Filed 4/4/17 In re Matthew C. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re MATTHEW C. et al., Persons Coming Under the Juvenile Court Law.	B271273 (Los Angeles County Super. Ct. No. DK03997)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. LETICIA C., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Debra L. Losnick, Juvenile Court Referee. Conditionally affirmed and remanded.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

Leticia C. (Mother) appeals from the juvenile court's Welfare and Institutions Code[1] section 366.26 permanency planning and legal guardianship orders relating to her four children, contending the court failed to comply with the notice procedures mandated by the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA).[2] Finding error in the manner in which statutorily required notices were given, we conditionally affirm the juvenile court's orders, and remand for compliance with ICWA notice requirements.

STATEMENT OF THE CASE

The Los Angeles County Department of Children and Family Services (DCFS) initiated juvenile dependency proceedings on behalf of three children of Mother on February 28, 2014, filing an application for, and that day obtaining, a protective custody warrant on behalf of Matthew C. (born July 2007), Joy C. (born December 2012) and Faith C. (born September 2013) (the Three Children) alleging parental neglect and violence between the parents which exposed the Three Children to serious physical and emotional harm and abuse. The Three Children were ordered detained and placed with the maternal aunt, Monique O.

DCFS then filed a juvenile dependency petition which alleged that Mother and father engaged in violent altercations exposing the Three Children to the danger of serious physical harm (section 300, subdivision (a)); also alleging the parents' violent altercations and father's alcohol abuse placed the Three Children at risk for their physical health and safety (section 300, subdivision (b)). An amended juvenile dependency petition, which added

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] The father of the children is not a party to this appeal.

allegations of substance abuse by both parents, was filed on March 7, 2014. On June 23, 2014, the juvenile court adjudicated the amended dependency petition, continuing the detention of the Three Children with the maternal aunt.

Five months later, in November 2014, Hope C. (the Fourth Child) was born to Mother and father. On December 16, 2014, DCFS initiated juvenile dependency proceedings as to the Fourth Child, obtaining authorization to remove and detain her. On December 29, DCFS filed a similar juvenile dependency petition as to the Fourth Child (under the same case number), and the court detained the Fourth Child in the custody of the maternal aunt the same day. On February 24, 2015, the court adjudicated the Fourth Child's petition, continuing her in the maternal aunt's ongoing care.

On February 16, 2016, the court held a section 366.26 legal guardianship hearing and appointed the maternal aunt and her partner, Alyssa P., as the co-legal guardians of all four children. Mother had not objected to the appointment of the maternal aunt as guardian, but did object to the appointment of her partner, Alyssa P., as co-guardian. That objection was overruled. Mother filed a timely appeal.

STATEMENT OF ICWA FACTS[3]

A. ICWA Inquiry and Notices Relating to the Three Children

The issue whether either parent had Indian heritage was first addressed at the March 7, 2014 hearing on the juvenile dependency petition filed with respect to the Three Children. At that hearing, the juvenile court ordered "DCFS to investigate possible ICWA heritage on mother's side of the family." The record indicates this order was made based on the contents of "Parental Notification of Indian Status" forms completed by the parents

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[3] We set out those facts relevant to the issues raised on this appeal.

under penalty of perjury and filed that day. Mother indicated she "may have Indian ancestry [in the] Cherokee [tribe]" through her maternal grandmother. Father declared he had no Indian ancestry "as far as I know."

In its April 11, 2014 Jurisdiction/Disposition Report, DCFS reported father thought he did have Indian heritage in the Santa Ynez band of [Chumash] Mission Indians, later stating it might be in the Apache tribe. Father directed DCFS to the children's paternal great-grandmother, but, when DCFS sought to pursue the matter, father did not respond to a DCFS phone message asking for her contact information.

At the April 11, 2014 jurisdictional hearing on the juvenile dependency petition for the Three Children, the juvenile court ordered investigation of father's claims of Indian heritage in the Chumash and Apache tribes, further investigation of Mother's claim relating to the Cherokee tribe, and preparation and mailing of ICWA-compliant hearing notices to all "applicable tribe[s] and their designated agent[s] as recognized by the federal government," the Bureau of Indian Affairs (BIA), and the Secretary of the Interior. The court also ordered DCFS to provide it with documentation of compliance with its order, including return receipts and written responses.

