Filed 5/23/23 In re M.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.M. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.M. et al., Defendants and Appellants.	E079986 (Super. Ct. Nos. J273626, J273627, J273628, J273629) OPINION

APPEAL from the Superior Court of San Bernardino County. Steve Mapes, Judge. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant, K.Z.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant, J.M.

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

I.

INTRODUCTION

J.M. (Father) and K.Z. (Mother) appeal from the juvenile court's order removing their four children from parental custody pursuant to Welfare and Institutions Code[1] section 387. The parents' sole contention on appeal is that the San Bernardino County Children and Family Services (CFS) failed to discharge its duties of inquiry under state law implementing the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.), and therefore substantial evidence did not support the juvenile court's finding that ICWA did not apply. CFS concedes the error and acknowledges it has an ongoing duty to inquire of known extended relatives, but contends the parents have failed to submit an actual controversy and thus the appeal should be dismissed for lack of justiciability. In the alternative, CFS asserts the matter should be affirmed, rather than "conditionally affirmed" as Mother seeks. Applying *In re Dominick D.* (2022) 82 Cal.App.5th 560, 563, 567 (*Dominick D.*) and *In re S.H.* (2022) 82 Cal.App.5th 166 (*S.H.*), we affirm on the basis that alleged ICWA inquiry error does not warrant reversal of a dispositional order.

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

II.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On November 8, 2017, petitions were filed on behalf of then-11-month old M.M., two-year-old N.M., four-year-old V.M., and five-year-old A.M., pursuant to section 300, subdivisions (b)(1) (failure to protect) and (j) (abuse of sibling) based on Mother having tested positive for methamphetamines at the time she delivered L.M.,[3] the parents' longstanding substance abuse history, and Mother's child welfare history which resulted in the termination of her paternal rights as to the children's half-siblings. The petitions noted that the children had no known Indian ancestry.

During an interview with the parents, the parents provided the social worker with a phone number and address for the paternal grandfather who resided in New Mexico. The social worker attempted to call the paternal grandfather but he did not answer his phone. Mother reported that she was raised by her parents and that her mother (the maternal grandmother) lived in Santa Ana. Mother's father was deceased. She also stated that her grandmother (the maternal great-grandmother) lived in Missouri and that her paternal grandfather was deceased. She noted that her biological maternal grandparents were unknown as her mother (the maternal grandmother) was adopted and that her adopted maternal grandmother was still alive. Father reported that his mother (the paternal

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[2] Because the parents challenge only the juvenile court's finding that ICWA did not apply, we recite only the background relevant to that issue.

[3] L.M. is not a subject of this appeal.

grandmother) and his sisters (the paternal aunts) and his adult children were his support system. The parents desired to place the children with the paternal grandmother.

At a hearing on October 19, 2017, the parents denied having any Native American ancestry.

The detention hearing was held on November 9, 2017. Neither parent appeared for the hearing. The court found a prima facie showing the children were persons described under section 300, ordered the children formally detained, and issued warrants to take the children into protective custody once they were located.

On November 28, 2017, paternal aunt C.D. filled out the Family Find and ICWA Inquiry form, stating she did not have any Native American ancestry. CFS informed relatives A.R. and R.B. of the jurisdictional/dispositional hearing and their right to attend.

The jurisdictional/dispositional hearing was held on November 29, 2017. At that time, Mother was present in court but Father was not, and the children's whereabouts still remained unknown. At the hearing, the juvenile court asked Mother whether she had any Native American heritage. Mother denied any such ancestry. As the children's whereabouts remained unknown, the court ordered the warrants of apprehension for the children to remain in effect and continued the hearing.

By February 14, 2018, the children's whereabouts still remained unknown. CFS made efforts to locate the children at the paternal grandfather's home in New Mexico, however he indicated that he had not seen the children since September 2017. The extended maternal and paternal relatives had also been attempting to locate the children

but had been unsuccessful. The social worker was informed that the children's adult siblings may have information regarding the children's whereabouts, but the social worker had been unable to contact the siblings. The relatives were noticed of the next court hearing and indicated they would be present at the hearing.

