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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.V. et al., Persons Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.V. et al.,

Defendants and Appellants.

B316674

(Los Angeles County
Super. Ct. No. 17CCJP01909A-D)

APPEAL from orders of the Superior Court of Los Angeles County. Honorable Mary E. Kelly. Affirmed.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant J.V.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant S.T.

Dawyn R. Harrison, Acting County Counsel, Kim Nemoy, Assistant County Counsel, and Kelly Emling, Deputy County Counsel for Plaintiff and Respondent.

INTRODUCTION

S.T. (Mother) and J.V. (Father) appeal from the juvenile court's November 15, 2021 order terminating parental rights to their children, A.V. (born 2014), S.V. (born 2016), G.V. (born 2017), and A.T. (born 2019). The parents' sole asserted basis for reversal is that the Los Angeles County Department of Children and Family Services (the Department) failed to ask extended family members whether A.V., S.V., G.V., or A.T. is an "Indian child" within the meaning of Section 1903 of the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.), as required by section 224.2, subdivision (b), of the Welfare and Institutions Code.¹

We find that the juvenile court erred in determining that ICWA did not apply. There was no evidence that the Department questioned extended maternal and paternal family members about Indian ancestry. However, we conclude that the error was harmless because Mother and Father participated in the proceedings below and denied Indian ancestry. The record before us does not provide any reason to believe that they may have Indian ancestry and thus that the Department's failure to properly inquire was prejudicial to the juvenile court's ICWA finding as to Mother and Father. We therefore affirm.

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

BACKGROUND²

A. The Petition, Termination of Parental Rights, and Parents' Appeals.

In November 2017, Mother gave birth to G.V. Both Mother and G.V. tested positive for methamphetamine at birth. At the time, Father was incarcerated in North County Correctional Facility.

On November 17, 2017, the Department filed a petition alleging that S.V., G.V., and A.V. came within the provisions of section 300, based on Mother testing positive for amphetamines at the time of G.V.'s birth, her history of using illicit substances, and Father's criminal conviction history for possessing, transporting, and selling controlled substances.

The court detained the children from Mother and Father. It further ordered monitored visits for Mother, minimum three times per week, one hour per visit, with Department discretion to liberalize depending on her compliance with the case plan, which included a substance abuse program with testing, individual counseling, and parenting.

On January 5, 2018, the juvenile court found Father to be the presumed father of G.V. and A.V. The court granted the Department discretion to liberalize Mother's visits and to allow the children to be placed with Mother while she was living with maternal grandmother.

On March 21, 2018, the court held a combined jurisdiction and disposition hearing. The petition was sustained with minor modifications as to both parents. The children were placed with

² Due to the limited nature of this appeal, we recite only the facts and procedural background relevant to ICWA inquiry.

Mother provided she lived with the children's maternal grandmother.

The Department issued a detention warrant for the children on August 3, 2018, as a result of Mother's failure to cooperate in drug counseling and therapy. Father, who had been released from custody in March of 2018, was again arrested in April on drug charges.

The Department filed a supplemental petition on August 17, 2018 under Welfare and Institutions Code section 387 alleging that Mother and Father were refusing to cooperate in drug counseling and therapy. This petition was sustained on October 10, 2018. The children were removed from the custody of their parents and placed in foster care. Reunification services and monitored visits were granted.

Mother gave birth to infant A.T. on February 16, 2019. On April 2, 2019 the Department obtained a removal order for A.T. On April 5, 2019, the Department filed a section 300 petition on behalf of the parents' newborn child, A.T. alleging that, among other things, the parents failed to protect A.T., and that Mother and Father failed to comply with the requirements of their juvenile court case plans.

On September 30, 2019, the juvenile court found that Father was the biological father of infant A.T., based on a DNA test. The court sustained all counts of the petition, finding that the parents failed to protect A.T., due to Mother's substance abuse and Father's record of illicit substance related convictions.

Father's counsel requested assessment of and placement with paternal grandmother or paternal aunt if Father failed to reunify with the children. The court ordered the children removed from both parents, denied the request for bypass of

reunification services for Father, ordered reunification services and monitored visitation for Father, and ordered that the paternal aunt and paternal grandmother be assessed for placement. The court ordered Mother's reunification services to be bypassed as her whereabouts were unknown.

On October 10, 2019, at the section 366.21 subdivision (f) review hearing, the juvenile court terminated family reunification services for both parents as to A.V., S.V. and G.V. The court set a selection and implementation hearing for February 6, 2020.

