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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re L.J., et al., Persons Coming Under the Juvenile Court Law.	B272043 (Los Angeles County Super. Ct. No. CK97923)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JESSICA J. et al., Defendants and Appellants.	

APPEALS from orders of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Conditionally affirmed and remanded with directions.

Pamela Deavours, under appointment by the Court of Appeal, for Defendant and Appellant Jessica J.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant PJ.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

In this dependency case involving siblings Z.G., L.J., N.J., and K.J., the biological father of the latter three children, P.J., appeals from a juvenile court order denying his petition, filed pursuant to Welfare and Institutions Code section 388,[1] seeking a determination he was the presumed father of all four children and an order awarding him custody of them. The children's mother, Jessica J., appeals from a subsequent order terminating jurisdiction over L.J., whom the juvenile court had removed from Jessica's custody and placed with L.J.'s presumed father, V.D. P.J. and Jessica contend the juvenile court and the Los Angeles County Department of Children and Family Services failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and related California law. We agree, remand to allow the Department and the juvenile court to remedy those failures, and otherwise conditionally affirm the orders.

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Juvenile Court Sustains the Initial and Subsequent Petitions and Places L.J. with V.D.*

On February 21, 2013 the Department filed a non-detain petition concerning 11-year-old Z.G., 21-month-old L.J., and 10-month-old twins, N.J. and K.J., all of whom lived with their mother, Jessica, and her boyfriend, V.D. The petition alleged the children came within the jurisdiction of the juvenile court under section 300, subdivisions (a) and (b), because, among other reasons, Jessica and V.D. had a history of violent altercations in the presence of the children and Jessica did not take the medications prescribed for her mental health issues.

At the initial hearing, the juvenile court found V.D. was the presumed father of L.J., N.J., and K.J., and the Department had made a prima facie showing that all four children were persons described by section 300, subdivisions (a) and (b). The court released the children to Jessica and V.D. and directed the Department to provide family maintenance services.

In April 2013 the juvenile court sustained an amended version of the petition, declaring the children dependents of the court under section 300, subdivisions (a) and (b). The court allowed the children to remain in the home of Jessica and V.D. under the supervision of the Department and directed the Department to continue providing family maintenance services.

At the six-month review hearing in October 2013, the juvenile court determined that continued jurisdiction was necessary and left its previous disposition order in effect. (§ 364, subds. (a), (c).) After the Department recommended the same result in advance of the next review hearing, the juvenile court

granted a request by Jessica and V.D. to continue the hearing and set it for a contest. In the meantime, Jessica and V.D. separated, and the children continued to live with Jessica.

In June 2014, before the contested review hearing, the Department detained the children and filed a subsequent petition pursuant to section 342. The Department alleged, as additional grounds for the juvenile court's jurisdiction over the children, that Jessica's alcohol and drug use and her and V.D.'s failure to comply with the court-ordered case plan put the children at substantial risk of harm. The juvenile court sustained the subsequent petition and removed the children from Jessica's custody. The court placed Z.G. and the twins with the Department for suitable placement and placed L.J. with V.D. under the Department's supervision.

B. *The Juvenile Court Denies P.J.'s Section 388 Petitions and Terminates Jurisdiction over L.J.*

At a section 364 review hearing for L.J. in February 2015, counsel for P.J. appeared and requested a paternity test to determine whether P.J. was the biological father of L.J. and the twins. The court granted that request, and the results of the test showed P.J. was indeed their biological father.

In March 2015 P.J. filed a section 388 petition asking the court to find him the presumed father of L.J. and the twins and to place those children with him. After a hearing, the court denied the petition.

In September 2015 P.J. filed another section 388 petition, this time asking the court to find him the presumed father of all four children and to place them with him. In the alternative, P.J. requested unmonitored visits and reunification services. On

January 26, 2016 the juvenile court held a hearing on this petition and denied it. P.J. timely appealed.

On March 24, 2016, at the conclusion of another section 364 review hearing regarding L.J., the juvenile court terminated its jurisdiction over L.J. and awarded sole legal and physical custody to V.D., with monitored visits for Jessica. Jessica timely appealed.

C. *Jessica Claims Indian Ancestry*

In connection with the initial hearing in February 2013, Jessica filed a declaration indicating she may have Indian ancestry. Jessica stated in her declaration that her maternal grandmother, N.P., was a member of the Cherokee tribe. Jessica provided the telephone number of a maternal aunt, Winifred G, "for information."