The parents did not appear at the February 14, 2018 continued hearing. The court ordered the warrants of apprehension for the children to remain in effect and continued the matter to August 14, 2018.

On May 10, 2018, CFS updated the court regarding its efforts to locate the children. The social worker had made efforts to contact the parents, Father's adult children and paternal and maternal relatives. Contact was made with a paternal aunt, the paternal grandmother, a paternal cousin, and adult sibling G.M. CFS contacted Nevada child protective services and was informed the parents had a pending application for government assistance in Nevada.

By August 2018, CFS continued its efforts to locate the children by contacting maternal and paternal relatives. The paternal grandmother stated that she had not heard from the family and did not know the children's whereabouts.

At the August 14, 2018 hearing, the parents did not appear. The court ordered the protective custody warrants for the children to remain in effect and continued the matter.

The children were taken into protective custody on November 2, 2018 by child protective services in Nevada. At a hearing on November 7, 2018, the juvenile court noted the children had been detained and recalled the protective warrants.

On November 28, 2018, the court held the further jurisdictional/dispositional hearing at which Mother and Father were present. The court found true the allegations in the petitions and removed the children from parental custody. The court declared the children dependents of the court and provided the parents with reunification services. The court found that ICWA did not apply.

By the six-month review hearing, CFS recommended services be continued to the parents. CFS had inquired of Mother, Father and the paternal grandparents whether they had Native American ancestry, and they all replied in the negative. The parents were compliant with their case plans but failed to randomly drug test or tested positive for drugs.

The parents were present at the May 28, 2019 six-month review hearing. The court adopted the findings and orders and continued reunification services for the parents. However, by the 12-month review hearing, due to noncompliance with their case plan, CFS recommended the court terminate reunification services for the parents and set a section 366.26 hearing to establish a legal guardianship.

At the November 13, 2019, 12-month review hearing, neither Mother nor Father were present. The court terminated reunification services for the parents and set the matter for a section 366.26 hearing.

On March 10, 2020, Mother filed a section 388 petition seeking additional reunification services and increased visitation. Mother reported that she had completed

an outpatient substance abuse program and other services. On June 2, 2020, Father filed a section 388 petition seeking further reunification services.

At the March 12, 2020, section 366.26 hearing both Mother and Father were present. The court continued the matter to allow CFS to respond to Mother's section 388 petition

CFS contacted a paternal aunt and the paternal grandmother regarding the family's Native American ancestry. They both confirmed that they had no Native American ancestry.

CFS recommended that the juvenile court grant Mother's petition and authorize an additional six months of reunification services. Accordingly, on June 8, 2020, the court granted Mother's petition and ordered an additional six months of reunification services for Mother. CFS also recommended the court grant Father's petition and offer him additional reunification services. On August 31, 2020, the court granted Father's section 388 petition.

On November 13, 2020, CFS conducted a further inquiry regarding Native American ancestry of Mother, Father and the paternal grandmother, who all denied any such ancestry.

Due to the parents' progress, by February 2021, CFS recommended returning the children to the parents' care under family maintenance services.

At the February 26, 2021 hearing, the children's counsel asked for more time to allow for the children to transition to the parents' home. The court thus continued the

matter. The matter was again continued after the children's counsel expressed concerns regarding Mother's testing history and objected to family maintenance pending a demonstrated period of sobriety. The matter was thereafter continued to May 21, 2021.

At the May 21, 2021 hearing, the court followed CFS's recommendation and returned the children to parental custody.

By November 2021, CFS recommended the matter be dismissed.

On November 8, 2021, the social worker again asked the parents if they had any Native American ancestry, and both replied "no."

On January 28, 2022, the children's counsel filed a section 388 petition seeking to have the children removed from parental custody due to the parents failure to consistently drug test, Father's arrest for slapping Mother, and Mother's failure to keep in contact with CFS.

CFS reported that the parents had continued to fail to submit to random substance abuse testing, that Mother admitted to Father's arrest for slapping her, and that she had a restraining order against Father. CFS also noted that the children had not been attending school, and that communication with Mother had become difficult.