On August 26, 2020, at a section 366.21 subdivision (e) hearing regarding A.T., the juvenile court terminated reunification services for Father and set the matter for a permanency planning hearing on January 4, 2021.

The Department provided a copy of the legal notice, slated to be published in the newspaper on April 27, May 4, May 11 and May 28, 2021, as well as proof of publication, addressed to Mother, regarding the termination of her parental rights, as her whereabouts were unknown.

On July 6, 2021, at a permanency planning review hearing, the court ordered adoption as the permanent plan for all of the children. The Department's section 366.26 report dated July 7, 2021, indicated that Mother had not had any contact or visits with the children and that Father had been unable to visit the children as he was in custody.

On November 15, 2021, the juvenile court terminated the parental rights of both parents as to all four children and found them adoptable by their foster parents.

Both Father and Mother timely appealed.

B. The ICWA Inquiry

ICWA-010 forms attached to the initial petition indicated that an Indian child inquiry was not made.

On November 15, 2017, the Department interviewed maternal grandmother who identified her husband Juan L. The Department did not include any ICWA inquiry of maternal grandmother in its detention report.

ICWA-020 forms signed by Mother, indicated she had no Indian ancestry, as far as she knew. On November 20, 2017, the juvenile court found that there was no reason to know that the ICWA applied, as Mother indicated she had no American Indian ancestry. Identical minute orders for A.V., S.V., and G.V stated, “The Court does not have a reason to know that this is an Indian Child, as defined under ICWA, and does not order notice to any tribe or the BIA. Parents are to keep the Department, their Attorney and the Court aware of any new information relating to possible ICWA status. JV-020, the Parental Notification of Indian Status is signed and filed.”

Maternal great-aunt was present in the courtroom at the November 20, 2017 detention hearing. The court made no ICWA inquiry of maternal great-aunt.

Father’s ICWA-020 forms for A.V. and G.V. indicate that Father had no Indian ancestry. Minute orders for A.V., S.V. and G.V., dated January 18, 2018, stated, “The Court does not have a reason to know that this is an Indian Child, as defined under ICWA, and does not order notice to any tribe or the BIA. Parents are to keep the Department, their Attorney and the Court aware of any new information relating to possible ICWA status. JV-020, the Parental Notification of Indian Status is signed and filed.”

On September 30, 2019, the court found that ICWA does not apply to A.T. The court stated, “I do believe that based on the face-to-face interview on March 15, 2019, with Mother [S.T], she reported that A.T. had no Indian ancestry. And the court did make a prior finding on November 20, 2017, that ICWA did not apply to the siblings’ case 17CCJP01909 A through C. And Father [V.] is the same father for [A.T.] and the siblings. Therefore, the court finds that there is no reason to believe that . . . this child is subject to the ICWA statute.”

At same hearing, and at the request of the Department, the court asked father if he believes he has any known Native American ancestry. Father responded, “No.” The court said, “Okay. So you don’t believe there is?” Father replied, “No.” The court stated, “All right. So that was based on, you know—he had indicated that prior, so I find that there is no basis for either Mother or Father to believe that the child is subject to the ICWA statute.”

On August 26, 2020, with counsel for Father present and Father absent due to not being transported because of his incarceration, and with Mother and Mother’s counsel absent, counsel for the Department requested a “no ICWA finding” for Mother. The juvenile court stated, “[D]oes anybody disagree with the court making a finding that there’s no reason to know this is a case involving the Indian Child Welfare Act as to Mother? Seeing no objection and hearing no objection, the court will make that finding. Is there anything else?”

The November 15, 2021 pre-release investigation report states ICWA does not apply, referring to the November 20, 2017 finding. That report identifies paternal grandmother Maria C., with an address and telephone number; it states paternal

grandmother resides with her adult daughter Jennifer V., and her adult son Moises G. The report identifies maternal grandmother Zulma M., maternal aunt Griselda and minor maternal uncle Diego, with whom the children have contact.

Although the Department interviewed maternal grandmother, maternal aunt, maternal great-aunt, maternal grandfather and several paternal relatives, nothing in the record indicates the Department inquired of their Indian ancestry.