Regarding Mother's family, DCFS reported in its May 2, 2014 Interim Review Report that Mother had refused to speak to DCFS again about her ICWA contentions, but that the maternal grandparents had provided the needed information for ICWA notices. Regarding father's family, DCFS reported speaking with the paternal grandmother, who advised she had Apache heritage and the paternal grandfather had Chumash and Apache heritage. DCFS attached to its May 2, 2014 report a copy of the completed "Notice of Child Custody Proceeding for Indian Child" form it had sent by registered/certified mail return receipt requested to: (a) the parents, (b) the

federally recognized Apache and Cherokee tribes, (c) the federally recognized Santa Ynez Chumash tribe, and (d) the required governmental entities.[4]

In its June 23, 2014 Interim Review Report for the jurisdictional hearing, DCSF provided proof of mailing to 12 tribes, including United States Post Office return receipt forms and the letter responses it had received from six of the tribes to whom ICWA notices had been sent. Each of the six responding tribes stated that the Three Children did not meet the definition of "Indian child" or were "not eligible for enrollment" in the respective tribes.[5]

At the June 23, 2014 hearing, the juvenile court found ICWA did not apply to the Three Children.

B. *ICWA Notice and Inquiry as to the Fourth Child*

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[4] The attached documents established that ICWA notice had been sent to 12 tribes. As will be discussed, *post*, federal law requires that notice be mailed to each tribe at the address for it as published in the Federal Register. In this case, eight of the tribes received notice at their respective correct addresses; however, four of the tribes did not. The eight correctly addressed notices were sent to the following tribes: Cherokee Nation, United Keetoowah Band of Cherokee Indians in Oklahoma, Jicarilla Apache Nation, Mescalero Apache Tribe, San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe and Yavapai-Apache Nation. The four tribes to which improperly addressed notices were mailed were: Eastern Band of Cherokee Indians, Santa Ynez Band of Chumash Indians, Apache Tribe of Oklahoma, Fort Sill Apache Tribe of Oklahoma.

[5] The six tribes which did not respond were: Eastern Bank of Cherokee Indians, Santa Ynez Band of Chumash Indian, Apache Tribe of Oklahoma, Tonto Apache Tribe, White Mountain Apache Tribe and Yavapai-Apache Nation.

Absence of response from a tribe which received properly addressed notice does not adversely affect the ICWA notice requirement; viz., a tribe which receives proper notice is not obligated to respond. Notice complies with ICWA and California law so long as there is proof of actual notice, delivered to the address for the tribe as published in the Federal Register.

The Fourth Child was detained shortly after her November 2014 birth, also in the care of the maternal aunt. The subject of ICWA compliance was addressed at the hearing on the juvenile dependency petition for the Fourth Child on December 29, 2014. In the Indian Child Inquiry Attachment to the juvenile dependency petition DCFS filed as to the Fourth Child, DCFS reported that "[o]n 6/23/14, the Court found that ICWA does not apply." At the hearing that day, Mother again reported she may have Cherokee ancestry. When questioned prior to that hearing, however, Mother had told DCFS that the Fourth Child may have no Indian ancestry. Father reported under penalty of perjury in his Parental Notification of Indian Status document filed for this hearing that he had "no Indian ancestry as far as I know." However, at the hearing that day, father's counsel stated that "after further consideration, my client believes that his mother might have Cherokee and Apache." Father corrected counsel and said it was the "Chiricahua Apache tribe," and "Father is Chumash."[6]

The record indicates the file containing the record of prior proceedings was not in the courtroom for the hearing and neither the referee who presided that day nor any of the lawyers present at that hearing had any first-hand knowledge of the prior proceedings. Counsel for Mother advised the referee it was his understanding that the bench officer who had heard the matter in June 2014 regarding the Three Children had made the determination "that ICWA does not apply to the other children. There may be a dispute on that. And so my client still believes that she has this Native American ancestry as I indicated in the questionnaire." Thereafter, the court inquired if notice had been given to the Cherokee Nations for the Three

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[6] The record does not make clear to whom father is referring; he may have intended to identify his father as having Chumash ancestry.

Children. When counsel for DCFS responded she did not know, the court observed, "Okay. It's the same mother and the same father, correct?" Once that fact was confirmed, the court ruled, "I'm going to find that there is no Indian heritage here." Father made the representations stated above. Thereafter, the referee explained, "I can't imagine that [the prior bench officer] did not do what she was supposed to do, which was notice the tribes. So this court will find that I have no reason to know there is Indian heritage. However, I will allow [the commissioner who had made the determination as to the Three Children] to rehear that issue at the jurisdictional hearing. If the parents can come up with anything that would give us more information, that would be great. Anything from the tribes yourselves [*sic*] that you can give the court will probably help." No notice to any tribe was ordered, and the burden was placed on the parents to advise DCFS of "any new information relating to possible ICWA status."

