Filed 12/29/17 In re J.V. 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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| In re J.V. et al, Persons Coming Under the Juvenile Court Law. | B278240<br><br>(Los Angeles County Super. Ct. No.DK05290) |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>F.R.,<br><br>Defendant and Appellant. | |

APPEAL from an order of the Superior Court of Los Angeles County, Emma Castro, Temporary Judge. (Pursuant to Cal. Const., art. VI, §21.) Affirmed in part and remanded with directions.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Kim Nemoy, Senior Deputy County Counsel, for Plaintiff and Respondent.

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Appellant F.R. (mother) appeals the order terminating her parental rights over three of her children, sons Jo., Je., and Ja. Mother contends only that the court and the Los Angeles County Department of Children and Family Services (DCFS) failed to comply with the inquiry and notice obligations imposed by the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq., ICWA). We agree. DCFS did not make inquiry of mother's father, despite being told that Indian heritage passed through him and that mother knew how to reach him. Additionally, the notices DCFS sent to potentially affiliated Indian tribes included at best incomplete and at worst inaccurate information about mother's grandmother. We accordingly remand the matter to allow DCFS and the juvenile court to fully comply with ICWA and related California law and otherwise conditionally affirm the order.

**FACTUAL AND PROCEDURAL BACKGROUND**

The facts underlying the dependency proceeding are not pertinent to this appeal. In brief, mother pleaded no contest to DCFS's July 2014 amended allegations that her substance abuse placed young sons Jo., Je., Ja., and their older sister K. at risk, and that she failed to protect them from her male companion's drug use, sales, and a law enforcement raid related thereto. K. was placed with her father in July 2014. The boys were placed in foster care, and mother was provided with reunification services. Those services were terminated on February 8, 2016, and

mother's parental rights over the boys were terminated on August 8, 2016. The boys are now placed with prospective adoptive parents, who have cared for them since early 2015.

In the detention report accompanying its initial dependency petition, DCFS noted that it made ICWA inquiries to the boys' father, who denied Indian ancestry. DCFS further noted that mother also denied Indian ancestry, but had asserted Cherokee ancestry during previous interactions with DCFS. In an attached ICWA-020 form,[1] mother reported that she also might have Apache heritage; she noted that her father, the maternal grandfather, "has info." Mother did not provide his name or contact information on the form. At the detention hearing held on June 2, 2014, the juvenile court ordered DCFS "to investigate the mother's claim of possible Apache Indian heritage."

In a jurisdiction/disposition report filed on July 7, 2014, DCFS noted that a dependency investigator (DI) spoke to mother about her possible Indian heritage on June 9, 2014. According to the report, mother stated, "My dad is supposed to find out about that." The report further noted, "The DI asked the mother to obtain information from her father, and she stated she would." The DI contacted mother about her heritage again on June 25, 2014. Mother reiterated that she had Indian heritage but explained that "her family members have been unable to provide any concrete information." "[T]he DI told the mother to bring family information to the [next scheduled] interview on 07/01/14,

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[1] The ICWA-020 form, entitled "Parental Notification of Indian Status," has been adopted for mandatory use by the Judicial Council of California. The court is required to order a parent or guardian to complete the form during their first appearance in any dependency case in which a child is at risk of entering foster care. (Cal. Rules of Court, rule 5.481(a)(2).)

and the mother stated she would."

On July 1, 2014, "[t]he DI had face-to-face contact with the mother at the DCFS Lakewood Office. The mother reported that she had not obtained the needed ICWA information (DI had requested names, dates of birth, places of birth, etc.), however, she reported that the maternal great grandmother, Aurora D[.], was waiting in the lobby. Ms. D[.] came into the interview room and mother asked the questions posed by the DI as they communicated in sign language as Ms. D[.] is deaf. The maternal great grandmother reported Cherokee heritage on her side of the family." According to the report, mother additionally "reported Apache heritage on the maternal grandfather's paternal side."

The report referred the court to a family tree captioned "Interview w/ mother F[.] R[.] + mggm Aurora on 7/1/14." The tree included the names of mother's parents; the names of her paternal grandparents, including Aurora; and the names of Aurora's parents, mother's paternal great grandparents. The last name given for Aurora on the family tree was P., a completely different last name than that noted in the accompanying report and elsewhere in the record. No explanation for this discrepancy appears in the record, and it is unclear which name is correct.

