenile court's orders.

## FACTS AND PROCEEDINGS

### *Detention and Jurisdiction Hearings*

On May 16, 2011, a petition was filed pursuant to section 300 alleging that when Francisco was born earlier that month, his mother, M.G. (mother), tested positive for the presence of methamphetamine and marijuana in her blood.<sup>2</sup> Mother had tested positive for the presence of methamphetamine and marijuana while pregnant with Francisco. Mother failed to obtain prenatal care while pregnant with Francisco. Mother was on family maintenance services in the past for Francisco's older sibling. The petition alleged mother and father continued to abuse drugs and had a problem with substance abuse. The petition stated mother may have Indian ancestry.

The petition stated father was homeless and was the subject of an arrest warrant. The social worker reported that both parents appeared to be under the influence of narcotics at the time of Francisco's birth. After Francisco was born, father was observed to be under the influence in the hospital while visiting the newborn Francisco. Father's speech was fluctuating and he was staggering. He was observed holding Francisco

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

<sup>2</sup> The petition was also filed as to two older siblings who are not subjects of this appeal.

upside down. The nursing staff had to intervene and take Francisco away from father for the child's protection. A first amended petition was filed on May 18, 2011. The allegations were substantially the same as those in the original petition.

At the detention hearing on May 19, 2011, mother stated that she may have Indian ancestry. Father filed a statement stating he had no Indian ancestry. The detention hearing was continued. On May 24, 2011, mother filed a statement stating she believed she had Comanche ancestry.<sup>3</sup> On May 24, 2011, Francisco was detained. The department noted in a detention report that it had information from the maternal grandmother in 2007 that mother's family may have Apache ancestry but she was not sure whether any family member was a member of the tribe.

On June 21, 2011, a jurisdiction hearing was held for mother. Mother executed a document formally waiving her right to a contested hearing and submitted the matter on the allegations of the petition and the social worker's reports. The juvenile court found the allegations in the petition to be true. Father's jurisdiction hearing was continued to June 28, 2011. Father also executed a waiver of his right to a contested hearing and submitted the matter based on the pleadings and the social worker's reports. The juvenile court found the allegations in the petition to be true as to father.

### ***Initial ICWA Notices and Disposition Hearing***

The department sent notices to the following tribes and federal agencies in June 2011: Apache Tribe of Oklahoma, Bureau of Indian Affairs (BIA), Fort Sill Apache Tribe of Oklahoma, Jicarilla Apache Nation, Mescalero Apache Tribe, San Carlos Tribal Council, Tonto Apache Tribal Council, White Mountain Apache Tribe, and Yavapai-Apache Nation.

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<sup>3</sup> Mother later told the department that she is Apache and Choinumni. The department determined the Choinumni are not a recognized tribe by the federal government.

Between June 14, 2011, and June 28, 2011, the BIA, BIA Mescalero Indian Agency, Jicarilla Apache Nation, San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation sent responses indicating that Francisco was not a member of their tribes or eligible for tribal membership. On July 28, 2011, the Fort Sill Apache Tribe responded that Francisco was not a member nor was he eligible for tribal membership.

By August 8, 2011, there had been no response from Apache Tribe of Oklahoma and the White Mountain Apache Tribe.<sup>4</sup> On August 8, 2011, the department prepared and filed points and authorities to have the court determine that the ICWA was not applicable in this case. More than 60 days after notices had gone out to the tribes and BIA, counsel for each parent was served with the department's points and authorities.

At the disposition hearing on August 9, 2011, the parties submitted the matter on the department's motion without objection. The court found that the ICWA was not applicable to this action. The court ordered reunification services for both parents. The juvenile court notified the parents of their right to appeal its orders within 60 days. Neither parent appealed the juvenile court's orders or findings.

### ***Subsequent Hearings***

In its report for the six-month review hearing, the department recommended that reunification services be terminated as to father because his compliance with the reunification plan was minimal, he had not enrolled in a drug treatment plan, he had not

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<sup>4</sup> The department incorrectly stated there was no response from the Fort Sill Apache Tribe, but one had been received as indicated above stating that Francisco was not a member of and was not eligible for tribal membership. The Mescalero Apache Tribe sent a reply on August 11, 2011, that Francisco and his parents were not members of the tribe. On November 9, 2011, the Apache Tribe of Oklahoma responded that Francisco was not enrolled nor was he eligible for enrollment in the tribe.

requested visitation with Francisco, and his whereabouts were unknown. At the six-month review hearing on January 24, 2012, father was not present.

The juvenile court stated the department had filed a declaration of due diligence in regards to its efforts to locate father. The court found the whereabouts of father were unknown and he had failed to maintain contact with the department. The court ruled the department had complied with the case plan. The court terminated reunification services to father and continued them for mother. Father did not file a writ to challenge the juvenile court's order terminating his reunification services.

