Filed 12/29/22 In re V.D. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re V.D., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.M., Defendant and Appellant.	E079406 (Super.Ct.No. J-287566) OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed with directions.

Shobita Misra, under appointment by the Court of Appeal, for Defendant and Appellant.

David Guardado, Deputy County Counsel, and Tom Bunton, County Counsel for Plaintiff and Respondent.

In this appeal following the termination of parental rights, the mother contends that errors in complying with the duty of initial inquiry (regarding the father) and the duties of further inquiry and providing notice (regarding the mother) under the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.; ICWA) are prejudicial. (See *In re Benjamin M.* (2021) 70 Cal.App.5th 735 (*Benjamin M.*).) We agree as to the duty of initial inquiry and the duty of further inquiry, but not as to the duty to provide notice. Accordingly, we conditionally affirm and remand with directions.[1]

BACKGROUND

In December 2020, plaintiff and respondent San Bernardino County Children and Family Services (CFS) filed a petition pursuant to section 300 for V.D., whose parents are defendants M.D. (Father) and L.M. (Mother). Only Mother is a party to this appeal. Because this appeal raises only ICWA compliance, we need not discuss the circumstances leading to the child's removal or the parents' reunification efforts, other than to note that the juvenile court terminated Mother's (and Father's) parental rights to V.D. in July 2022.

At the detention hearing, Father denied Indian ancestry, while Mother claimed "Azteca and Apache" ancestry. In January 2021, CFS sent ICWA notices to several tribes containing information about Mother's relatives, although the record is silent on

[1] Undesignated statutory references are to the Welfare and Institutions Code. In addition, because 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.

whether the information came from interviewing Mother, other family members, or both. The ICWA notice also included information about Father's relatives, including his father. As is the case with Mother, the record does not establish whether information about Father's family came from interviewing Father, other family members, or both. As well, the names of three of Father's relatives (two aunts and a great-aunt) were identified during the proceedings as potential caregivers. No contacted tribe has stated that V.D. is a member or eligible for membership.

Following CFS's April 2021 declaration of due diligence regarding ICWA, the trial court found that the statute did not apply. The juvenile court's later order terminating Mother's parental rights did not mention ICWA, but the order was "necessarily premised on a current finding by the juvenile court that it had no reason to know [V.D.] was an Indian child." (*In re Isaiah W.* (2016) 1 Cal.5th 1, 10, italics omitted.)

DISCUSSION

"Congress enacted ICWA over 40 years ago to address '"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."' [Citation.] . . . As a result, ICWA's express purpose is 'to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive

homes which will reflect the unique values of Indian culture.'" (*In re K.T.* (2022) 76 Cal.App.5th 732, 740.)

"When ICWA applies, the Indian tribe has a right to intervene in or exercise jurisdiction over the proceeding. [Citation.] If the tribe does not assume jurisdiction, the state court must nevertheless follow various heightened procedural and substantive requirements, such as stricter removal standards and mandatory placement preferences that promote keeping Indian children with family members or members of their tribe." (*In re K.T.*, *supra*, 76 Cal.App.5th at p. 741.) "Violations of ICWA '"render[] the dependency proceedings, including an adoption following termination of parental rights, vulnerable to collateral attack if the dependent child is, in fact, an Indian child."'" (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 741.)

ICWA's concern is with Indian children, and "[b]ecause 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. These requirements are sometimes collectively referred to as the duty of initial inquiry." (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 741.)

"The duty of initial inquiry arises, in part, from federal regulations under ICWA stating that '[s]tate courts must ask each participant in an . . . 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.' [Citation.] Thus, the federal regulation places a duty on only 'courts' to inquiry

or instruct 'participants' and 'parties' to a case." (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 741.)

"State law, however, more broadly imposes on social services agencies and juvenile courts (but not parents) an 'affirmative and continuing duty to inquire' whether a child in the dependency proceeding 'is or may be an Indian child.' [Citation.] When the agency takes the child into temporary custody, its duty to inquire 'includes, but is not limited to, asking the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child.' [Citation.] State law also expressly requires the juvenile court to ask participants who appear before the court about the child's potential Indian status." (*Benjamin M.*, *supra*, 70 Cal.App.5th at pp. 741-742.)

"If the initial inquiry gives the juvenile court or the agency 'reason to believe' that an Indian child is involved, then the juvenile court and the agency have a duty to conduct 'further inquiry,' and if the court or the agency has 'reason to know' an Indian child is involved, ICWA notices must be sent to the relevant tribes." (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 742.) As part of its duty of further inquiry, a social services agency must interview the parents as well as extended family members for information about the child's biological parents, grandparents, and great-grandparents. (§§ 224.2, subd. (e)(2), 224.3, subd. (a)(5).)

Here, Mother correctly contends that CFS prejudicially failed to comply with its duty of initial inquiry regarding Father's relatives. This was a violation of duty because, as Mother observes, even though CFS needed to ask extended family members whether V.D. is or may be an Indian child, nothing in the record shows that it interviewed Father's father, aunts, and great-aunt about V.D.'s potential Indian heritage. CFS may not rely on a silent record to establish compliance. (*In re K.R.* (2018) 20 Cal.App.5th 701, 709.)[2]

CFS does not dispute that it erred, arguing only that the error was harmless. Although there are currently no fewer than four approaches to assessing harmlessness (see *In re Dezi C.* (2022) 79 Cal.App.5th 769, 777-782 (*Dezi C.*), review granted Sept. 21, 2022, S275578), we will apply the approach we described in *Benjamin M.* In other words, we will find prejudice when an agency "fail[s] to investigate readily obtainable information tending to shed meaningful light on whether a child is an Indian child." (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 739.)