On July 3, 2014, DCFS sent ICWA notices to three Cherokee tribes, eight Apache tribes, the Bureau of Indian Affairs, and the Secretary of the Interior. The notices, sent separately for each child, included the following: the child's name, birthdate, and birthplace; mother's name, current and former addresses, birthdate, and birthplace; father's name, current address, and birthdate; the names and birthdates of mother's parents; the names, birthdates, and birthplaces of mother's paternal grandparents, including Aurora; and the names and

birthplaces of Aurora's parents. The notices listed Aurora's last name as P. Although the ICWA notice form says to "include maiden, married, and former names or aliases," the last name beginning with D. was not included in any of the notices.

The record includes return receipts from all 13 tribes and federal entities, indicating they received the notices. By October 2014, eight of the tribes responded that the boys were not eligible for enrollment. In January 2015, DCFS filed an ex parte application and order requesting that the court find ICWA inapplicable.[2] On January 22, 2015, the court found "these children do not fall under the Indian Child Welfare Act." The court made the same finding a second time on August 8, 2016, during the hearing at which it terminated mother's parental rights.

## DISCUSSION

The sole issue on appeal is whether DCFS complied with its obligations under ICWA. We agree with mother that it did not, at least in part.

### I. ICWA

ICWA is a federal law "designed to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children 'in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of

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[2] After 60 days, the remaining tribes' silence became equivalent to a response that the children did not have Indian heritage. (See Welf. & Inst. Code, § 224.3, subd. (e)(3).) All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

child and family service programs.' (25 U.S.C. § 1902; *Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30 [109 S.Ct. 1597, 104, 104 L.E.2d 29].)" (*In re Levi U.* (2000) 78 Cal.App.4th 191, 195.) "To that end, specific notice requirements to the applicable tribes are triggered when the juvenile court knows or has reason to know that an Indian child is involved in a dependency proceeding. (25 U.S.C. § 1912(a).)" (*In re Charlotte V.* (2016) 6 Cal.App.5th 51, 56.) The notices serve the dual purposes of facilitating the tribes' determination of the child's membership and ensuring their awareness of their right to intervene in the proceedings should the child qualify for membership. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 8 (*Isaiah W.*))

"In 2006, our Legislature enacted provisions that affirm ICWA's purposes (§ 224, subd. (a)) and mandate compliance with ICWA '[i]n all Indian child custody proceedings' (*id.*, subd. (b)). Section 224.2 codifies and elaborates on ICWA's requirements of notice to a child's parents or legal guardian, Indian custodian, and Indian tribe, and to the BIA [Bureau of Indian Affairs]. In addition to requiring notice to the BIA 'to the extent required by federal law,' the statute requires any notice sent to a 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. (§ 224.2, subd. (a)(4).) Section 224.3, subdivision (e)(1) provides that an Indian tribe's determination of a child's membership or eligibility for membership in the tribe 'shall be conclusive,' and subdivision (e)(2) says that a determination by the BIA of tribal membership or eligibility for membership 'is conclusive' in the absence of a contrary determination by the tribe. Section 224.4 affirms that '[t]he Indian child's tribe and Indian custodian have the right to intervene at any point in an

Indian child custody proceeding.'" (*Isaiah W.*, *supra*, 5 Cal.5th at p. 9.)

"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 in effect at the time required the notice to include the child's name, birthdate, and birthplace; and all known names, "including maiden, married and former names or aliases," tribal enrollment numbers, current and former addresses, birthdates, birthplaces, death dates, death places, and "other identifying information" of the "biological mother, biological father, maternal and paternal grandparents and great grandparents." (Former 25 C.F.R. § 23.11(d)(1), (3).)[3] The requirements under California law are virtually identical.

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[3] The federal regulations governing ICWA were revised effective December 12, 2016. The new regulations apply to any child custody proceeding initiated on or after December 12, 2016, even if the child has been involved in dependency proceedings prior to that date. A "child-custody proceeding" includes, as a separate proceeding, a termination of parental rights, a preadoptive placement or an adoptive placement. (25 U.S.C. § 1903(1); 25 C.F.R. § 23.2.) If any one of those types of proceedings is initiated on or after December 12, 2016, the new regulations apply to that proceeding. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 650, fn. 7 (*Breanna S.*).) The current version of 25 C.F.R. § 23.11 provides that "Notice must include the requisite information identified in [new] § 23.111." 25 C.F.R. § 23.111(d) identifies similar categories of information, including "If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents." (25 C.F.R. § 23.111(d)(3).)

