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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re Marlena G., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.R., Defendant and Appellant.	E078247 (Super.Ct.No. J288526) OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Conditionally reversed and remanded with directions.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant and Appellant.

Tom Bunton, County Counsel and Kaleigh Ragon, Deputy County Counsel, for Plaintiff and Respondent.

L.R. (Mother) appeals from the juvenile court's order terminating parental rights to her daughter, Marlena G. Mother argues that the San Bernardino County Department of Children and Family Services (CFS) failed to comply with the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) and related state law. We conclude that CFS failed to discharge its duty of initial inquiry. On this record, we must conditionally reverse the order terminating parental rights and remand the matter for further proceedings.

BACKGROUND

Mother and M.G. (Father) have three other children. (Father is not a party to this appeal.) The family has a dependency history concerning Marlena's three siblings. The juvenile court took jurisdiction over the siblings on the basis of domestic violence between the parents and Mother's untreated mental health issues, and the court terminated parental rights to the siblings in November 2020. Marlena was born in October 2020.

The present case began in March 2021. CFS received a referral alleging that the parents had a history of domestic violence. The reporting party was concerned that the parents were continuing to engage in domestic violence. Mother reportedly shook and yelled at Marlena often, and the parents fought over Mother's treatment of the child. Also, Mother had recently left the child with paternal aunt and failed to return. When CFS contacted Mother, she explained that she left the child with paternal aunt because she needed "time to 'work on herself'" and "'get back on [her] medication.'" Father told CFS that he had become angry with Mother for shaking and yelling at Marlena, and he

admitted that they had recently engaged in domestic violence. Mother and Father both told the social worker that they did not have any Native American ancestry.

CFS obtained a detention warrant for Marlena and placed her with paternal aunt and uncle (Father's brother and sister-in-law), where her siblings were also placed. The agency filed a petition under Welfare and Institutions Code section 300, subdivisions (b)(1) and (j), alleging that (1) the parents had exposed Marlena to domestic violence, (2) Mother had ongoing mental health problems, and (3) the parents had failed to address the issues that led to termination of parental rights in the siblings' cases, placing Marlena at risk of similar abuse or neglect. (Unlabeled statutory citations refer to the Welfare and Institutions code.) The juvenile court detained Marlena from both parents.

When CFS interviewed Mother for the jurisdiction/disposition report, she again stated that she did not have any Native American ancestry. Father did not attend his scheduled interview with CFS.

On the day of the jurisdiction and disposition hearing, Mother filed Judicial Council form ICWA-020 (Parental Notification of Indian Status). She also filled out a San Bernardino County form (Family Find and ICWA Inquiry) asking for similar information. On both forms, she checked the box indicating that she did not have any Native American or Indian ancestry.[1]

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[1] "[B]ecause ICWA uses the term 'Indian,' we do the same for consistency, even though we recognize that other terms, such as 'Native American' or 'indigenous,' are preferred by many." (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 739, fn. 1 (*Benjamin M.*).)

The jurisdiction and disposition hearing occurred in April 2021. The court found the allegations of the petition to be true and removed Marlena from the parents' custody. The court denied both parents reunification services under section 361.5, subdivision (b)(10) and (11) (failure to reunify with the child's siblings and termination of parental rights to the child's siblings), and it set the matter for a section 366.26 hearing. The court found that Marlena did not come within the provisions of ICWA.

The section 366.26 report requested a continuance of the section 366.26 hearing to complete the assessment of paternal aunt and uncle's home. The report noted that paternal aunt and uncle were in the process of adopting Marlena's siblings.

The continued section 366.26 hearing took place in December 2021. The court found that Marlena was likely to be adopted and terminated parental rights. The court did not make any express ICWA findings.

DISCUSSION

Although the court did not expressly find that ICWA did not apply to Marlena, the order terminating parental rights "was 'necessarily premised on a current finding by the juvenile court'" that ICWA did not apply to the child. (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 740.) Mother argues that CFS failed to comply with the duty of initial inquiry under ICWA-related state law, so the court erred by finding ICWA did not apply. We agree and conditionally reverse the order terminating parental rights.