At the initial hearing the juvenile court noted Jessica "claim[ed] to have some possibility of Indian heritage" and asked her where her maternal grandmother lived. Jessica stated her grandmother was born and lived in Colorado and later moved to Los Angeles. The court "direct[ed] the Department to conduct the appropriate investigation to contact any appropriate tribes." The court's minute order stated: "To determine whether the Indian Child Welfare Act applies in this case, [the Department] is ordered to: [¶] . . . investigate parents' claim of Native American heritage by interviewing the parents and any known relatives to obtain all possible information concerning this claim[;] [¶] . . . prepare the appropriate form(s) . . . and include all available information; [¶] . . . give notice to any applicable tribe and their designated agent as recognized by the federal government; [¶]

give notice to the Bureau of Indian Affairs and the Secretary of the Interior." (Capitalization omitted.)

On April 4, 2013 the Department filed a jurisdiction and disposition report that addressed "Indian Child Welfare Act Status." The report stated: "On 03/26/2013 Mother claimed possible Indian heritage. Mother reported that MGGM,[2] [N.P.] [,] was Cherokee Indian. Mother stated that MGGM was born in Canada. Mother denied that MGGM and/or any other family member is registered or resided on an Indian reservation. Mother was unable to provide additional information as to MGGM's DOB or when MGGM passed away. Mother referred [the Department investigator] to MGM. On 03/26/2013 a message was left for MGM . . . in efforts to inquire again regarding Mother's claim of Indian heritage to no avail. To date MGM has not returned [the investigator's] phone call. [¶] At the time of MGM's interview on 03/23/2013, MGM denied Indian Heritage. . . . [¶¶] At this time [the Department] has no reason to believe that the Indian Child Welfare Act should apply to this family."

Neither the parties nor the juvenile court mentioned the ICWA issue during the combined jurisdiction and disposition hearing on April 19, 2013, and the court did not address ICWA in its minute order. In fact, no subsequent minute order in the record in this appeal mentions ICWA or any participant's claim of Indian ancestry.

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2 "MGGM" refers to the children's maternal great-grandmother, i.e., Jessica's grandmother, and "MGM" to the children's maternal grandmother, i.e., Jessica's mother.

Nonetheless, in a status report filed in connection with the six-month review hearing held in October 2013, the Department wrote: "On 2/12/13, the court found that the Indian Child Welfare Act does not apply."[3] In subsequent reports the Department simply stated, without further comment, "The Indian Child Welfare Act does not apply."

D. *P.J. Claims Indian Ancestry*

In February 2015, in connection with the review hearing at which counsel for P.J. requested the paternity test, P.J. filed a parental notification of Indian status stating he was or may be a member of, or eligible for membership in, the Cherokee tribe. At the review hearing the juvenile court noted this statement and stated, "I don't think we need to proceed with that at this moment because we haven't determined that he is the biological parent."

Neither the court nor the Department addressed the issue again until the January 26, 2016 hearing on P.J.'s second section 388 petition. At the conclusion of that hearing, after the court indicated it was denying the petition, the court stated, "However, there's an issue that's related to this. [P.J.] does claim that he has Indian heritage. He says that he is—I think that puts the burden on the Department to investigate whether or not ICWA is now applicable in this case as to the three younger children. [P.J.] indicated, I believe, he was Cherokee. So, again, I'll direct the Department to proceed with the inquiries regarding the appropriateness of whether or not ICWA is applicable in this case."

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[3] The Department concedes this was a mistake. The Department did not file the case until February 21, 2013.

DISCUSSION

A. *The ICWA Inquiry and Notice Requirements*

"ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. [Citations.] For purposes of ICWA, an 'Indian child' is a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (*In re Michael V.* (2016) 3 Cal.App.5th 225, 231-232; see 25 U.S.C. §§ 1902, 1903(4); § 224.1, subd. (a) [adopting federal definitions].)

"As the Supreme Court recently explained, notice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. [Citation.] Notice to the parent or Indian custodian and the Indian child's tribe is required by ICWA in state court proceedings seeking foster care placement or termination of parental rights 'where the court knows or has reason to know that an Indian child is involved.' [Citation.] Similarly, California law requires notice to the parent, legal guardian or Indian custodian and the Indian child's tribe in accordance with section 224.2, subdivision (a)(5), if the Department or court 'knows or has reason to know that an Indian child is involved' in the proceedings." (*In re Michael V.*, *supra*, 3 Cal.App.5th at p. 232; see § 224.3, subd. (d); *In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8; Cal. Rules of Court, rule 5.481(b)(1) [notice is required "[i]f it is known or there is reason to know that

an Indian child is involved in a proceeding listed in rule 5.480," which includes all dependency cases filed under section 300].) In addition, California law "requires any notice sent to the child's parents, Indian custodians or tribe to 'also be sent directly to the Secretary of the Interior' unless the Secretary has waived notice in writing." (*In re Michael V.*, at p. 232, quoting § 224.2, subd. (a)(4); accord, *In re Isaiah W.*, at p. 9.)

