Filed 5/15/17 In re Ashton P. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ASHTON P., A Person Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. G.A., Defendant and Appellant.	B276626 (Los Angeles County Super. Ct. No. CK99531)

APPEAL from an order of the Superior Court of Los Angeles County, Natalie Stone, Judge. Conditionally reversed and remanded.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

Appellant G.A. (Mother) appeals the order terminating parental rights over her son, Ashton P., contending the juvenile court and the Department of Children and Family Services (DCFS) failed to comply with the requirements of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq., ICWA) prior to terminating parental rights. On the record before us, we find that DCFS failed to comply with its duty to adequately inquire into Ashton's possible status as an Indian child by interviewing Mother's father, the relative Mother identified as having information about possible Indian ancestry. Accordingly, we conditionally reverse and remand for ICWA compliance.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Underlying Proceedings*

Ashton is one of Mother's four children. Ashton and his two older brothers were the original subjects of the underlying proceeding, initiated in May 2013. Their younger

half-sibling, Mark M., Jr. (Mark), was added in September 2014.[1]

Early in the proceeding, Mother informed the caseworker that her father -- Julian Richard C. -- had possible Indian ancestry, and that Ashton and his siblings might be eligible for membership in the Navajo tribe.[2] At the May 2013 detention hearing, when the court inquired about Mother's possible Indian heritage, her attorney stated: "She indicated to me that she may have some heritage

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[1] Vince P. is the presumed father of the two older boys. Genetic testing established he was likely Ashton's biological father, but Vince was never found to be Ashton's presumed father. Mark's presumed father is Mark M., Sr. (Mark Sr.). At the time the appeal was filed, parental rights had not been terminated as to either of the older boys or Mark, and they are not the subjects of this appeal. Ashton's case proceeded to termination separately from that of his siblings because Mother had given custody of him at birth to a family friend.

The jurisdictional facts are not pertinent to this appeal. We will briefly note, however, that jurisdiction over Ashton and his two older siblings was based on inappropriate physical discipline by Mark Sr. and Mother, domestic violence between Mark Sr. and Mother, and Vince's substance abuse. The jurisdictional findings were made in October 2013. Reunification services for Mother and Vince were terminated in August 2014.

[2] In her opening brief, Mother questioned whether her father's name was Julian Richard C. or Adrian. Her reply acknowledged that Julian Richard C. was the correct name. We note that while we abbreviate his full name to protect the family's privacy, Julian Richard C.'s last name is a common Hispanic name.

through some unknown tribe, and the only person [who] would have more information would be her father." The court asked Mother if she had any additional information. She said "no." The court ordered DCFS to conduct an investigation into Mother's alleged Indian heritage. At a July 2013 hearing, Mother again stated that she might have Navajo ancestry. The court again instructed DCFS to investigate.[3]

In September 2013, the caseworker contacted Mother, who reported she had "Ettee Koee (Navajo)" ancestry on her father's side, and provided some information about her family. That same month, DCFS sent ICWA notices for Ashton and his two older siblings to the Navajo Regional Office, the Navajo Region, the Ramah Navajo School Board, and the Colorado River Indian Tribes, as well as the U.S. Secretary of the Interior and California's Bureau of Indian Affairs. The notice for Ashton provided his name, birth date and birth place, and Mother's name, birth date and birth place. It also included the name, birth date, birth place, address and possible tribe ("Etee Koee (Navajo)") for her father, "Julian Richard [C.]"[4] The form did not, however, list

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[3] Ashton's alleged father Vince had previously informed the caseworker he had no Indian ancestry. At the July 2013 hearing, the court found that Ashton had no Indian heritage through Vince.

[4] Although we use only the first initials of the last names of the minors' relatives in order to protect their anonymity, the forms included their full names.

Julian Richard C.'s parents' names. Instead, it listed information (names, birth dates, birth places and addresses) for Mother's mother (Yolanda S.) and her parents (Gloria and Robert A.), although no allegation had been made that those relatives were Indian or had Indian ancestry. In addition, it mistakenly stated that Robert, Yolanda's father, was possibly Navajo.