The children were detained from parental custody on February 4, 2022. And on February 8, 2022, CFS filed supplemental petitions on behalf of the children pursuant to section 387 seeking to remove the children from parental custody due to concerns of substance abuse. On March 1, 2022, CFS filed an amended section 387 and subsequent

section 342 petition adding an allegation that the parents engaged in domestic violence in the presence of the children.

The children were formally detained on February 9, 2022 at the detention hearing on the section 387 petition. Both Mother and Father were present at the time, and the children's attorney withdrew the section 388 petition. The court ordered the parents to complete the ICWA-020 Parental Notification of Indian Status (ICWA-020) form.

On February 18 and 23, 2022, the parents again denied any Native American ancestry. The paternal grandmother and paternal aunt C.D. were informed of their right to attend the hearing.

The contested jurisdictional hearing on the section 387 petitions was held on October 5, 2022. Neither parent was present. The juvenile court found true the allegations in the amended section 387 petitions true. The contested dispositional hearing was held the following day at which time Mother was present. The juvenile court ordered the children removed from parental custody, continued the children as dependents of the court, terminated reunification services for the parents, and set the matter for a permanent plan review hearing. Both parents timely appealed.

III.

DISCUSSION

Mother contends the juvenile court and CFS failed to comply with their duty of inquiry with respect to ICWA. She thus argues there is insufficient evidence to support

the court's finding that ICWA did not apply and the matter should be conditionally affirmed and remanded. Father joins in the arguments and relief requested by Mother.

CFS concedes the record does not contain evidence regarding its' efforts to inquire of known extended relatives. CFS also acknowledges it has an ongoing duty to inquire of known extended relatives, but contends the parents have failed to submit an actual controversy and thus the appeal should be dismissed for lack of justiciability. In the alternative, CFS asserts the matter should be affirmed, rather than conditionally affirmed. We reject CFS's justiciability argument and affirm the juvenile court's order since alleged ICWA inquiry error does not warrant reversal of a dispositional order.[4]

Initially, we reject CFS's contention that we should dismiss this appeal because it fails to raise a justiciable controversy. (See *In re Isaiah W.* (2016) 1 Cal.5th 1, 9-12, 14-15 [Supreme Court concluded the mother did not forfeit the ICWA issue by failing to appeal from the dispositional order because ICWA and the corresponding provisions of California law impose an affirmative and continuing duty on the juvenile court to inquire

[4] We note that Courts of Appeal are split on the proper disposition of cases where the parents appeal an order other than the order terminating parental rights, so the dependency remains ongoing in the lower court, and the only alleged error is with the ICWA inquiry. Another panel of this court has held the appropriate disposition where the juvenile court has found that ICWA does not apply is to vacate the ICWA finding and remand, but otherwise affirm. (*Dominick D.*, *supra*, 82 Cal.App.5th at p. 568.) At least one case has disagreed with this approach and instead concluded the appeal is moot and should be dismissed. (See *In re Baby Girl M.* (2022) 83 Cal.App.5th 635.) We follow the approach outlined in *S.H.*, *supra*, 82 Cal.App.5th at pp.179-180, concluding that the appropriate disposition is to affirm without remand. Whether we remand as in *Dominick D.* or affirm as we do here, the case returns to juvenile court with an ongoing duty to comply with ICWA.

whether the child is an Indian child].) An ICWA violation renders an order that is otherwise final subject to attack. (See *In re Breanna S.* (2017) 8 Cal.App.5th 636, 653 [an ICWA violation "renders 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"].)

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.) California law implementing ICWA also imposes requirements to protect the rights of Indian children, their families, and their tribes. (See §§ 224-224.6; *In re Abbigail A.* (2016) 1 Cal.5th 83, 91 ["persistent noncompliance with ICWA led the Legislature in 2006 to 'incorporate[] ICWA's requirements into California statutory law'"].)

"""'Federal regulations implementing ICWA . . . 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."'"' [Citations.] '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."'"' (*In re J.C.* (2022) 77 Cal.App.5th 70, 77.)