DISCUSSION

I. Standard of Review

“ ‘ “[W]e review the juvenile court’s ICWA findings under the substantial evidence test, which requires us to determine if reasonable, credible evidence of solid value supports the court’s order. [Citations.] We must uphold the court’s orders and findings if any substantial evidence, contradicted or uncontradicted, supports them, and we resolve all conflicts in favor of affirmance.” ’ ” (*In re Josiah T.* (2021) 71 Cal.App.5th 388, 401 (*Josiah T.*), quoting *In re D.F.* (2020) 55 Cal.App.5th 558, 565, 569 (*D.F.*).)

II. Overview of ICWA and Related State Law

ICWA contains provisions governing court proceedings concerning custody of Indian children. (See generally 25 U.S.C. §§ 1911–1923.) “ICWA reflects a congressional determination to protect American Indian children and to promote the stability and security of Indian tribes and families.” (*Josiah T.*, *supra*, 71 Cal.App.5th at p. 401.) In ICWA, Congress established procedural rules applicable in dependency cases to ensure that if an Indian child is involved, they are properly identified. (*Ibid.*; 25 C.F.R § 23.107(a).)

Federal regulations implementing ICWA provide that “[s]tate courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child[]” and that “[s]tate courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.” (25 C.F.R § 23.107(a).)

Under state law, the juvenile court and the Department both additionally have a “ ‘continuing duty to inquire’ ” whether the child is an Indian child. (*D.F., supra*, 55 Cal.App.5th at p. 566, citing § 224.2, subd. (a).) This duty has three phases: the initial duty to inquire, the duty of further inquiry, and the duty to provide formal ICWA notice. (*Ibid.*)

III. Due to Inadequacies in the Initial Inquiry, the Trial Court Erred in Finding ICWA Inapplicable

The juvenile court’s finding that ICWA does not apply to the four children implies that (a) the Department fulfilled its duty of inquiry; and (b) neither the Department nor the court had a reason to know or believe they were Indian children. (*Josiah T., supra*, 71 Cal.App.5th at p. 401.) The first question we must answer is whether the implied finding that the Department fulfilled its duty of inquiry constitutes error. We conclude that it does.

When the Department takes children into custody, it is required to ask “extended family members,” among others, “whether the child is, or may be, an Indian child” (§ 224.2, subd. (b).) This is a requirement imposed only by state law and not by federal law. (*In re S.S. (2022)* 75 Cal.App.5th 575, 581 (S.S.).)

Here, although the social worker and the court asked Mother and Father about their Indian heritage, Mother and Father argue on appeal that the Department failed to inquire of their extended family members with whom the Department had contact in this matter. Specifically, they argue that even though the Department interviewed them, the Department failed to inquire of maternal grandmother, maternal aunt, maternal great-aunt, maternal grandfather and several paternal relatives. The Department does not dispute this contention, nor are we directed to any evidence that the Department made any such inquiry or that the juvenile court inquired into whether the Department made any such inquiry.

In the absence of any evidence that the Department complied with its section 224.2, subdivision (b), duty to inquire with Mother and Father's extended family members, the juvenile court's implied finding that the Department fulfilled its duty of inquiry constitutes error. (See *In re Darian R.* (2022) 75 Cal.App.5th 502, 509 [finding error where evidence showed Department had contact with maternal aunt and maternal grandfather but failed to inquire of them regarding Indian ancestry].) However, because the error is one of state law, we reverse only if it was prejudicial. (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 742 (*Benjamin M.*), citing Cal. Const., art. VI, § 13.)

IV. The Juvenile Court's Error Was Not Prejudicial

In California, prejudicial error is generally found only if, “‘after an examination of the entire cause, including the evidence,’” we are “of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have

been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Courts are divided on what showing of prejudice warrants reversal for initial inquiry errors under Section 224.2. “Some courts have addressed this problem by requiring an appellant who asserts a breach of the duty of inquiry to, at a minimum, make an offer of proof or other affirmative assertion of Indian heritage on appeal.” (S.S., *supra*, 75 Cal.App.5th at pp. 581–582, citing cases.) Others have excused such a showing, effectively treating failure to inquire as error per se. (See, e.g., *In re Y.W.* (2021) 70 Cal.App.5th 542, 556; *In re J.C.* (2022) 77 Cal.App.5th 70, 80.) The Fourth Appellate District in *Benjamin M.*, *supra*, 70 Cal.App.5th 735, took a third approach, concluding that “a court must reverse where the record demonstrates that the agency has not only failed in its duty of initial inquiry, but where the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child.” (*Id.* at p. 744.)