In October 2013, DCFS received a response from the Navajo Nation stating: "We have been unable to verify the above children's eligibility for enrollment with the Navajo Indian Tribe based on the information provided.[¶] . . . If you are able to obtain additional information which will assist us in determining the children's eligibility for enrollment with the Navajo Indian Tribe, please notify us."[5]

The court made no ICWA finding with respect to Mother in 2013 or 2014. In July 2015, DCFS reminded the court of the necessity of making such finding.[6] At a January 2016 hearing, the court inquired about the outstanding ICWA issue, and ordered DCFS to give ICWA notice to all potentially interested tribes and provide proof of service at

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[5] DCFS also received the green return receipt cards indicating the notices had been delivered to the Navajo Regional Office, the Navajo Region, the Ramah Navajo School Board and the Colorado River Indian Tribe. DCFS filed copies of the notices, the Navajo Nation's response and the green cards with the court in September 2013.

[6] Multiple judicial officers presided over the case before it was assigned to Judge Stone in 2015.

the section 366.26 hearing, then scheduled for March 2016. The caseworker scheduled an appointment with Mother to interview her regarding Indian heritage, but at the May 9, 2016 hearing, the court informed the parties that it had located the September 2013 ICWA notices. The court found the notices proper as to Ashton and his older brothers, and ruled that ICWA did not apply.

The section 366.26 hearing for Ashton was held June 15, 2016. The court found by clear and convincing evidence that he was likely to be adopted and that no exception applied. The court terminated parental rights to free the boy for adoption. Mother appealed.

B. *Post-Appeal Proceedings*

At the May 2016 hearing, the court ordered DCFS to send an ICWA notice for Mark, as he had not been a subject of the proceedings when the September 2013 notices were sent.[7] The June 15, 2016 hearing at which parental rights

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[7] At the time, Mark Sr.'s appeal from the jurisdictional findings with respect to Mark, entered in May 2015, was pending. In an opinion filed November 2, 2016, this court sustained the jurisdictional findings but remanded for ICWA compliance. (*In re Mark M.* (November 2, 2016, B267470) 2016 Cal.App. Unpub. LEXIS 7861 at pp. *23, *50, *52.) We stated: "Here, [Mother] indicated she has Navajo ancestry at the detention hearing, but said DCFS would need to follow up with [the maternal grandfather] to get details. DCFS made little effort to gather information. . . . [W]ithout an adequate inquiry, and notice to the appropriate tribes, the court prevented any applicable tribe from

(Fn. continues on the next page.)

over Ashton were terminated was also the date set for the court to consider terminating parental rights over Mark. However, the court continued the hearing for Mark because ICWA issues were unresolved.

In September 2016, after Mother appealed the termination of parental rights over Ashton, the caseworker informed the court that she had re-interviewed Mother in April 2016.[8] Mother reported that her paternal grandparents (the children's great-grandparents) -- identified in the report as "Sally [E.] and Richard [C.]" -- were registered with the Navajo tribe.[9] Mother reported that both were dead. Sally had reportedly died in 2015; Richard's date of death was unknown. The caseworker inquired whether there were any other relatives or individuals who might have additional information. Mother said she would contact other relatives and let the caseworker know if she obtained further information. In August 2016,

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determining whether Mark is an Indian child within the meaning of the ICWA." (*In re Mark, supra,* at pp.*51-52.) We directed the court "if it ha[d] not already done so" to "order DCFS to further investigate Mark's claimed Navajo heritage, and if required, notify the designated tribe or tribes, Bureau of Indian Affairs, and Secretary of the Interior . . . ." (*In re Mark M.* (November 14, 2016, B267470) 2016 Cal.App. Unpub. LEXIS 234 at p. *1.)

[8] We granted respondent's request for judicial notice of certain post-judgment proceedings related to Mark.

[9] The report mistakenly identified Sally and Richard, the children's great-grandparents, as their great-great-grandparents.

Mother reported she was told by "family" that through her father (Julian Richard C.), she and Ashton had Navajo heritage, and that it was possible that her father -- along with her paternal grandmother Sally E., and great-grandfather Ceasr E. (the children's great-great grandfather) -- were registered with the tribe. The caseworker "inquired if there were any other relatives or individuals that may have any further information," and "Mother denied [there were] any other individuals that may have more information."