Section 224.2, subdivision (a)(5)(C) requires the notice to contain "All names known of the Indian child's biological parents, grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known." Failure to include information required under these provisions and known to the caseworker generally will result in a limited or conditional reversal and remand for issuance of proper notice. (See, e.g., *Breanna S.*, *supra*, 8 Cal.App.5th at pp. 652-656; *In re S.E.* (2013) 217 Cal.App.4th 610, 614-616; *In re D.T.* (2003) 113 Cal.App.4th 1449, 1454-1455.)

DCFS cannot wait for parents or guardians of potential Indian children to provide information regarding the children's heritage. California statutory law, section 224.3, imposes on the court and DCFS "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." (§ 224.3, subd. (a).) This statutory duty of inquiry is triggered when the court or DCFS "'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 (*Michael V.*), quoting Cal. Rules of Court, rule 5.841(a)(4).) To satisfy its obligations, DCFS must "make further inquiry regarding the possible Indian status of the child . . . as soon as practicable" 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 also Cal. Rules of Court, rule 5. 481(a)(4).) Like failure to issue adequate notice,

failure to make adequate inquiry may result in limited reversal and remand. (See *Michael V.*, *supra*, 3 Cal.App.5th at p. 235; *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167-1168; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 700, 703-704.)

**II. Standard of Review**

We review mother's ICWA arguments despite her silence on the issue below. (*Isaiah W.*, *supra*, 1 Cal.5th at p. 5.) We review the trial court's findings regarding ICWA's applicability and DCFS's compliance with its requirements for substantial evidence. (*In re E.W.* (2009) 170 Cal.App.4th 396, 403-404.) Ordinarily, failure to comply with ICWA requirements constitutes prejudicial error. (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 653.) Failure to comply with a higher state standard, however, such as that imposing the affirmative duty of inquiry, "'must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836, [ ].)' [Citations.]" (*Ibid.*)

**III. Analysis**

Mother raises two separate claims of error. First, she contends, DCFS violated its statutory duty of inquiry by "failing to attempt to identify, locate, and speak with the maternal grandfather [her father, Luis,] and other maternal relatives or contact paternal relatives." Specifically, mother asserts that DCFS should have attempted to identify and contact the children's paternal relatives, as well as unnamed family members she claimed had "been unable to provide any concrete information" to her about the children's possible Indian heritage. She also argues that DCFS should have contacted her father,

Luis, after she told the DI that he was looking into the children's possible Indian heritage. We agree with the latter contention.

These alleged inquiry errors are predicated upon state statutory law and therefore are subject to harmless error analysis. We conclude that any errors that may have occurred regarding DCFS's failure to contact the children's paternal relatives or mother's unnamed "family members" are harmless on the record before us. First, there was no need for DCFS to contact the children's paternal relatives because their father told DCFS that he did not have any Indian ancestry. DCFS must make inquiry only of people who "reasonably can be expected to have information regarding the child's membership status or eligibility." (§ 224.3, subd. (c).) There is no suggestion in the record that father or his relatives reasonably could be expected to have such information; father disclaimed Indian heritage, and there is no evidence that he or his family was privy to significant information about any heritage allegedly passing through mother.[4] Even if we assume DCFS nonetheless was obligated to identify and contact these relatives, mother has not carried her burden of demonstrating a reasonable probability that the result here would have been different had DCFS identified and contacted them.

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[4] We respectfully disagree with *Michael V.*, *supra*, 3 Cal.App.5th at p. 235, to the extent it suggests that relatives with "no Indian ancestry on their side of the family" should be contacted in all cases to see if they have information regarding the children's heritage through other branches of their family trees. 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. No such suggestion appears in the record here.

Next we consider the unknown "family members" whose names and contact information mother did not provide. Even if we assume DCFS was obliged to investigate and contact these unknown individuals, we cannot conclude that its failure to do so caused any harm here. A DI personally interviewed Aurora, Luis's mother, through whom the alleged Cherokee ancestry passed. She provided the DI with sufficient information to prepare a family tree that included information about her parents, Luis's father, and Luis, all of which the DI relayed to the 11 noticed tribes. Mother has not identified other family members she believes might have had further information, or how further inquiry into that line of alleged ancestry would have changed the outcome here.