ICWA establishes minimum federal standards that a state court must follow before removing Indian children from their families. (*In re T.G.* (2020) 58 Cal.App.5th 275, 287.) An Indian child is any unmarried person under 18 who "is either (a) a member of

an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); accord, § 224.1, subd. (b).)

"Because it typically is not self-evident whether a child is an Indian child, both federal and state law mandate certain inquiries to be made in each case." (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 741.) CFS and the juvenile court have an "affirmative and continuing duty to inquire" whether a child in a dependency proceeding "is or may be an Indian child." (§ 224.2, subd. (a).) The duty to inquire consists of two phases—the duty of initial inquiry and the duty of further inquiry. (*In re T.G.*, *supra*, 58 Cal.App.5th at p. 290.)

As for the duty of initial inquiry, when CFS takes a child into temporary custody, state law requires the agency to ask "the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child," and the reporting party whether the child is or may be an Indian child. (§ 224.2, subd. (b).) Extended family members include adults who are the child's stepparents, grandparents, siblings, brothers- or sisters-in-law, aunts, uncles, nieces, nephews, and first or second cousins. (25 U.S.C. § 1903(2); § 224.1, subd. (c).) In addition, "[a]t the first appearance in court of each party, the court shall ask each participant present in the hearing whether the participant knows or has reason to know that the child is an Indian child." (§ 224.2, subd. (c); 25 C.F.R. § 23.107(a) [requiring state courts to ask each participant "at the commencement" of a child custody proceeding "whether the participant knows or has reason to know that the child is an Indian child"].)

The duty of further inquiry comes into play if the initial inquiry gives the juvenile court or agency "reason to believe that an Indian child is involved." (§ 224.2, subd. (e), 1st par.) "[R]eason to believe" exists whenever there is "information suggesting that either the parent of the child or the child is a member or may be eligible for membership in an Indian tribe." (§ 224.2, subd. (e)(1).) The required further inquiry includes interviewing the parents and extended family members to gather the information necessary for an ICWA notice, contacting the Bureau of Indian Affairs and the State Department of Social Services to gather the names and contact information of the pertinent tribes, informally contacting the tribes, and contacting any other person who may reasonably be expected to have information regarding the child's membership status or eligibility. (§ 224.2, subd. (e)(2)(A)-(C).)

If the inquiries reveal "reason to know that an Indian child is involved," ICWA requires that the pertinent tribes receive notice of the proceedings and of their right to intervene. (25 U.S.C. § 1912(a); accord § 224.3, subd. (a).) Federal regulations define the circumstances establishing a "reason to know." (25 C.F.R. § 23.107(c).) California law conforms to that definition. (§ 224.2, subd. (d).)

CFS "must on an ongoing basis include in its filings a detailed description of all inquiries, and further inquiries it has undertaken, and all information received pertaining to the child's Indian status." (Cal. Rules of Court, rule 5.481(a)(5).) If the court finds that CFS has complied with its duty of inquiry, and there is no reason to know that the child is an Indian child, then the court may find that ICWA does not apply. (§ 224.2, subd. (i)(2)); Cal. Rules of Court, rule 5.481(b)(3)(A); *In re Austin J.* (2020) 47

Cal.App.5th 870, 887 [a finding that ICWA did not apply implied that social workers had fulfilled their duty of inquiry].)

When CFS fails to comply with the duty of initial inquiry under state law, we will conditionally reverse if "the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child." (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 744.)

Here, while CFS asked the parents whether they had Indian ancestry, the agency failed to complete its initial ICWA inquiry. It did not ask extended family members about Indian ancestry. That information was readily obtainable from at least paternal aunt and uncle, with whom Marlena and her siblings were placed. CFS thus was in contact with those paternal relatives. And given that paternal uncle was Father's brother, the relatives' information was potentially meaningful. Paternal uncle's "knowledge of his own Indian status would be suggestive of Father's status." (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 745.) Accordingly, we must conditionally reverse the order terminating parental rights so that, at a minimum, CFS can contact the known extended family members to make an ICWA inquiry.

