Filed 1/6/23 In re A.D. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.D. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. D.F., Defendant and Appellant.	E079747 (Super.Ct.No. RIJ2100552) OPINION

APPEAL from the Superior Court of Riverside County. Dorothy McLaughlin, Judge. Reversed with directions.

Sarah Vaona, under appointment by the Court of Appeal, for Defendant and Appellant.

Minh C. Tran, County Counsel, Teresa K.B. Beecham and Larisa R-McKenna, Deputy County Counsel for Plaintiff and Respondent.

Defendant and appellant D.F. (Mother) and W.D. (Father[1]; collectively, Parents) are the parents of A.D. (male, born March 2009) and B.D. (male, born June 2010); collectively, the Children). Mother appeals from the juvenile court's termination of her parental rights under Welfare and Institutions Code[2] section 366.26. The sole issue on appeal is whether the errors by the juvenile court and the Riverside County Department of Public Social Services (the Department), in complying with the duty of initial inquiry under the Indian Child Welfare Act[3] (ICWA), are prejudicial. For the reasons set forth *post*, we find the errors prejudicial and conditionally reverse and remand with directions.

FACTUAL AND PROCEDURAL HISTORY

On September 21, 2021, the Department filed a petition under section 300, subdivision (b), alleging Mother's historic and present substance abuse. The petition alleged Mother's history of homelessness and the criminal history of both Mother and Father. The petition also alleged that Mother had previously failed to reunify with the Children's older siblings. Furthermore, the petition alleged that Father had a domestic violence history with a different partner; and that Father failed to provide the Children with adequate food, clothing, shelter, medical care or protection.

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[1] Father is not a party to this appeal.

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

[3] "[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.*).)

In the detention report filed on September 21, 2021, the social worker reported that on September 11, 2021, the Department received a referral that Mother had given birth in Orange County the day prior; both she and the baby tested positive for opioids and amphetamines. Mother denied using drugs and threatened to leave the hospital with her baby. On September 12, 2021, the baby was placed into protective custody through Orange County. Mother's girlfriend in Riverside County was caring for the Children.

Upon further investigation, the Department reported that Mother had a different child test positive for methamphetamine when the child was born in 2004, which resulted in a dependency case. In 2005, Mother's parental rights to that child were terminated. Moreover, Mother had an open dependency matter in Orange County at the time of the September 2021 detention report. Furthermore, there were several previous referrals concerning the Children from 2011 through 2021.

On September 15, 2021, the social worker contacted the school wherein the Children were enrolled. The social worker learned that the Children's recent progress reports indicated that they were not completing their homework and were failing their classes. When the social worker met with Mother, her girlfriend, and the Children at a Motel 6 hotel, the Children told the social worker that they were enrolled in online school because they moved from motel to motel. Mother completed a urine drug test which was positive for amphetamines, methamphetamines, and opioids. Mother admitted that she smoked methamphetamines a week prior to giving birth. The social worker provided Mother with a referral to a substance abuse program.

The social worker attempted to contact Father but the phone number provided was incorrect.

At the detention hearing on September 22, 2021, the juvenile court appointed counsel for Mother. Father's paternity was elevated to presumed for both children. He spoke with the social worker once, prior to the detention hearing. He, however, never came forward and was not appointed counsel in this case. The juvenile court detained the Children and found that a prima facie showing had been made that the Children came within section 300, subdivision (b).

With regard to ICWA, Mother and a paternal aunt both denied known Native American ancestry. Mother's ICWA-020 form indicated that there was no known Indian ancestry. At the detention hearing, the court found that a sufficient inquiry under ICWA was made and ICWA did not apply. The court set the jurisdiction and disposition hearings for October 14, 2021.

In the jurisdiction and disposition report filed on October 8, 2021, the social worker recommended that the juvenile court make a true finding on the petition and bypass family reunification services for Parents. The recommendation to bypass Mother's services was made under section 361.5, subdivisions (b)(11), and (b)(12). Mother was not present for the initial jurisdiction and disposition hearing; the matter was set for contest.