CFS candidly concedes that there was readily obtainable information from Father's relatives. It argues, however, that there is no prejudice under *Benjamin M.* because there is nothing to suggest that any of those relatives would have had more information about V.D.'s potential Indian ancestry. But this conflates the *Benjamin M.*

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[2] There may have been more missed relatives. Mother contends that Father's grandparents and brother-in-law were not contacted. It is not clear from the ICWA notice sent to the tribes whether Father's grandparents are alive—the notice provides very little information about them at all—and we see no references to a brother-in-law at the portions in the record Mother cites.

standard with the one articulated in *Dezi C.* (See *Dezi C.*, *supra*, 79 Cal.App.5th at p. 779 ["In our view, 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"].) Under *Benjamin M.*, the burden is on the agency to show that it fulfilled its duty to investigate readily obtainable information, not on the appellant to show what the results of such an investigation might be. In our view, that is the appropriate distribution of responsibility under ICWA. We therefore find that the error was prejudicial under *Benjamin M.*

As to her relatives, Mother contends that CFS prejudicially failed to comply with both its duty of further inquiry and its duty to provide notice to the relevant tribes. We agree that CFS prejudicially erred in complying with its duty of further inquiry but find no error regarding the duty to provide notice.

CFS did not comply with its duty of further inquiry, as there is nothing in the record to show that CFS interviewed Mother's relatives even though it was required to under section 224.2. CFS concedes this. And although *Benjamin M.* concerned only the state law duty of initial inquiry, given that the failure here was based on state law as well, there is no reason why a court should be any less willing to find prejudice because the agency's failure goes toward a different inquiry. (See *Benjamin M.*, *supra*, 70 Cal.App.5th at p. 742 ["Where a violation is of only state law, we may not reverse unless

we find that the error was prejudicial"].) Applying *Benjamin M.* here as well, we find that CFS's failure to comply with its duty of further inquiry was prejudicial.

Nevertheless, we find that CFS complied with its duty to provide notice. There is nothing in the record demonstrating that CFS or the juvenile court had "reason to know" V.D. is an Indian child, and indeed no party has contended otherwise, so no duty to provide notice was triggered.

"Indian child" is a defined term under ICWA: it means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) . . . 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).) "Reason to know" is defined, too: there is "reason to know" that a child is an Indian child if any one of six scenarios applies.[3]

Four of the reasons to know simply do not apply. V.D., who is two years old, has not given the court reason to know she is an Indian child (see 25 C.F.R. § 23.107(c)(3));

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[3] In full, the federal definition provides that there is "reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if: [¶] (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child; [¶] (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child; [¶] (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child; [¶] (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village; [¶] (5) The court is informed that the child is or has been a ward of a Tribal court; or [¶] (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe." (25 C.F.R. § 23.107(c).) The Welfare and Institutions Code provides a "substantially identical" definition. (*In re Austin J.* (2020) 47 Cal.App.5th 870, 884.)

neither V.D. nor her parents live on a reservation or in a Alaska Native village (see *id.* at (c)(4)); V.D. is not a ward of a tribal court (see *id.* at (c)(5)); and V.D. does not have an identification card indicating membership in an Indian tribe (see *id.* at (c)(6)).

The remaining two statutory reasons to know are also inapplicable, though they merit some discussion. No one has informed the juvenile court that V.D. is "either . . . a member of an Indian tribe or . . . 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)). (See 25 C.F.R. § 23.107(c)(1).) Similarly, no one has informed the juvenile court that they have discovered information indicating such facts. (See *id.* at (c)(2).) In considering this, it is important to take into account that the federal government "expressly denied requests for more inclusive language[] such as[] 'is *or could be* an Indian child'" when drafting the federal definition, and that our Legislature significantly narrowed California's definition when it chose to conform to the federal one in 2016. (*In re Austin J.*, *supra*, 47 Cal.App.5th at p. 885.)

Here, CFS sent notices to several tribes, but it contends that it did so only out of an abundance of caution. Based on the record, we accept this characterization. And Mother has not persuaded us that if an agency sends ICWA notices despite having no obligation to do so, it is reversible error if some of the information they contain may be inaccurate.[4] To the extent Mother contends that the notices were deficient because the inquiry was

[4] Mother contends that the ICWA notices sent to the tribes did not clearly indicate whether Mother's mother was alive or deceased and "appears to have incorrectly indicated the maiden name of certain maternal relatives."

deficient, we agree, but that reflects error in CFS's duty of further inquiry, not in its duty to provide notice. If, after further inquiry, CFS has "reason to know" that V.D. is an Indian child, then the sufficiency and accuracy of the notices becomes vital.

DISPOSITION

The order terminating parental rights to V.D. is conditionally affirmed. The matter is remanded to the juvenile court with directions to comply with the inquiry provisions of ICWA and of Welfare and Institutions Code sections 224.2 and 224.3 (and, if applicable, the notice provisions as well), consistent with this opinion. If, after completing the inquiries, neither CFS nor the court has reason to know that V.D. is an Indian child, the order terminating parental rights will remain in effect. If CFS or the court has reason to know that V.D. is an Indian child, the court shall proceed accordingly.

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RAPHAEL
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.