DCFS's failure to contact mother's father, Luis, poses a closer question. Mother told the DI that Apache heritage ran through the "maternal grandfather's paternal side"—that is, through Luis's father, not his mother Aurora. Luis therefore reasonably could have been expected to have information about that heritage that Aurora, his mother, might not have. The record also indicates that mother was in contact with Luis; she told the DI that Luis was "supposed to find out about" Indian heritage. It accordingly would not have been onerous for DCFS to obtain his information from mother and reach out to him. Indeed, DCFS should have done so. Although DCFS claims it "persisted" in its inquiries despite mother's failure "to provide any information," there is no evidence that it made any effort to contact Luis, whom mother mentioned both as a source of information and of Apache heritage separate from the Cherokee heritage he obtained through Aurora. DCFS learned Luis's name and biographical details from Aurora, but did not follow up to

determine whether, for instance, Luis had any extended family members who might have more information about his alleged Apache heritage. It was unreasonable to ignore the distinct possibility that Luis might have information about his paternal heritage that his mother, Aurora did not. Thus, we are not persuaded by DCFS's suggestion that its investigation was adequate merely because it contacted Luis's mother. DCFS must make reasonable efforts to contact Luis on remand.

Mother's second claim of error rests on an omission from the notices. She identified Aurora to DCFS as "Aurora D.," and that name appears in at least two different reports in the record. Yet the family tree prepared during or after DCFS's meeting with Aurora identified her as "Aurora P." The notices DCFS sent to the tribes likewise identified Aurora only as "Aurora P.," despite the regulatory and statutory directives to include all former names and aliases. Mother contends this was reversible error, and we agree.

The notice requirements are embodied in the federal ICWA regulations. Because of their critical importance, these notice requirements are strictly construed. (*In re Robert A.*, *supra*, 147 Cal.App.4th at p. 989.) Here, DCFS failed to include known information –"maiden, married and former names or aliases"—about a relative through whom alleged Indian ancestry directly passed. DCFS attempts to excuse its omission by arguing "there were no inconsistent statements," and claiming that its inclusion of the D. last name in its report was "clearly . . . a typographical error, nothing more." These contentions are not well-taken on this record.

The two last names DCFS was given for Aurora, P. and D., are wholly dissimilar. Indeed, they are different lengths—the

name beginning with P. has five letters, and the name beginning with D. has six—and they do not even contain any of the same letters. The record includes both names, in full, in multiple locations. This is an obvious inconsistency, and both the court and DCFS had an obligation to clarify the discrepancy, or at the very least ensure that both names were reported to the tribes. The omission of a last name Aurora presumably used at some point in her life is problematic. Unlike the misspelling of a first name, which was found to be non-prejudicial where the notice contained the person's "correct last name, former last names, current address, and date of birth" (*In re D.W.* (2011) 193 Cal.App.4th 413, 418), the omission of a known last name is more likely to impede a tribe's records search.

Although the record reflects that DCFS undertook substantial efforts to comply with ICWA, substantial compliance is not satisfactory. "[V]igilance in ensuring strict compliance with federal ICWA notice requirements is necessary because a violation renders the dependency proceedings, including an adoption following a termination of parental rights, vulnerable to collateral attack if the dependent child is, in fact, an Indian child." (*Breanna S.*, *supra*, 8 Cal.App.5th at p. 653.) Had DCFS inquired of Luis's alleged Apache heritage or provided the tribes with complete information about Aurora, the tribal investigations may well have taken a different turn or led to different findings. "[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." (*Id.* at p. 655.) Accordingly, "we would be extremely reluctant under most circumstances to foreclose the tribe's prerogative to evaluate a child's membership rights

without it first being provided all available information mandated by ICWA" (*ibid.*), namely accurate and complete information about Aurora.

We remand the matter for the juvenile court to conduct a further investigation into mother's claim of Indian ancestry by making a genuine effort to locate mother's father, Luis, and other family members who might have information bearing on the children's possible Indian ancestry. Once that investigation is completed, new notices—updated with any new information as well as both of Aurora's last names and any other additional information DCFS has learned—must be provided to the relevant tribes, the BIA, and the Secretary of the Interior. DCFS shall thereafter notify the court of its actions and file certified mail return receipts for the new ICWA notices, together with any responses received. The court shall then determine whether ICWA and state law inquiry and notice requirements have been satisfied and whether Jo., Je., and Ja. are Indian children. If the court finds they are Indian children, it shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and related California law. If not, the court's original section 366.26 order remains in effect.

## DISPOSITION

The section 366.26 order of the juvenile court is 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 consistent with this opinion.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.