On October 21, 2021, the Children were placed with their paternal grandparents (PGPs), as well as their paternal aunt.[4]

At the contested jurisdiction and disposition hearing on November 3, 2021, the juvenile court found that the Department conducted an adequate ICWAS inquiry, found the allegations as to the parents true, and denied reunification for both parents. The court then set a section 366.26 hearing for May 2, 2022. Mother appeared at the jurisdiction and disposition hearing telephonically, and was ordered to appear at the next hearing. A personal locater search failed to locate Father; the court authorized notice by publication. CT 172, 232-233, 235}

At the May 2, 2022, section 366.26 hearing, the juvenile court continued the hearing for the completion of an adoption assessment.

The adoption assessment was filed on August 12, 2022. The adoption assessment included interviews with the PGPs. The paternal grandfather (PGF) stated that he was born to a two-parent family in another country. He and the paternal grandmother (PGM) were separated from 1983 to 1986 while he became settled in the United States. PGM also stated that she was born in a two-parent family in another country. Both PGM and PGF immigrated to the United States. The adoption assessment noted that there were no cultural issues or barriers. Moreover, the assessment stated: "The prospective adoptive parents are related to [the Children], and as such are able to talk with [them] about being

[4] The grandparents were erroneously referred to as "maternal relatives." However, they were referred to as "paternal relatives" throughout the remainder of the case documents.

adopted, and will share age appropriate information about their family culture and heritage."

At the section 366.26 hearing on August 31, 2022, Mother, the PGPs, and the paternal aunt were present. The court denied Mother's request to change a court order under section 388 and terminated parental rights as Parents.

On September 7, 2022, Mother filed a timely notice of appeal.

DISCUSSION

Mother contends that "the department failed to comply with its duty of initial inquiry when it did not ask available paternal relatives about possible Native American ancestry." We agree with Mother.

ICWA, enacted in 1978, is a federal law, which is recognized and applied in California. (See, e.g., *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1197.) Its purpose is to protect the interests of Indian children and to promote the stability and security of Indian tribes and families. (25 U.S.C. § 1902; see, e.g., *In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.) The law was adopted "in response to concerns ' "over the consequences to Indian children, Indian families, and Indian tribes of 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." ' [Citations.] [The] ICWA addresses these concerns by establishing '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, and by providing for assistance to Indian tribes in the operation of child and family service programs.' " (*In re Abbigail A.* (2016) 1 Cal.5th 83, 90.)

"In 2006, California adopted various procedural and substantive provisions of ICWA. [Citation.] In 2016, new federal regulations were adopted concerning ICWA compliance. [Citation.] Following the enactment of the federal regulations, California made conforming amendments to its statutes, including portions of the Welfare and Institutions Code related to ICWA notice and inquiry requirements. [Citations.] Those changes became effective January 1, 2019 . . . , and govern here." (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1048, fn. omitted (*D.S.*).) The new statute defines the actions necessary to determine a child's possible status as an Indian child.

ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and 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, § 225.1, subd. (a) [adopting the federal standard].) "Being an 'Indian child' is thus not necessarily determined by the child's race, ancestry, or 'blood quantum,' but depends rather 'on the child's political affiliation with a federally recognized Indian Tribe.' " (*In re Austin J.* (2020) 47 Cal.App.5th 870, 882.)

"ICWA itself does not impose a duty on courts or child welfare agencies to inquire as to whether a child in a dependency proceeding is an Indian child. [Citation.] Federal regulations implementing ICWA, however, require that state courts '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.' [Citation.]

The court must also 'instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.' " (*In re Austin J.*, *supra*, 47 Cal.App.5th at pp. 882-883.)

Since states may provide "a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided" (25 U.S.C. § 1921), under California law, the court and the county welfare department have an "affirmative and continuing duty to inquire" whether a child in dependency proceedings "is or may be an Indian child." (§ 224.2, subd. (a) [the duty to inquire whether a child is or may be an Indian child begins with the initial contact]; Cal. Rules of Court, rule 5.481(a); see *In re Isaiah W.* (2016) 1 Cal.5th 1, 14.)

Initially, the county welfare department must ask 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 and where the child, the parents, or Indian custodian is domiciled." (§ 224.2, subd. (b).) At the parties' first appearance before the juvenile court, the court must 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), italics added), and "[o]rder the parent . . . to complete *Parental Notification of Indian Status* ([Cal. Judicial Council] form ICWA-020)." (Cal. Rules of Court, rule 5.481(a)(2)(C).)