Under California law, the juvenile court and county child welfare department have "an affirmative and continuing duty to inquire" whether a child subject to a section 300 petition may be an Indian child. (§ 224.2, subd. (a); see *In re D.F.* (2020) 55 Cal.App.5th 558, 566.) "This continuing duty can be divided into three phases: the initial duty to inquire, the duty of further inquiry, and the duty to provide formal ICWA notice." (*In re D.F.*, *supra*, at p. 566.) The juvenile court must inquire at each party's first appearance, whether any participant in the proceeding "knows or has reason to know that the child is an Indian child." (§ 224.2, subd. (c).) Part of the initial inquiry also includes requiring each party to complete California Judicial Council form ICWA-020, Parental Notification of Indian Status. (Cal. Rules of Court, rule 5.481(a)(2)(C).)

When the initial inquiry gives the juvenile court or social worker "reason to believe that an Indian child is involved," (§ 224.2, subd. (e)) the court and social worker must conduct further inquiry to "determine whether there is reason to know a child is an Indian child." (§ 224.2, subd. (e)(2); see *In re J.S.* (2021) 62 Cal.App.5th 678, 686.) The department "does not discharge their duty of further inquiry until they make a 'meaningful effort' to locate and interview extended family members and to contact BIA and the tribes.'" (*In re K.T.* (2022) 76 Cal.App.5th 732, 744.) 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).) Finally, if the further inquiry """"results in a reason to *know* the child is an Indian child, then the formal notice requirements of section 224.3 apply."""" (*In re*

J.C., *supra*, 77 Cal.App.5th at p. 78) Federal regulations define the grounds for reason to know that an Indian child is involved (25 C.F.R. § 23.107(c)(1)-(6)), and state law conforms to that definition (§ 224.2, subd. (d)(1)-(6)).

"""If the court makes a finding that proper and adequate further inquiry and due diligence as required in [section 224.2] have been conducted and there is no reason to know whether the child is an Indian child, the court may make a finding that [ICWA] does not apply to the proceedings, subject to reversal based on sufficiency of the evidence."""" (*In re J.C.*, *supra*, 77 Cal.App.5th at p. 78.)

There is a "split of authority as to whether a violation of the ICWA constitutes jurisdictional error," such that any violation requires reversal. (See *In re Brooke C.* (2005) 127 Cal.App.4th 377, 384 [discussing split].) This court has previously followed the approach taken in *Brooke C.* (See *Dominick D.*, *supra*, 82 Cal.App.5th at pp. 563, 567; *In re Jonathon S.* (2005) 129 Cal.App.4th 334, 340.) Under that approach, in a dependency case, "ICWA inquiry and notice errors do not warrant reversal of the juvenile court's jurisdictional or dispositional findings and orders." (*Dominick D.*, *supra*, at p. 567.) In other words, "the only order which would be subject to reversal for failure to give notice would be an order terminating parental rights." (*In re Brooke C.*, *supra*, at p. 385.)

The parents' current appeal is from the juvenile court's dispositional order, not a legal guardianship order or an order terminating parental rights. Therefore, even assuming ICWA inquiry error, such error is not sufficient to warrant reversing the

juvenile court's dispositional order. Nor is remand with instructions to complete the ICWA inquiry necessary, regardless of the merits of Mother's arguments that CFS has not yet completed its duty of inquiry. (See *S.H.*, *supra*, 82 Cal.App.5th at pp. 176-178.) This dependency matter will not end with this appeal. Proceedings concerning the children are ongoing. CFS has a continuing obligation, "'on an ongoing basis,' to report 'a detailed description of all inquiries, and further inquiries it has undertaken, and all information received pertaining to the child's Indian status.'" (*S.H.*, *supra*, at p. 176.) "So long as proceedings are ongoing and all parties recognize the *continuing* duty of ICWA inquiry, both the Agency and the juvenile court have an adequate opportunity to fulfill those statutory duties." (*S.H.*, *supra*, at p. 179.) That appears to be the case in the instant matter.

IV.

DISPOSITION

The juvenile court's dispositional order is affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.