C. *The ICWA Issue Was Not Raised Again Thereafter*

In three later interim reports, all of which related to all four children, DCFS reported both the June 23, 2014 finding that ICWA did not apply to the Three Children, and the December 29, 2014 finding the ICWA did not apply to the Fourth Child. The ICWA issue was not raised at any hearing after December 29, 2014, and the record contains no indication that any ICWA notices were sent after April 2014.

CONTENTIONS

Mother argued in her opening brief on appeal that the juvenile court failed to comply with ICWA notice requirements with respect to the Three Children when, at the December 2014 hearing on the matter of detention of the Fourth Child, father again asserted he had Native American heritage, but the court took no action on that claim. With respect to the Fourth Child,

Mother argued it was error for the juvenile court to rely on the determination made earlier as to the Three Children as the basis for making a determination ICWA did not apply to the newborn. In response to our letter to all counsel stating we were considering whether to take judicial notice of the fact of publication and the content of certain notices published in the Federal Register which set out procedures for giving notice to Designated Tribal Agents and others pursuant to ICWA, Mother advanced an additional argument: ICWA notice was prejudicially deficient because several of the letters sent by DCFS in its effort to comply with ICWA were sent to incorrect addresses as is apparent from inspection of the Federal Register documents and comparing the addresses set out there with the addresses on the notices actually sent which are in the record on appeal.

When DCFS responded to our letter to counsel on February 16, 2017, it concurred in appellant's agreement that we may take judicial notice of the subject Federal Register notices; however, it did not address appellant's additional argument.[7]

We will conclude that appellant's additional contention must be addressed, and that it is meritorious.

DISCUSSION

A. *Applicable Law*

"When a dependency court has reason to know the proceeding involves an Indian child, the Department must notify the Indian child's tribe, or, if the

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[7] In its Respondent's Brief, DCFS first contended "the ICWA issue is moot," and moved to dismiss the appeal. However, "'[b]ecause the [ICWA] notice requirement is intended, in part, to protect the interests of Indian tribes, it cannot be waived by the parents' failure to raise it.' [Citation.]" (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 706; see also *In re Marinna J.* (2001) 90 Cal.App.4th 731, 733; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.) Moreover, this issue may be raised for the first time on appeal.

tribe's identity or location cannot be determined, the Bureau of Indian Affairs, of the pending proceedings and of the right to intervene; and no proceeding to place the child in foster care or terminate parental rights shall be held until at least 10 days after the tribe or Bureau of Indian Affairs has received the notice. (25 U.S.C. § 1912[ ](a); 25 C.F.R. § 23.11(c)(12) (2003).) Notice must be sent to all tribes of which a child may be a member or eligible for membership. (See *In re Louis S.* (2004) 117 Cal.App.4th 622, 632–633.) The notice must include the names of the child's ancestors and other identifying information, if known, and be sent registered mail, return receipt requested. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) *When proper notice is not given, the dependency court's order is voidable.* (*In re Karla C.*, *supra*, 113 Cal.App.4th at p. 174; 25 U.S.C. § 1914.)" (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 383–384, italics added.)[8]

The showing required to trigger notice to the tribes, the BIA and the Secretary of the Interior is "minimal." Notice must be sent where there is evidence even "*suggest[ing]* that [the minors] may be Indian children within the meaning of the ICWA." (*Dwane P. v. Superior Court* (2002) 103 Cal.App.4th 247, 258; Cal. Rules of Court, rule 5.481 ["information suggesting" the child is an Indian child triggers notice requirements].)

This threshold is required by ICWA. Congress enacted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ." (25 U.S.C. § 1902.) ICWA recognizes that "'the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.'" (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 52.) "The ICWA presumes it is

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[8] California statutes also mandate the sending of appropriate notices. (§ 224.2.) The addresses to which those notices are to be sent are set out in the Federal Register from time to time, as discussed in the text.

in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource. [Citation.] Congress has concluded the state courts have not protected these interests and drafted a statutory scheme intended to afford needed protection. [Citation.]" (*In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 469; see also *Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 253.)

ICWA notice requirements are not onerous. "'[C]ompliance requires no more than the completion of a preprinted form promulgated by the State of California, Health and Welfare Agency, for the benefit of county welfare agencies." (*In re Desiree F., supra,* 83 Cal.App.4th at p. 475.) When proper notice is not given under the ICWA, the court's order is voidable. (25 U.S.C. § 1914.)" (*Dwayne P. v. Superior Court, supra*, 103 Cal.App.4th at p. 254.)

