Filed 6/2/23 In re A.F. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.F. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.F., Defendant and Appellant.	E080074 (Super.Ct.Nos. J293001 & J293002) OPINION

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

Vincent Uberti, under appointment by the Court of Appeal, for Defendant and Appellant.

Tom Bunton, County Counsel, and Catherine Wollard, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

R.F. (father) appeals from the juvenile court's jurisdictional and dispositional orders as to his children, Aa.F. and Ai.F. (the children). Father's sole contention on appeal is that the juvenile court and the San Bernardino County Children and Family Services (CFS) failed to comply with their duty of initial inquiry under the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) and related California statutes. CFS concedes error but asserts that it was not prejudicial. We vacate the court's finding that ICWA did not apply and remand for compliance with ICWA and related California law, but otherwise affirm the jurisdictional and dispositional orders.

PROCEDURAL BACKGROUND

On April 29, 2022, CFS filed separate Welfare and Institutions Code[1] section 300 petitions on behalf of the children. Aa.F. was two years old at the time, and Ai.F. was five. Aa.F.'s petition alleged that she came within subdivisions (a) (serious physical harm) and (b) (failure to protect). Ai.F.'s petition alleged that he came within subdivisions (b) and (j) (abuse of sibling).

A California Judicial Council Forms, form ICWA-010 (Indian Child Inquiry Attachment) was filed with the petition, stating that mother was questioned and did not give CFS a reason to believe Aa.F. was an Indian child.

A detention hearing was held on May 2, 2022. Father and mother both appeared with counsel. The maternal aunt, M.L.G., was also present, and mother's counsel

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[1] All further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

reported that she was asking for emergency placement that day. The court asked father if he had any Native American ancestry, and he said no. The court asked mother if she had any Indian ancestry, and she said yes. The court confirmed that she had ancestry with the Twentynine Palms Band of Mission Indians (hereinafter, the Twentynine Palms tribe). Mother said she and the children were not registered members, but her mother was. The maternal grandfather was present, but he said he did not have Indian ancestry. The court asked M.L.G. if she had Indian ancestry, and she said, "Through our mother." Another maternal aunt, A.R., was also present, and she agreed that she had Indian ancestry. The court determined there was reason to know the children had Indian ancestry based on the representations, and said that notice should be given to the tribe. M.L.G. commented that she and her sisters were not technically enrolled in the tribe "as our mother's children . . . [because] the blood line stopped at our mother." The court then detained the children in foster care.

Mother completed a CFS-030 form and California Judicial Council Forms, form ICWA-020, indicating that she had Indian ancestry through the Twentynine Palms tribe. The maternal aunts, the maternal great grandfather, and the maternal great grandmother completed forms indicating the same. Father's CFS-030 and ICWA-020 forms indicated the children may have Indian ancestry through mother. He also listed the names and phones numbers of two paternal aunts. The paternal grandmother filled out a form indicating she did not have Indian ancestry and listing the names and phone numbers of two paternal aunts.

On May 11, 2022, CFS sent formal ICWA notice to the Twentynine Palms tribe and the Bureau of Indian Affairs (BIA). The notices included information on the parents, the paternal grandparents and great grandparents, and the maternal grandparents and great grandparents.

On May 18, 2022, the social worker filed a jurisdiction/disposition report and again indicated that father denied there was Native American ancestry in his family on May 10, 2022. She also stated that on May 11, 2022, mother indicated her family had Indian ancestry through the maternal grandmother, who was a member of the Twentynine Palms tribe; however, she indicated that although the maternal grandmother was a member of the tribe, her children and grandchildren did not qualify to be registered members.

The court held a jurisdiction hearing on May 23, 2022, but continued the matter to July 18, 2022. It was later continued again.

On July 13, 2022, the social worker filed an ICWA Declaration of Due Diligence and attached a letter from the Twentynine Palms tribe stating that the children and the parents were not registered members or eligible for enrollment.

On August 1, 2022, the social worker filed, and the court signed, ICWA Findings and Orders stating that adequate inquiry had been conducted by CFS, and there had been no affirmative response of tribal eligibility of membership.