"The circumstances that may provide reason to know the child is an Indian child include, without limitation, when a person having an interest in the child, including a member of the child's extended family, 'provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe.'" (*In re Michael V.*, *supra*, 3 Cal.App.5th at p. 232, quoting § 224.3, subd. (b)(1); see also *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1386-1387 & fn. 9 [because only the tribe may make the determination whether the child is a member or eligible for membership, there is no general blood quantum requirement or "remoteness" exception to ICWA notice requirements]; *In re B.H.* (2015) 241 Cal.App.4th 603, 606-607 ["a person need not be a *registered* member of a tribe to be a member of a tribe—parents may be unsure or unknowledgeable of their own status as a member of a tribe"].)

"Juvenile courts and child protective agencies have 'an affirmative and continuing duty to inquire' whether a dependent child is or may be an Indian child." (*In re Michael V.*, *supra*, 3 Cal.App.5th at p. 233, quoting § 224.3, subd. (a); accord, *In re Isaiah W.*, *supra*, 1 Cal.5th at pp. 9, 10-11.) "This affirmative duty to inquire is triggered whenever the child protective agency

or its social worker 'knows or has reason to know that an Indian child is or may be involved . . . .' [Citation.] At that point, the social worker is required, as soon as practicable, to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility." (*Michael V.*, at p. 233, quoting Cal. Rules of Court, rule 5.481(a)(4); see § 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4)(A).)

B. *The Juvenile Court and the Department Did Not Comply with ICWA in Response to P.J.'s Claim of Indian Ancestry*

At the February 2015 review hearing at which counsel for P.J. requested a paternity test, the juvenile court noted P.J.'s claim of Indian ancestry, but stated it was premature "to proceed with that" because the court had not yet determined whether P.J. was the biological parent of any of the children. The record reflects that by March 10, 2015, however, the court and parties were aware of the paternity test's results showing that P.J. was the biological father of L.J. and the twins. Thus, by at least that date, P.J.'s claim of Indian ancestry triggered, at a minimum, ICWA's inquiry requirements. (See *In re Michael V.*, *supra*, 3 Cal.App.5th at p. 233; Cal. Rules of Court, rule 5.481(a)(4)(A).) And yet the juvenile court and the Department apparently ignored those requirements until January 26, 2016, when, upon denying P.J.'s second section 388 petition, the court finally directed the Department to investigate P.J.'s claim. The juvenile court and the Department did not comply with their duty to investigate P.J.'s claim as soon as practicable.

The Department concedes P.J.'s claim of Indian ancestry triggered ICWA's inquiry requirements, but argues we should dismiss P.J.'s appeal because it "fail[s] to raise a justiciable controversy." More specifically, the Department contends we should dismiss the appeal as to L.J. because by the time P.J. filed his notice of appeal the juvenile court had placed L.J. with V.D. and terminated its jurisdiction.[4] Thus, according to the Department, at the time P.J. appealed there was no longer any state court proceeding seeking foster care placement or termination of parental rights concerning L.J., ICWA consequently did not apply, and no ICWA issue remained for us to review.

This argument is incorrect. "It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition'" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405), not at the time the appellant files a notice of appeal. Moreover, an ICWA violation renders an order that is otherwise final subject to attack. (See *In re Breanna S.* (2017) 8 Cal.App.5th 636, 653 [an ICWA violation "renders the dependency proceedings, including an adoption following termination of parental rights, vulnerable to collateral attack if the dependent child is, in fact, an Indian child"].)

The Department also contends P.J. has not raised a justiciable controversy because on November 14, 2016 the juvenile court ordered the Department to provide, in connection with a March 2017 review hearing, a report on the Department's

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[4] In fact, P.J. filed his notice of appeal the same day, March 24, 2016.

investigation of P.J.'s claim of Indian ancestry.[5] Thus, according to the Department, "[P.J.] is asking the Court of Appeal to order the juvenile court to do what it is already doing." Wrong again. An order directing the Department to provide its first report on an investigation that should have occurred more than a year and a half earlier hardly demonstrates compliance with ICWA's inquiry and notice requirements, which is what P.J. seeks.