The reason why failure to give proper notice is so significant is that "failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe." (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) Proper ICWA notice "is absolutely critical . . . for one of [ICWA's] major purposes is to protect and preserve Indian tribes. (25 U.S.C. § 1901.)" (*In re Marinna J., supra,* 90 Cal.App.4th at p. 738.)

The juvenile court has a sua sponte obligation to independently inspect "the information concerning the notice given, the timing of the notice, and the response of the tribe[s], so that [the court] may make a determination as to applicability of the ICWA, and thereafter comply with all of its provisions." (*In re Jennifer A.*, *supra*, 103 Cal.App.4th at p. 705.) To enable the juvenile court to review whether ICWA notice requirements have been met, the social services agency must file with the court the ICWA notice, return receipts and

responses received from the tribes. (Guidelines for State Courts; Indian Child Custody Proceedings (44 Fed.Reg. 67584 (Nov. 26, 1979)); *In re Karla C.*, *supra,* 113 Cal.App.4th at p. 175.)

"In *In re H.A.* (2002) 103 Cal.App.4th 1206, the Fifth District Court of Appeal published its opinion for the express purpose of emphasizing the importance of ICWA notice compliance. (*Id.* at p. 1214.) Noting it frequently encountered 'deficient records' (*ibid.*), the court stated: 'We hold that a party, such as the [social services agency] here, who seeks the foster care placement of or termination of parental rights to a child who may be eligible for Indian child status, must do the following or face the strong likelihood of reversal on appeal to this court. [¶] First, the [social services agency] must complete and serve . . . the "Notice of Involuntary Child Custody Proceeding Involving an Indian Child" along with a copy of the dependency petition. Second, the [social services agency] must file with the superior court copies of proof of the registered mail or certified mail and the return receipt(s), the completed [notice] that was served, and any responses received.' (*Id.* at pp. 1214–1215, some capitalization omitted.)" (*In re Karla C.*, *supra*, 113 Cal.App.4th at p. 176.)

The taking of judicial notice of matters published in the Federal Register to assure compliance with ICWA requirements is well-established. (Evid. Code, § 452, subd. (c); e.g., *In re N.M.* (2008) 161 Cal.App.4th 253, 268, fn. 9 [judicial notice of tribes' current addresses taken at the request of DCFS].)

B. *Discussion*

The essence of Mother's dispositive contention is that inspection of the current address list for the tribes requiring notice in this case demonstrates that the mandatory ICWA notices were not sent to correct addresses as

determined by the list of those addresses published in the Federal Register, and that this error mandates remand so that new ICWA notices can be sent to correct addresses for the relevant tribes to assure compliance with ICWA.

On its face, the record in this case contains the information required by statute, viz., the required notices to the potentially affected tribes, proof that the notices were sent by registered mail return receipt requested, completed return receipts, and in some cases letters from tribe officials. When such letters were returned, they indicated no tribal affiliation for any of the children. *However*, what the trial court did not know when it reviewed these materials in connection with its June 2014 determination for the Three Children was that four of the notices were sent to incorrect addresses[9] even though correct address information was available in the Federal Register as well as from the BIA and the California Department of Social Services.[10]

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[9] The notices which were sent to wrong addresses, as appellant points out in her February 14, 2017 letter, were sent to the Eastern Band of Cherokee Indians, the Santa Ynez Band of Chumash Indians, the Apache Tribe of Oklahoma, and the Fort Sill Apache Tribe of Oklahoma. The Santa Ynez Band of Chumash Indians did respond to the ICWA notice even though notice to it had been misaddressed. Because this tribe received actual notice as confirmed by its response, we deem the error in misaddressing the notice to it to be harmless.

Appellant also argues there were additional errors in letters sent, including incorrect telephone numbers and/or names of responsible individuals. We deem these latter errors to be harmless as the addresses of the particular tribes were correct. It was the failure to send properly addressed ICWA notices to the following three tribes which is not harmless error: Eastern Band of Cherokee Indians, Apache Tribe of Oklahoma, and Fort Sill Apache Tribe of Oklahoma.

[10] California Rules of Court, rule 5.481(a)(4)(B) requires that the social services agency (DCFS) "Contact[] the Bureau of Indian Affairs and the California Department of Social Services for assistance in identifying the

Clearly, the court was relying on DCFS to comply with the law and keep current its mailing list. It is also clear that this did not occur in this case.