We have previously rejected the error per se line of cases. (*In re M.M.* (2022) 81 Cal.App.5th 61, 71, review granted Oct. 12, 2022, S276099.) We believe a fourth rule recently adopted by our colleagues in *Dezi C.* is the better approach. (*In re Dezi C.* (2022) 79 Cal.App.5th 769, 777, review granted, Sep. 21, 2022, S275578.) In *Dezi C.*, the court stated that “an agency’s failure to conduct a proper initial inquiry into a dependent child’s American Indian heritage is harmless unless the record contains information suggesting a reason to believe that the child may be an ‘Indian child’ within the meaning of ICWA, such that the absence of further inquiry was prejudicial to the juvenile court’s ICWA finding.” (*Id.* at p. 779.) “To illustrate, a reviewing court

would have ‘reason to believe’ further inquiry might lead to a different result if the record indicates that someone reported possible American Indian heritage and the [Department] never followed up on that information; if the record indicates that the [Department] never inquired into one of the two parents’ heritage at all [citation]; or if the record indicates that one or both of the parents is adopted and hence their self-reporting of ‘no heritage’ may not be fully informed.” (*Ibid.*)

In any event, we conclude that under any and all of the three approaches articulated in *Dezi C., S.S.*, and *Benjamin M.*, the court’s error here was harmless.

There is nothing in the record that gives us any reason to believe that any of the four children are Indian children. Neither Mother nor Father point us to any such evidence. Mother and Father also make no proffer of evidence on appeal that they have Indian heritage. Mother and Father appeared in court and unequivocally denied knowledge of any Indian ancestry. On appeal, Mother and Father simply assert that the Department should have asked extended relatives about the children’s possible Indian heritage, yet Mother and Father denied Indian heritage throughout the proceedings. There is no suggestion these denials were insufficient because Mother and Father were adopted or otherwise might not have known their own heritage.

Mother and Father both certified that they have no information that the four children may have Indian heritage. As such, this case is unlike *Benjamin M.* There, the father was entirely absent from the proceedings and no person from the father’s side of the family had been asked about Indian ancestry. With information about ancestry on the father’s side completely

“missing,” inquiry with a person sharing the father’s ancestry “would likely have shed meaningful light on whether there [wa]s reason to believe Benjamin [wa]s an Indian child.” (*Benjamin M., supra*, 70 Cal.App.5th at p. 744.) No such facts are present here.

Accordingly, Mother’s and Father’s “unvarnished contention that additional interviews of [relatives] would have meaningfully elucidated [the children’s’] Indian ancestry” does not support a finding of prejudice. (*In re Darian R., supra*, 75 Cal.App.5th at p. 510.)

DISPOSITION

The juvenile court’s findings and orders are affirmed.

HARUTUNIAN, J.*

I concur:

GRIMES, Acting P.J.

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

WILEY, J., dissenting.

The Department failed to phone the children's paternal grandmother, among others, about possible Indian ancestry. It would have taken slight effort to try that number, as the 2018 amendment to California's version of the Indian Children Welfare Act required.

This is significant. Through questions like that, tribes can connect with children who might carry an indigenous heritage into the future. No question means no answer. No answer shuts tribes out of the legal process that places children who might be their future. No answer means tribes cannot learn their interests are at stake. Tribes will have no notice of a relevant case and will not get an opportunity to be heard.

Tribes are the real parties in interest under California's amended law. They sought this change in the law because the old system was failing them. The Legislature responded unanimously and with alacrity, for the tribes' benefit. Why such unanimity, such alacrity? That is not standard for a legislature.

It was because 500 years of our history freights this issue. The Legislature took measures to counteract a history that has so devastated tribes.

So prejudice to tribes is the issue. The 2018 amendment sought to secure notice to tribes when a dependency case might involve Indian children. A child welfare agency failed to do what this amendment directed: to ask "extended family members" about the possibility of the child's Indian ancestry. Agency failures like this deprive the intended tribal beneficiaries of notice and an opportunity to be heard, if the information would have shown Indian ancestry. This deprivation of an amendment's benefit is a miscarriage of justice to tribes.

They are the statute's beneficiaries and now have no way of knowing when their rights are at stake. This failure entirely negates the intended effect of the Legislature's 2018 amendment.

To say this omitted telephone call did not matter—that it caused no prejudice—is to misapprehend the stakes. Tribes have been losing for 500 years. They lose again today.

This is my 16th dissent on this issue.

WILEY, J.