We therefore remand the matter for the juvenile court to determine whether the ICWA inquiry and notice requirements have been satisfied regarding P.J.'s claim of Indian ancestry and whether L.J., N.J., and K.J. are Indian children. (*In re Michael V.*, *supra*, 3 Cal.App.5th at p. 236; see *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1168 [a juvenile court's failure to ensure compliance with ICWA requirements "'does not mean [it] must go back to square one,' but that the court ensures that the ICWA requirements are met"].) If the juvenile court finds they are Indian children, it must conduct a new hearing on P.J.'s second section 388 petition, as well as all further proceedings, in compliance with ICWA and related California law. If the court finds they are not, the court's original order denying P.J.'s petition remains in effect.

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[5] We previously granted the Department's request for judicial notice of the juvenile court's November 14, 2016 minute order.

C. *The Juvenile Court and the Department Did Not Comply with ICWA in Response to Jessica's Claim of Indian Ancestry*

We also agree with Jessica the Department did not sufficiently investigate her claim of Indian ancestry. The Department does not dispute that Jessica's claim of Indian ancestry triggered its and the juvenile court's affirmative and continuing duty to inquire whether Jessica's children were Indian children. The Department maintains, however, that once it contacted Jessica's mother and she "denied Indian Heritage," as reflected in the Department's April 4, 2013 jurisdiction and disposition report, neither the Department nor the juvenile court had a duty to investigate Jessica's claim any further.

The Department is again mistaken. Its inquiry obligations included interviewing "extended family members . . . and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility." (*In re Michael V.*, *supra*, 3 Cal.App.5th at p. 233.) In addition, the juvenile court's February 21, 2013 minute order directed the Department to investigate Jessica's claim by interviewing "any known relatives to obtain all possible information concerning [her] claim." Jessica's February 2013 declaration noted her aunt, Winifred G., could provide further information concerning Jessica's claimed Indian ancestry. The Department placed Z.G. with Grant during these proceedings, and it evaluated other members of Jessica's extended family, including another aunt, Jocelyn Pratt, and a cousin, Sherry Grant, as temporary placements for the other children. Nothing in the record or the Department's brief, however, suggests the Department

interviewed any of these people about Jessica's claim of Indian ancestry.

That Jessica's mother purportedly "denied Indian Heritage" presents little more than a "conflict in the evidence," which triggered the Department's "duty of further inquiry." (*In re Gabriel G.*, *supra*, 206 Cal.App.4th at p. 1167.) Similarly, having received conflicting information concerning Jessica's claim of Indian ancestry, the juvenile court had a duty to inquire further of Jessica, who was often present at the hearings, including the adjudication hearing for which the Department filed its April 4, 2013 report. (See *ibid.*) The court did not do so.

Therefore, as with P.J.'s claim of Indian ancestry, we remand for the juvenile court to determine whether the ICWA inquiry and notice requirements have been satisfied regarding Jessica's claim of Indian ancestry and whether Z.G., L.J., N.J., and K.J. are Indian children. If the juvenile court finds they are Indian children, it must vacate its March 24, 2016 order terminating jurisdiction over L.J. and awarding custody to V.D. and conduct all further proceedings in compliance with ICWA and related California law. If the court finds the children are not Indian children, the court's March 24, 2016 order remains in effect.[6]

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[6] In minute orders issued since P.J. and Jessica filed their appeals, the juvenile court made findings of "No ICWA as to mother" (minute order of January 10, 2017) and "No ICWA as to [Paige]" (minute order of March 14, 2017) and other notations relating to ICWA. The Department has not asked us to take judicial notice of these minute orders, argued Paige's and Jessica's appeals are moot in light of the orders, or stipulated to a limited remand to address the issues relating to ICWA. In any

DISPOSITION

The juvenile court's January 26, 2016 order denying P.J.'s section 388 petition and March 24, 2016 order awarding V.D. custody of L.J. and terminating jurisdiction over L.J. are conditionally affirmed. The matter is remanded to the juvenile court for compliance with the inquiry and notice provisions of ICWA and related California law as set forth above and for further proceedings not inconsistent with this opinion.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.

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event, the orders do not resolve whether the investigations of Paige's and Jessica's claims of Indian ancestry were adequate.