CFS argues that we need not reverse because the failure to ask paternal aunt and uncle about Indian ancestry was harmless—Father had already denied any such ancestry. But the paternal relatives could have information that Father does not have. Otherwise, there would be no point to requiring the agency to ask the parents plus extended family members about Indian ancestry. (§ 224.2, subd. (b).) The expansive duty to inquire "is premised on the commonsense understanding that, over time, Indian families . . . may

well have lost the ability to convey accurate information regarding their tribal status." (*In re T.G.*, *supra*, 58 Cal.App.5th at p. 295.) Some members of a family might be more accurately informed than others. We should not assume that every member of a family possesses precisely the same information.

CFS also argues that the ICWA findings in Marlena's siblings' cases show that any information paternal aunt and uncle have would not bear meaningfully on the ICWA inquiry. That argument also lacks merit. The record includes minute orders from the siblings' cases; CFS included them as exhibits to the jurisdiction/disposition report in this case. Those minute orders show that the court found ICWA did not apply to the siblings in April 2019 and January 2020. But we have no information about CFS's inquiry in the siblings' cases. We have no idea whether CFS asked any extended family members about Indian ancestry or what family members might have been readily available. And even if CFS had asked extended family members for ICWA information, the available information could have changed since then. ICWA-related records "in separate dependency cases are not fungible evidence," even when the cases involve siblings. (*In re Robert A.* (2007) 147 Cal.App.4th 982, 990 [rejecting the agency's "attempt to bootstrap [the] case to the half sibling's case for ICWA purposes and thereby find the admitted ICWA error" harmless].) The ICWA findings in the siblings' cases therefore do not show that CFS's error here was harmless.

CFS lastly argues that this case is similar to *In re A.C.* (2021) 65 Cal.App.5th 1060, in which "the court applied a requirement some other cases have articulated as well: that in order to demonstrate prejudice, 'a parent asserting failure to inquire must

show—at a minimum—that, if asked, he or she would, in good faith, have claimed some kind of Indian ancestry.'" (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 745, quoting *In re A.C.*, *supra*, at p. 1069.) CFS urges us to apply that rule here, arguing that Mother must demonstrate the extended family members would have provided new information about Indian ancestry.

But this case more closely resembles *Benjamin M.*, and we decline to apply the *In re A.C.* rule for the reasons discussed in *Benjamin M.* First, Mother "has no legal duty or necessary logical reason to know" whether Father has Indian ancestry. (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 745.) Second, "it is in part the tribe's right to a determination of a child's Indian ancestry, but the tribe is not present, and the agency is charged with obtaining information to make that right meaningful." (*Ibid.*) The statutory scheme does not charge the parents with obtaining that information. Third, the risk of a collateral attack on a juvenile court judgment based on later-discovered information about Indian ancestry is "greater, and even more unacceptable, if the agency foregoes basic inquiry into potentially meaningful, easily acquirable information." (*Ibid.*) We thus apply the rule articulated in *Benjamin M.*: "[I]n ICWA cases, 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.)

For all of these reasons, we conclude that CFS did not comply with the duty of initial inquiry under ICWA and related state law. We must conditionally reverse the

order terminating parental rights and remand the matter for the court to ensure that CFS satisfies that duty.

DISPOSITION

The order terminating parental rights is conditionally reversed. On remand, the juvenile court shall order CFS to comply with the duty of initial inquiry (§ 224.2, subd. (b)) and, if applicable, the duty of further inquiry (§ 224.2, subd. (e)) and the duty to provide notice to the pertinent tribes (25 U.S.C. § 1912(a); § 224.3). If the court determines that ICWA does not apply—either (1) because CFS has conducted a sufficient inquiry, and there is no reason to believe Marlena is an Indian child, or (2) because CFS's inquiry reveals reason to know she is an Indian child, notice was sent to the pertinent tribes, and the tribes' responses show that she is not an Indian child—then the court shall reinstate the order terminating parental rights. If the court determines that ICWA applies, then it shall proceed in conformity with ICWA and related California law.

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MENETREZ
J.

We concur:

FIELDS
Acting P. J.

RAPHAEL
J.