Attached to the report was a copy of Mark's ICWA notice, sent in 2016 to the same entities as the September 2013 notices. The 2016 notice set forth Mother's name, address, birth date and birth place and her father, Julian Richard C.'s name, address, birth date and birth place. Unlike the 2013 notices, it included the names of Julian Richard C.'s parents, although it listed his father, previously identified as "Richard C.," as "Julio [C.]." It contained no information as to Sally or "Julio's" former addresses, birth dates or birth places, or dates or places of death. It indicated Sally was a possible member of the Navajo tribe, but not "Julio." In addition, it stated that "Ceasr [E.]" was the children's great-great grandfather and a possible member of the Navajo tribe, but included no other information about him.[10]

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[10] Ceasr's last name was the same common Hispanic name as Sally's maiden name.

In November 2016, the caseworker filed a last-minute information for the court, reporting that return receipts had been received from all entities to which the notices had been sent, except the Navajo Nation, and that none of the entities had sent responses. The caseworker concluded from this that ICWA did not apply. On November 1, 2016, the court found that ICWA did not apply to Mark.

DISCUSSION

The sole issue on appeal is whether the September 2013 ICWA notice sent on behalf of Ashton was adequate and if not, whether the error was harmless in view of the lack of response to the more complete notice sent on behalf of his sibling Mark in 2016. For the reasons discussed, we conclude DCFS's failure to communicate with Mother's father, Julian Richard C., to obtain more information about his family members, the alleged members of the Navajo tribe, rendered ICWA compliance incomplete and the finding that Ashton was not an Indian child unsupported. We further conclude that the notice sent on behalf of Mark in 2016 did not cure the problems with respect to the 2013 notice for Ashton.

A. *ICWA's Purpose and Parent's Right to Appeal*

"Congress enacted ICWA in 1978 in response to 'rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large

numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.'" (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7 (*Isaiah W.*).) ICWA recognizes that tribes have an interest in Indian children "'"which is distinct from but on a parity with the interest of the parents."'" (*Isaiah, supra,* at p. 9.) It requires "notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.'" (*Id.* at p. 8, quoting 25 U.S.C. § 1912(a).) "ICWA notice ensures that an Indian tribe is aware of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving an Indian child." (*Isaiah W., supra,* at p. 8.) No proceeding to place a child in foster care or terminate parental rights can be held "until at least ten days after receipt of [ICWA] notice by the parent or Indian custodian and the tribe . . . ." (25 U.S.C. § 1912(a).) "After proper notice has been given, if the tribes respond that the minor is not a member or not eligible for membership, or if neither the BIA nor any tribe provides a determinative response within 60 days, then the court may find that ICWA does not apply to the proceedings." (*Isaiah W.*, *supra*, at p. 15.)

Any party has standing to raise ICWA compliance issues, without regard to that party's heritage. (*In re O.C.* (2016) 5 Cal.App.5th 1173, 1180, fn. 5; accord, *In re B.R.* (2009) 176 Cal.App.4th 773, 779-780.) Moreover, issues

pertaining to ICWA notice or a juvenile court's finding that a child is not an Indian child may be raised on appeal from the order terminating parental rights, even where the party failed to raise ICWA issues at the section 366.26 hearing or when the court made its initial ICWA finding. (*In re B.R., supra,* at pp. 779-780; *Isaiah W.*, *supra*, 1 Cal.5th at p. 15.)

B. *Notice and Inquiry Requirements*

"The notice sent to the Indian tribes must contain enough identifying information to be meaningful." (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989.) In addition to identifying the tribe in which the child is a member or may be eligible for membership, federal regulations require notices to contain the child's name, birth date and birth place, the parents' names, birth dates and birth places, and the names, birth dates and birth places of "other direct lineal ancestors of the child," such as grandparents, "[i]f known." (25 C.F.R. § 23.111(d)(1)-(3).) California law requires the same, and also requires inclusion in the notice of lineal ancestors' places of death and "any other identifying information, if known." (Welfare and Institutions Code, § 224.2, subd. (a)(5)(A) & (C); see *In re Francisco W.* (2006) 139 Cal.App.4th 695, 703 (*Francisco W.*) ["It is essential to provide the Indian tribe with all available information about the child's ancestors, especially the ones with the alleged