The department's status review report for the 12-month review hearing noted father's whereabouts were unknown. Father had told mother that he did not want anything to do with her or her children. Mother had relapsed and began to use methamphetamine and marijuana again. The department recommended the termination of mother's reunification services.

After continuances, the contested review hearing commenced on August 7, 2012. Father was not present. At the conclusion of the hearing, the court terminated further reunification services for mother and ordered that a hearing pursuant to section 366.26 be set within 120 days. The court advised the parties of their right to seek review of its orders with the appellate court.

### ***Renewed ICWA Notices***

In mid October 2012, the department prepared and sent new ICWA notices. In addition to the eight above mentioned Apache Tribes, the department also sent notices to the Kiowa Indian Tribe of Oklahoma and the federally unrecognized Choinumni Tribe. The notices contained additional family information as to two of Francisco's great-great-great-grandparents and enrollment numbers for the Kiowa and Apache tribes.

Responses that Francisco was not a member nor was he eligible for tribal membership came from the BIA, San Carlos Apache Tribe, Tonto Apache Tribe,

Mescalero Apache Tribe, Kiowa Tribe of Oklahoma, and BIA, Mescalero Indian Agency. Responses were also received by the department from the White Mountain Apache Tribe and Apache Tribe of Oklahoma stating that Francisco was not a member nor was he eligible for membership in the tribe. The department filed a motion to declare the ICWA inapplicable to this case.

On April 16, 2013, there was a hearing on the department's renewed ICWA motion. The department explained to the court that responses had not been received from the Fort Sill Apache Tribe, Jicarilla Apache Nation, and Yavapai-Apache Nation; more than 60 days had passed since the notices were sent; and the remaining tribes all responded that mother and Francisco were not eligible for tribal membership. Without objection, the parties submitted the matter and the court found that the ICWA was inapplicable to this case.

### ***Section 366.26 Hearing***

The section 366.26 hearing was continued several times between November 2012 and June 2013. Mother began a bonding study in December 2012, but failed to complete it. Father never visited Francisco. The department filed a report for the section 366.26 hearing recommending termination of parental rights for mother and father with a plan of adoption for Francisco.

The section 366.26 hearing was held on June 4, 2013. Father lodged an objection to the recommendation of adoption as a permanent plan. Mother elected not to testify at the hearing. Mother argued that she had a significant attachment to her children. The court found the children were all adoptable and the department had complied with the case plan. The court terminated the parents' parental rights and ordered adoption as the permanent plan.

## ICWA CHALLENGE

Father argues the ICWA notice was insufficient because the department did not perform an adequate inquiry into mother's Indian heritage. Father contends the department failed to notice one tribe he asserts is an Apache Tribe, the Fort McDowell Yavapai Nation. Father relies on references to this tribe as an Apache tribe in a California appellate decision. (*In re Glorianna K.* (2005) 125 Cal.App.4th 1443, 1447 (*Glorianna K.*).

Respondent replies that *Glorianna K.* does not establish that the Fort McDowell Yavapai Nation is currently an Apache Tribe, even if it was so recognized in the past. Respondent further argues that this issue was forfeited because no appeal was taken from the juvenile court's disposition rulings. We agree with respondent on both points, but we do not find waiver or forfeiture as to the second set of notices sent by the department pursuant to the ICWA.

### *Alleged Inadequate Notice*

Father argues, based on *Glorianna K.* and information contained in nongovernment, nontribal websites, that the current Fort McDowell Yavapai Nation was formally the Fort McDowell Mohave-Apache Community after a change to its constitution in 1999. We find several procedural flaws in father's argument. We initially observe that *Glorianna K.* only refers to notices being sent pursuant to the ICWA to several tribes, including the Fort McDowell Mohave-Apache Tribe. (*Glorianna K.*, *supra*, 125 Cal.App.4th at p. 1447.) There is no discussion in *Glorianna K.* concerning the change in tribal constitution, the name of the tribe, or how tribal membership is constituted. Father's reference to *Glorianna K.* is not dispositive of any issue father raises on appeal.<sup>5</sup>

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<sup>5</sup> We note that in its response indicating that Francisco did not have any tribal affiliation, the Fort Sill Apache Tribe stated it was not the only federally recognized

Second, for us to rely on the unofficial websites cited in father's reply brief, we would have to take judicial notice of the information in those websites. Father, however, has not requested that we take judicial notice of anything outside the record pursuant to Evidence Code section 452. To the extent father is making an implied request that we take judicial notice of the materials outside the record he cites in his reply brief, we decline to do so. We are particularly unpersuaded to take judicial notice of unofficial websites that are unaffiliated with federal, tribal, or state governments. We further note this court usually does not take judicial notice of matters that were not before the trial court.

Third, although we have the discretion to do so, we normally do not make factual findings on appeal and will not do so on this occasion. The appropriate venue to argue this point was before the juvenile court. It is the appellant's burden to make an affirmative showing of error by an adequate record. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.) There is nothing in the current record to support father's contention on appeal.