When there exists a *reason to believe* that an Indian child is involved, the social worker must "make further inquiry regarding the possible Indian status of the child." (§ 224.2, subd. (e).)

"On appeal, we review the juvenile court's ICWA findings for substantial evidence. [Citations.] But where the facts are undisputed, we independently determine whether ICWA's requirements have been satisfied." (*D.S.*, *supra*, 46 Cal.App.5th at p. 1051.)

In this case, the issues of further inquiry or ICWA's notice provisions are not at issue. Mother only challenges the failure to complete an initial inquiry. Mother contends that the Department's "failure to comply with the duty of initial inquiry is prejudicial error, requiring reversal." We agree with Mother that there is no evidence to indicate that the Department made any inquiries of paternal relatives about their Indian ancestry, except for one paternal aunt.

Under ICWA, the parents and siblings of Parents are among those " 'extended family members' " the Department must interview, if possible, to help determine whether the proceeding involves an Indian child. (See Cal. Rules of Court, rule 5.481(a)(4)(A); 25 U.S.C. § 1903(2) [defines " 'extended family member' " to include "the Indian child's grandparent, aunt or uncle"].) The Department must make a good faith attempt to locate and interview extended family members who can reasonably be expected to have information concerning a child's membership status or eligibility. (*D.S.*, *supra*, 46 Cal.App.5th at pp. 1052-1053; see *In re Breanna S.* (2017) 8 Cal.App.5th 636, 652.) However, the Department "is not required to 'cast about' for information or pursue unproductive investigative leads." (*D.S.*, at p. 1053.)

In this case, although the Department asked Mother and the paternal aunt about the Children's Native American ancestry, there is nothing in the record to indicate that the

Department interviewed the Children's paternal grandparents, other aunts, or uncles about their Indian ancestry. (*In re K.R.* (2018) 20 Cal.App.5th 701, 709-710 [agency cannot rely on absence of documentation to argue that appellant's claim of ICWA error must fail on appeal].) The social services agency is obligated "to make a meaningful effort to locate and interview extended family members to obtain whatever information they may have as to the child's possible Indian status." (*Id.* at p. 709.) Moreover, the juvenile court "has a responsibility to ascertain that the agency has conducted an adequate investigation and cannot simply sign off on the notices as legally adequate without doing so." (*Ibid.*)

Here, the social worker had spoken to the PGPs to conduct an adoption assessment with them. Both PGF and PGM indicated they were born to two-parent families in another country. Notwithstanding, there is nothing to indicate that the social worker asked either PGF or PGM if they had any Indian ancestry. Moreover, absent from the record is whether the social worker talked to any maternal relative regarding the Children's possible Native American ancestry. Therefore, because the Department failed to document the inquiry efforts required under section 224.2, there is insufficient evidence to support the court's determination that ICWA did not apply to the case. (See § 224.2, subds. (b), (c) & (e); accord, *In re Darian R.* (2022) 75 Cal.App.5th 502, 509.)

Nonetheless, when an appeal concerns "the *agency's* duty of initial inquiry, only state law is involved. Where a violation is of only state law, we may not reverse unless we find that the error was prejudicial." (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 742.) Currently, there is "a wide and varied split of authority among the [California]

Court of Appeal regarding the proper standard to apply in determining the prejudicial effect of an agency's failure to comply with its section 224.2, subdivision (b) duty of initial inquiry [even within the same appellate court, like this court]." (*In re Y.M.* (2022) 82 Cal.App.5th 901, 911.)

Recently, in *In re Dezi C.* (2022) 79 Cal.App.5th 769 (*Dezi. C.*), our colleagues in the Second District, Division Two, explained the three different harmless error analysis rules, while creating a fourth "reason to believe" rule, as follows: "At this point in time, the California courts have staked out three different rules for assessing whether a defective initial inquiry is harmless. These rules exist along a 'continuum.' [Citation] The rule at one end of this continuum is one that mandates reversal: If the Department's initial inquiry is deficient, that defect necessarily infects the juvenile court's ICWA finding and reversal is automatic and required (the 'automatic reversal rule'). [Citations.] Under this test, reversal is required no matter how 'slim' the odds are that further inquiry on remand might lead to a different ICWA finding by the juvenile court. [Citation.] The rule at the other end of the continuum is one that presumptively favors affirmance. Hence, if the Department's initial inquiry is deficient, that defect will be treated as harmless unless the parent comes forward with a proffer on appeal as to why further inquiry would lead to a different ICWA finding (the 'presumptive affirmance rule'). [Citations] The third rule lies in between: If the Department's initial inquiry is deficient, that defect is harmless unless 'the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian

child' and that 'the probability of obtaining meaningful information is reasonable' ('the readily obtainable information rule')." (*Id.* at pp. 777-778.)