The court held a contested jurisdiction hearing on September 26, 2022. Both parents appeared, and M.L.G. and the paternal grandmother were also present. The court asked M.L.G. and the paternal grandmother if they had Native American ancestry.

M.L.G. said her mother did, in the Twentynine Palms tribe, and the paternal grandmother said no. The court adopted the social worker's findings and orders and found that the children did not come within the provisions of ICWA, declared them dependents of the court, ordered them removed from the parents' custody, and ordered reunification services for the parents.

The court subsequently ordered the matter transferred to Riverside County and set a transfer-in hearing for October 10, 2022.

DISCUSSION

CFS and the Court Failed to Discharge Their Initial Duty of Inquiry

Father contends the juvenile court and CFS failed to comply with their initial duty of inquiry with respect to ICWA, and the insufficient inquiries require the court's finding that ICWA did not apply to be reversed. He specifically argues that CFS knew of the paternal grandmother, two paternal aunts, and two paternal cousins,[2] but failed to inquire of them. Father claims they had readily obtainable information that was likely to bear meaningfully on whether the children were Indian children. Respondent asserts that the paternal grandmother was asked, and she denied Native American ancestry. It concedes that the paternal aunts and cousins were not yet questioned, but argues the record does not show they had information that was likely to bear meaningfully on whether the

[2] Father does not specifically identify the paternal cousins or two paternal aunts, so it is not clear to whom he is referring. We do note that he listed two paternal aunts on his CFS 309 A form, and the paternal grandmother listed two "tias" on her form.

children were Indian children. Thus, the failure to interview them was harmless error. We conclude the matter must be remanded to the juvenile court for ICWA compliance.

A. *Applicable Law*

ICWA requires that notice of the state court proceedings be given to Indian tribes "where the court knows or has reason to know that an Indian child is involved, . . ." (25 U.S.C. § 1912(a); see *In re Isaiah W.* (2016) 1 Cal.5th 1, 8; *In re Benjamin M.* (2021) 70 Cal.App.5th 735, 740-741 (*Benjamin M.*).) ICWA's notice requirement, which is also codified in California law (§ 224.3), "enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene" in the state court proceeding or exercise its own jurisdiction in the matter. (*Isaiah W.*, at p. 5.)

Although "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," 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.' " (*In re Austin J.* (2020) 47 Cal.App.5th 870, 882-883, superseded by statute on other grounds as stated in *In re E.C.* (2022) 85 Cal.App.5th 123, 147; see 25 C.F.R. § 23.107(a) (2022).)

Under California law, the juvenile court and social services agency 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).) "The duty to inquire consists of

two phases—the duty of initial inquiry and the duty of further inquiry." (*In re Ricky R.* (2022) 82 Cal.App.5th 671, 678 (*Ricky R.*).) We note that this case does not concern the duty of further inquiry, which arises only if the court or the department has "reason to believe that an Indian child is involved." (§ 224.2, subd. (e).)

The duty of initial inquiry begins with the initial contact when CFS must ask "the party reporting child abuse or neglect whether the party has any information that the child may be an Indian child." (§ 224.2, subd. (a).) Once a child is taken into temporary custody, CFS must ask the child, parents, legal guardian, extended family members, and others who have an interest in the child 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, aunts, uncles, brothers, sisters, nieces, nephews, or first or second cousins. (25 U.S.C. § 1903(2); § 224.1, subd. (c).) CFS 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." (*In re K.R.* (2018) 20 Cal.App.5th 701, 709.) 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.*) If the court finds that CFS has complied with its duty of inquiry and there is no reason to know 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).)

"[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." (*In re A.M.* (2020) 47 Cal.App.5th 303, 314.)

B. *CFS Failed to Satisfy its Duty of Inquiry with Regard to the Paternal Relatives*

Father argues that CFS did not contact all available paternal relatives—specifically, the paternal grandmother, two paternal aunts, and two paternal cousins—to inquire about the children's potential Native American ancestry. CFS points out that the paternal grandmother denied any such ancestry. The record shows that the court inquired whether she had Native American ancestry, and she said no. The paternal grandmother also filled out a CFS 309 A ICWA inquiry form and stated she did not have any Native American ancestry. Further, in response to the questions of whether any of the children's family members had ever lived on federal trust land or a reservation, or received medical treatment at an Indian health clinic, the paternal grandmother answered no. She also stated that none of the children or their relatives ever attended a Native American school. Thus, the record reflects that CFS satisfied its duty of inquiry as to the paternal grandmother.