We agree with respondent's reply to this argument that there is no demonstrable evidence in the record that the Fort McDowell Yavapai Nation is an officially recognized Apache Tribe even though it is undeniably a federally recognized Indian Tribe. We conclude that father's argument is based on speculation and conjecture. Father has failed to provide an adequate factual basis for this court to find error in the notices provided pursuant to the ICWA and to reverse the juvenile court's ICWA findings.

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Apache Tribe. The response listed contact information for the seven other Apache Tribes that received notice from the department. The Fort McDowell Yavapai Nation, however, was not included in the list of other federally recognized Apache Tribes provided by the Fort Sill Apache Tribe.

### ***Waiver and Forfeiture***

Father acknowledges in a supplemental brief that he failed to appeal from prior orders of the juvenile court in the disposition hearing finding that the ICWA was not applicable to Francisco. Father argues that his case is distinguishable from our opinion in *In re Pedro N.* (1995) 35 Cal.App.4th 183, 185, 189 (*Pedro N.*), which applies waiver and forfeiture to parents who wait until the termination of parental rights to first make a challenge to the ICWA. Respondent also argues that father's ICWA challenge is forfeited on this appeal.

We agree with respondent on this point and reject father's ICWA challenge as subject to waiver and forfeiture. As we explain below, however, waiver and forfeiture do not apply to the second set of ICWA notices and the juvenile court's April 16, 2013, ruling that the ICWA does not apply to this case.

In *Pedro N.*, *supra*, 35 Cal.App.4th at pages 185, 189, we held that a parent who fails to timely challenge a juvenile court's action regarding the ICWA is foreclosed from raising ICWA issues, once the juvenile court's ruling is final, in a subsequent appeal from later proceedings. The proper time to raise such issues is after the dispositional hearing. The juvenile court's rulings and findings at the dispositional 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 dispositional hearing.<sup>6</sup> (*Pedro N.*, *supra*, 35 Cal.App.4th at pp. 189-190.)

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<sup>6</sup> To the extent father relies on cases such as *In re Marinna J.* (2001) 90 Cal.App.4th 731, 737-739, *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, and *In re B.R.* (2009) 176 Cal.App.4th 773, 779, cases that disagreed with *Pedro N.* on the theory that it is inconsistent with the protections and procedures afforded by the ICWA to Indian tribes, we are not persuaded (see also *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 783-785; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413-1414.)

Mother signed forms earlier in the proceedings indicating she may have Indian heritage. Notices from the eight Apache Tribes were received before, or just after, the disposition hearing on August 9, 2011. The disposition hearing was held more than 60 days after notices were sent to all of the tribes. No tribe indicated that mother's family had any tribal affiliation or that her family was eligible for tribal membership.

Neither parent challenged the juvenile court's finding that the ICWA was inapplicable in this case based on a claim of possible Apache heritage. Both parents were represented by counsel and received copies of the ICWA notices sent to the tribes by the department. Neither parent made an objection challenging the absence of notice to the Fort McDowell Yavapai Nation, nor did either parent file a timely appeal of the juvenile court's disposition orders. The parents did nothing and have, therefore, forfeited the right to challenge any procedural deficiencies in the juvenile court proceedings that occurred prior to and through the disposition hearing.<sup>7</sup>

We note that the second hearing on the applicability of ICWA was conducted on April 16, 2013, and father's appeal from the hearing terminating his parental rights was filed on June 13, 2013, within 60 days of the second ICWA hearing. Father's appeal is therefore timely for this court to review the juvenile court's ruling that the ICWA did not

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<sup>7</sup> We further note that *Pedro N.* does not foreclose a tribe's rights under the ICWA due to a parent's forfeiture or waiver of the issue for failing to file a timely appeal at the conclusion of an earlier proceeding. (*Pedro N.*, *supra*, 35 Cal.App.4th at pp. 185, 189-190; see *In re Desiree F.* (2000) 83 Cal.App.4th 460, 477-478 [wherein we reversed the juvenile court's denial of a tribe's motion to intervene after a final order terminating parental rights and invalidated actions dating back to outset of dependency that were taken in violation of ICWA].)

In *Pedro N.*, 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 alleged defect in compliance with the ICWA.

apply as to the Kiowa Indian Tribe of Oklahoma, the federally unrecognized Choinumni Tribe, and the eight Apache Tribes. The second set of notices to the Apache Tribes included additional family information and roll numbers not provided in the first set of notices.

As to the juvenile court's second ICWA ruling, we find no error. No tribe indicated that Francisco was a member of its tribe or eligible for tribal membership. As noted above, father has failed to demonstrate any error due to the lack of notice to the Fort McDowell Yavapai Nation.

#### **DISPOSITION**

The orders and findings of the juvenile court are affirmed.