The *Dezi C.* court then went on to state that "despite this diversity of rules—and, indeed, perhaps because we have had the benefit of considering these rules—we propose a fourth rule for assessing harmlessness." (*Dezi C.*, *supra*, 70 Cal.App.5th at p. 778.) The court stated: "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. For this purpose, the 'record' includes both the record of proceedings in the juvenile court and any proffer the appealing parent makes on appeal. 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 agency never followed up on that information; if the record indicates that the agency 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." (*Dezi C.*, *supra*, 70 Cal.App.5th at p. 779, fn. and italics omitted.)

On this appeal, although Mother accurately contends that the Department failed in its duty to interview Father's extended relatives, we still must determine whether this error prejudiced Mother. Although we acknowledge the four diverse harmless error analysis rules, including three different rules from this court, we cannot say the error was

harmless for several reasons. First, there is no question information from the PGPs was readily obtainable and likely to bear on the Children's Indian status. The Department had contacted PGPs concerning placement of the Children and other concerns. As such, the Department could have easily interviewed them concerning the Children's Indian status. The Department never asked either PGM or PGF regarding the Children's Indian status. In short, there is no good excuse for why the Department did not seek any Indian status information, especially from the PGPs. Therefore, the Department's failure to obtain the information was prejudicial.

Notwithstanding the above, the Department argues the error was not prejudicial because "the paternal aunt unequivocally denied the paternal family had any Native American ancestry. There is nothing in the record to suggest that an extended family member would have provided different information." "Additionally, paternal aunt denied Indian heritage and continued to reside with the paternal grandparents, and therefore could presumably have asked the grandparents at any time about possible Indian heritage." However, the Department's "position ignores the express obligation that section 224.2, subdivision (b), imposes on the [d]epartment to inquire of a child's extended family members—regardless of whether the parents deny Indian ancestry." (*In re Antonio R.*, 2022) 76 Cal.App.5th 421, 431.) And, as we explained in *Benjamin M.*, although we do not know what the extended family members will say in response to an inquiry by the Department, their answers are likely to bear meaningfully on the question of whether the Children are or may be Indian children. (*Benjamin M.*, *supra*, 70 Cal.App.5th at pp. 744-745.)

Moreover, we cannot reasonably infer that the paternal aunt inquired with the PGPs about possible Indian heritage before denying Indian ancestry, as there is no evidence suggesting she did or did not. Absent some evidence suggesting the paternal aunt already asked her family members, or that the information the family members have is unlikely to meaningfully bear on the Children's Indian status (one way or the other), the Department is obligated to speak to them precisely because we cannot impute knowledge one family member has about their family to all family members. Moreover, it is not the relative's duty to ask their relatives for this information, it is the Department's. Without more, the Department cannot rely on the paternal aunt's denial—it must perform the investigation itself.

For these reasons, "[w]here the Department fails to discharge its initial duty of inquiry under ICWA and related California law, and the juvenile court finds ICWA does not apply notwithstanding the lack of an adequate inquiry, the error is in most circumstances, as here, prejudicial and reversible." (*Antonio R.*, *supra*, 76 Cal.App.5th at p. 435.) Therefore, a conditional reversal is required under *Benjamin M.*, which is grounded in our state's constitutional rule for determining whether error is prejudicial and requires reversal. (*Benjamin M.*, *supra*, 70 Cal.App.5th at pp. 742-744; Cal. Const., art. VI, § 13.) Accordingly, we conditionally reverse the order terminating parental rights to permit the Department to complete its initial inquiry.

DISPOSITION

The order terminating parental rights to the Children is conditionally reversed. The matter is remanded to the juvenile court with directions to comply with the initial

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 initial inquiry, neither the Department nor the court has reason to believe or reason to know that the Children are Indian children, the order terminating parental rights will remain in effect. If the Department or the court has reason to believe that the Children are Indian children, the court shall proceed accordingly.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.