CFS concedes that the paternal aunts and cousins (hereinafter, the extended paternal relatives) were not questioned about the children's Native American ancestry. Section 224.2 required CFS to inquire of the children's extended family members, and it was error for CFS to fail to do so. (*In re Antonio R.* (2022) 76 Cal.App.5th 421, 431 (*Antonio R.*); *In re J.W.* (2022) 81 Cal.App.5th 384, 389 [error not to ask the mother's extended family members about their Indian ancestry despite having contact with a

grandmother, uncle, and aunt].) The record shows that father listed two paternal aunts on his CFS 309 A form, and the paternal grandmother listed two "tias" on her form. By failing to ask these extended relatives about Indian ancestry, CFS failed to discharge its duty of initial inquiry. (*In re Dominick D.* (2022) 82 Cal.App.5th 560, 567 (*Dominick D*).)

When CFS fails to comply with the duty of initial inquiry, we will find the error to be prejudicial and 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.) That standard does not require "proof of an actual outcome (that the parent may actually have Indian heritage)." (*Id.* at pp. 743-744.) "The missing information need only be relevant to the ICWA inquiry, 'whatever the outcome will be.' " (*Ricky R.*, *supra*, 82 Cal.App.5th at p. 679; *Benjamin M.*, at p. 744; see *Antonio R.*, *supra*, 76 Cal.App.5th at p. 435 ["in determining whether the failure to make an adequate initial inquiry is prejudicial, we ask whether the information in the hands of the extended family members is likely to be meaningful in determining whether the child is an Indian child, not whether the information is likely to show the child is in fact an Indian child"].)

The record shows that CFS had contact information for the paternal relatives who qualified as extended family members, as father and the paternal grandmother provided their names and phone numbers. The extended paternal relatives thus were readily available, and "their responses would 'shed meaningful light on whether there is reason to believe' that [the children] are Indian children, whatever the outcome of the inquiry

may be." (*Ricky R.*, *supra*, 82 Cal.App.5th at p. 680; *Benjamin M.*, *supra*, 70 Cal.App.5th at p. 744.) We note respondent's argument that the inquiry error was harmless because it was unlikely the paternal extended relatives had information that was unknown to father and the paternal grandmother, who both denied Indian ancestry. However, we decline to speculate on what information they may or may not have. (*Antonio R.*, *supra*, 76 Cal.App.5th at p. 435 ["Speculation as to whether extended family members might have information likely to bear meaningfully on whether the child is an Indian child has no place in the analysis of prejudicial error where there is an inadequate initial inquiry."].)

"ICWA inquiry and notice errors do not warrant reversal of the juvenile court's jurisdictional or dispositional findings and orders other than the ICWA finding itself." (*Dominick D.*, *supra*, 82 Cal.App.5th at p. 567; see *In re S.H.* (2022) 82 Cal.App.5th 166, 175 [where parent on appeal solely challenges finding that ICWA does not apply, "we need not disturb the juvenile court's jurisdiction/disposition order just because the duty of initial ICWA inquiry has not yet been fully satisfied"]). The appropriate disposition is to affirm the findings and orders, but vacate the finding that ICWA does not apply, and "direct the juvenile court on remand to order [CFS] to comply with its inquiry and (if applicable) notice obligations under ICWA and related California law." (*Dominick D.*, at pp. 567-568.)

DISPOSITION

The finding that ICWA does not apply to the proceedings is vacated and the matter is remanded to the juvenile court. The juvenile court is directed to order CFS to comply

with its inquiry and (if applicable) notice obligations under ICWA and related California law. In all other respects, the jurisdiction and dispositional findings and orders are affirmed.

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FIELDS
J.

We concur:

CODRINGTON
Acting P. J.

RAPHAEL
J.