Because of the critical importance of proper notice to potentially affected tribes which underpins the federal statute, the relevant provisions of the California statutes (§ 224 et seq.), and the California Rules of Court (rule 5.480 et seq.), this deficit cannot be overlooked.[11]

This precise issue was presented in *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779.[12] There, ICWA notices mailed were inadequate because notice to one of the tribes was sent to an incorrect address. (One tribe's address had changed.) Based on that defect, the *Nicole K.* court remanded for the sending of proper ICWA notice to the correct address of the particular tribe. (*Id*. at p. 784.) The error in this case is identical—with the material distinction that four of the mandatory ICWA notices were sent to wrong addresses, rather than a single one.

The question remaining is the type of redress which is appropriate. In *In re Brooke C.*, *supra*, 127 Cal.App.4th 377, we reviewed cases addressing the proper remedy and held that failure to comply with ICWA notice

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names and contact information of the tribes in which the child may be a member or eligible for membership."

[11] Indeed, section 224.3, subdivision (a) provides, "The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition . . . has been[] filed is or may be an Indian child. . . ."

[12] In the cited case, the appellate court also reinforced the importance of the giving of proper notice to potentially interested tribes, stating that "the issue is not deemed forfeited [when raised on appeal] because the principal purpose of ICWA is to 'protect and preserve Indian tribes.' (*In re Marinna J.* [, *supra,*] 90 Cal.App.4th [at p.] 738.)" (*Nicole K. v. Superior Court*, *supra*, 146 Cal.App.4th [at p.] 783, fn. 1.)

requirements was appropriately addressed by a limited remand to the juvenile court for DCFS to comply with the notice requirement of ICWA and for the juvenile court then to assure compliance. There, we also held, "If, after proper notice is given under the ICWA, [the potentially affected child] is determined not to be an Indian child and the ICWA does not apply, prior defective notice becomes harmless error. (*In re Antoinette S.* [2002] 104 Cal.App.4th [1401,] 1413-1414.) In [such an] event, no basis exists to attack a prior order because of failure to comply with the ICWA." (*In re Brooke C.*, *supra*, 127 Cal.App.4th at p. 385.)

We note the court in *Nicole K.* disagreed with our holding in *In re Brooke C.* (see *Nicole K.*, *supra*, 146 Cal.App.4th at p. 785); however, we are not persuaded by the discussion in *Nicole K.* to depart from our determination of the appropriate disposition. Instead, we find supportive of our disposition the following discussion in *In re Christian P.* (2012) 208 Cal.App.4th 437, 452, a recent opinion by Division Three of this District in a case also presenting ICWA notice issues: "Mother neither argued nor pointed to any facts that support the conclusion that she would have obtained a more favorable result in the absence of the error. Therefore, rather than reversal, the proper remedy here is a limited remand to allow DCFS to comply with ICWA, with directions to the trial court that depend on the outcome of such notice. (*In re Brooke C., supra,* 127 Cal.App.4th at p. 385; see *In re Veronica G.* (2007) 157 Cal.App.4th 179; *Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 267 [limited remand still appropriate after amendments to § 224.2].)"[13]

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[13] In this case, as all of the children are placed with the maternal aunt, if it turns out that Mother does have Indian heritage, placement with the maternal aunt may remain consistent with ICWA requirements.

Our Division Three colleagues affirmed the judgment and dispositional order in that case and remanded the matter "for the limited purpose of directing the trial court to order DCFS to comply with the notice provisions of ICWA, the relevant case law interpreting ICWA and the views expressed in this opinion, and to file all required documentation with the trial court for its inspection. If, after proper notice, a tribe claims that [the children] are Indian children, the trial court shall proceed in conformity with all provisions of ICWA. And, the children, their mother, and their tribe may petition the trial court to invalidate any orders that violated ICWA. (*In re Veronica G., supra,* 157 Cal.App.4th at p. 188; 25 U.S.C. § 1914.) If, on the other hand, no tribe makes such claim, prior defective notice becomes harmless error." (*In re Christian P. supra,* 208 Cal.App.4th at pp. 452-453.)[14]

DISPOSITION

The juvenile court's orders are conditionally affirmed. The matter is remanded to the juvenile court for full compliance with ICWA requirements and for further proceedings as may be required.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

CHAVEZ, J., Acting P.J. HOFFSTADT, J.

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[14] In *In re Breanna S.* (2017) 8 Cal.App.5th 636, 656, Division Seven of this court entered a similar order.

* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.