Indian heritage"].)[11] Failure to include information required by the regulations and known to the caseworker will generally result in limited reversal and remand for issuance of proper notice.[12] (See, e.g., *In re Breanna S.* (2017) 8 Cal.App.5th 636, 651-656 (*Breanna S.*) [caseworker omitted known information from notices, including maternal grandmother's and great-grandparents' addresses, birth places and places of death]; *In re S.E.* (2013) 217 Cal.App.4th 610, 615 [notice failed to include name of child's great-great-grandfather, the ancestor mother claimed was Indian]; *In re D.T.* (2003) 113 Cal.App.4th 1449, 1454-1455 [notices failed to include information known to the caseworker, including mother's married name, parents' current addresses, names of grandparents or name of claimed tribe]; see also *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1266 [notices failed to provide information about dependency proceeding or inform tribe of upcoming hearing].) In addition, California law specifically requires that if, after ICWA notice is provided and the court makes an ICWA determination, "the court [or] social worker . . . subsequently receives any

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

[12] As explained in *Francisco W.*, *supra*, 139 Cal.App.4th at page 705, limited reversal and remand, employed when the "only error is defective ICWA notice," allows the juvenile court to "regain jurisdiction over the dependent child and determine the one remaining issue," and to "reinstate the judgment if no Indian tribe chooses to intervene."

information required under paragraph (5) of subdivision (a) of Section 224.2 that was not previously available or included in the [ICWA] notice . . . , the social worker . . . shall provide the additional information to any tribes entitled to notice . . . and the Bureau of Indian Affairs." (§ 224.3, subd, (f).)[13]

Further, DCFS cannot passively wait for information about a child's Indian ancestry to come to it. Section 224.3 provides that the court and child protective agency "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 . . . if the child is at risk of entering foster care or is in foster care." (*Id*., subd. (a); see also Cal. Rules of Court, rule 5.481(a).) This statutorily-imposed duty to inquire is triggered whenever the court or the agency "'knows or has reason to know that an Indian child is or may be involved'" (*In re Michael V.* (2016) 3 Cal.App.5th 225, 233, quoting Cal. Rules of Court, rule 5.481(a)(4) (*Michael V.*)), and requires that the caseworker "make further inquiry regarding the possible Indian status of the child . . . as soon as practicable" after the issue arises

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[13] In *In re I.B.* (2015) 239 Cal.App.4th 367, 377, this court remanded for notice to be re-sent where the caseworker learned additional information about the alleged Indian ancestors omitted from the original notice, including the great-grandmother's name and birth date, the maternal great-grandfather's name and birth date, and the maternal great-grandfather's birth date. (*Id*. at p. 377.)

by interviewing the parents, extended family members, and "any other person [who] reasonably can be expected to have information regarding the child's membership status or eligibility." (§ 224.3, subd. (c); see *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1466; Cal. Rules of Court, rule 5.481(a)(4).) Failure to make adequate inquiry may also result in limited reversal and remand. (See, e.g., *Michael V.*, *supra*, at p. 235 [Department made no effort to locate and interview children's maternal grandmother "even though it was she who reportedly had the direct link to a tribe"]; *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167-1168 [after receiving conflicting information about possible Indian heritage from child's biological father, caseworker failed to interview paternal grandmother]; *Francisco W.*, *supra*, 139 Cal.App.4th at pp. 700, 703-704 [notice omitted birth date and birth place of child's alleged Indian grandmother, although caseworker could easily have contacted her and obtained that information].)

Here, DCFS was told by Mother that her father, Julian Richard C., had possible Indian ancestry. It had an address for him. Yet, it made no attempt to contact and interview him, assigning that task to Mother. As a result, it failed to include in the September 2013 notices any information about Julian Richard C.'s parents -- the ancestors who allegedly had a direct connection to an Indian tribe.[14] In addition, it

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[14] This information was clearly available. In April 2016, Mother was re-interviewed and provided the names of her
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incorrectly identified Ashton's possible Navajo ancestor as *Yolanda's* father, Robert. Consequently, the 2013 ICWA notice for Ashton was defective, due to both erroneous and omitted information.

Respondent contends the defects were harmless because no tribe attempted to intervene in response to the more complete notices sent in connection with Mark in 2016. As discussed, the names of Julian Richard C.'s parents and grandfather, acquired when Mother was re-interviewed in April and August 2016, were included in the 2016 notice. However, even at that time, the caseworker made no attempt to interview Mother's father, Julian Richard C. As a result, the 2016 notices lacked information about the alleged tribal members -- including their birth dates and places and dates and places of death -- that might have assisted the tribes in identifying them and determining whether Ashton's connection was sufficient to warrant intervention. This is the type of information that Mother's father was likely to know. Moreover, the 2016 notice also contained inaccurate information: it identified Julian Richard C.'s father as "Julio" although the report identified him as "Richard." To conduct a meaningful search of its records, a tribe must be given as much correct information as possible about

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father's parents, allegedly registered with the Navajo tribe. A few months later, in August 2016, Mother provided the name of the children's great-great-grandfather, Ceasr, also allegedly registered with the tribe. Mother stated this information had been provided to her by "family."

everyone in the ancestral line allegedly connected to the tribe. As the 2016 notice contained an error and failed to supply information that might have been obtained from further inquiry, we cannot say the failure to inquire in 2013 was harmless.

Relying on excerpts from the constitutions and bylaws of the Navajo Nation and the Colorado River Indian Tribes defining eligibility for membership, respondent contends we may safely conclude Ashton is not eligible for membership in either tribe because he lacks the requisite percentage of "Indian blood." As the court stated in *Breanna S.* in response to a similar argument: "[T]he Indian tribe, not the juvenile court or the court of appeal, is the sole entity authorized to determine whether a child who may be an Indian child is actually a member or eligible for membership in the tribe. [Citations.]" (*Breanna S. supra,* 8 Cal.App.5th at p. 654; see § 224.3, subd. (e)(1) ["A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe, or testimony attesting to that status by a person authorized by the tribe to provide that determination, shall be conclusive. Information that the child is not enrolled or eligible for enrollment in the tribe is not determinative of the child's membership status unless the tribe also confirms in writing that enrollment is a prerequisite for membership under tribal law or custom"].)

Finally, respondent contends that "according to [M]other, the only other persons, including [Julian Richard C.], having [additional] . . . information had died."

Respondent's citations to the record do not support that contention. The record indicates Julian Richard C.'s parents are dead, but no information in the record or the exhibits filed in connection with the post-appeal motion for judicial notice suggested that Julian Richard C. also was deceased. To the contrary, the 2016 ICWA notice provided a "[c]urrent" address for him. On remand, DCFS is to clarify whether he is alive, and if so, to interview him.

Finally, we observe that in the 2016 reports to the court, Mother is quoted as stating that the additional information she received about her father's ancestors was obtained from "family." We presume she was referring to her father. On remand, DCFS should ascertain whether someone else provided the information about Julian Richard C.'s ancestors and whether that person has additional identifying information about them. If whoever Mother identifies as having provided the information is deceased or has no additional information, the inquiry may end.[15] If

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[15] Mother contends the caseworker should also be directed to interview non-Indian relatives, such as Yolanda and her husband (Mother's stepfather). We disagree. The statute requires inquiry to be made of those who "reasonably can be expected to have information regarding the child's membership status or eligibility." (§ 224.3, subd. (c).) Unless a parent or other interested party suggests otherwise, we see no reason to assume family members unrelated to the alleged Indian ancestor will be able to provide significant information. To the extent *Michael V.* suggests otherwise, we respectfully disagree. (See *Michael V., supra,* 3 Cal.App.5th at p. 235 [indicating relatives with "no

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further identifying information about the alleged Indian ancestors is provided, a new ICWA notice must be sent and Ashton's status as an Indian child resolved anew.

Indian ancestry on their side of the family" should be interviewed].)

DISPOSITION

The court's June 15, 2016 order terminating parental rights is conditionally reversed. The matter is remanded to the juvenile court for full compliance with the inquiry and notice provisions of ICWA and related California law as set forth above. If after proper inquiry, no additional information is uncovered, or if after any necessary additional notice, no tribe intervenes, the order terminating parental rights shall be reinstated.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.