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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re P.L., et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. J.G., Defendant and Appellant.	E080664 (Super.Ct.No. RIJ120253) OPINION

APPEAL from the Superior Court of Riverside County. Dorothy McLaughlin, Judge. Conditionally affirmed and remanded.

Anna M. Rak, under appointment by the Court of Appeal, for Defendant and Appellant.

Minh C. Tran, County Counsel, and Teresa K.B. Beecham and Prabhath D. Shettigar, Deputy County Counsel, for Plaintiff and Respondent.

J.G. (mother) appeals from orders terminating parental rights over her minor children. She argues the Riverside County Department of Public Social Services (department) did not conduct a sufficient inquiry into her children's possible Indian ancestry under the Indian Child Welfare Act (ICWA).[1] The department argues that it had a reduced duty of initial inquiry under ICWA. We disagree with the department, and therefore conditionally affirm the termination of parental rights and remand.

BACKGROUND

This dependency concerns mother and her two children: P.L. (born 2017) and H.L. (born 2020). P.L. and H.L. have two half siblings who are not part of this appeal.

In October 2020 the department filed a petition under section 300 as to all four of mother's children alleging, among other things, that mother struggled with substance abuse, homelessness, and was generally neglectful. On October 9, 2020, the department sought and obtained a protective custody warrant under section 340 and placed P.L. and H.L. in protective custody the day after.

Over the course of the dependency, the department contacted both parents, the maternal grandparents, paternal grandmother, a maternal great-uncle, a maternal great-

[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." (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 739, fn. 1 (*Benjamin M.*).)

aunt, and an aunt.[2] Father told the department paternal grandfather was deceased, but he had two brothers and two sisters. However, the department did not contact either brother and likely contacted only one of father's sisters.

Mother consistently denied any Indian heritage. Maternal grandmother also denied any Indian heritage. A maternal great-uncle said he had no information regarding any Indian heritage. The department did not ask the contacted maternal great-aunt or maternal grandfather about potential Indian heritage.

Father initially reported he had Indian ancestry, affiliation, or membership with the Tewa Tribe from New Mexico. He claimed this heritage through paternal great-grandmother, who is deceased. However, he later denied having any Indian heritage. Paternal grandmother also reported Indian heritage through the Tewa Tribe, but said the family is not registered with the tribe. An aunt also reported heritage through the Tewa tribe. However, the Tewa Tribe is not a federally recognized tribe. (88 Fed. Reg. 2112-2116 (Jan. 12, 2023).)

The court held a section 366.26 hearing in February 2023. At this hearing the court stated it "did review the Department of Interior List in terms of federally recognized tribes and . . . the Tewa tribe is not a federally recognized tribe." Accordingly, it found ICWA did not apply to the children. The court terminated both parents' parental rights. Only mother appealed.

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[2] The record refers to this aunt as a *paternal* aunt in one instance, but a *maternal* aunt in another, and it is unclear which is correct. However, because she reported Indian ancestry through the Tewa tribe, and could confirm paternal grandmother's contact information, it seems likely she is a paternal aunt.

ANALYSIS

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 (*D.F.*).) "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." (*D.F.*, at p. 566.) Only the first of these phases is at issue in this appeal.

The department always has an initial duty to inquire into whether a child is an Indian child. (*In re J.S.* (2021) 62 Cal.App.5th 678, 686; see § 224.2, subd. (b).) "The department's 'duty to inquire begins with the initial contact, including, but not limited to, asking the party reporting child abuse or neglect whether the party has any information that the child may be an Indian child.' " (*In re Robert F.* (2023) 90 Cal.App.5th 492, 499 (*Robert F.*), review granted July 26, 2023, S279743; see § 224, subd. (a); Cal. Rules of Court, rule 5.481(a).) "[U]nder subdivision (b) of section 224.2, '[i]f a child is placed into the temporary custody of a county welfare department pursuant to Section 306,' the department's obligation includes asking the 'extended family members' about the child's Indian status."[3] (*Robert F.*, at p. 500.) This language was added by Assembly Bill No. 3176 (Assembly Bill 3176) (2017-2018 Reg. Sess.), which made various ICWA-related changes to the Welfare and Institutions Code, effective January 1, 2019. (Stats.

[3] Section 224.2, subdivision (b), also applies when a child is placed in the temporary custody of a county probation department pursuant to section 307. But then it is the county probation department's duty of inquiry, and not the county welfare department's. (See § 224.2, subd. (b).)

2018, ch. 833, § 5.) Similar language appears in rule 5.481 of the California Rules of Court, which the Judicial Council revised to implement section 224.2, subdivision (b): "The party seeking a foster-care placement, . . . termination of parental rights, preadoptive placement, or adoption must ask the child, if the child is old enough, and the parents, Indian custodian, or legal guardians, *extended family members*, others who have an interest in the child, and where applicable the party reporting child abuse or neglect, whether the child is or may be an Indian child . . . ." (Cal. Rules of Court, rule 5.481(a)(1), italics added.)

Following the concurring opinion in *In re Adrian L.* (2022) 86 Cal.App.5th 342, 357-358 (*Adrian L.*), *Robert F.*, *supra*, 90 Cal.App.5th 492 equates the phrase " 'placed into the temporary custody of a county welfare department pursuant to Section 306' " (*id.* at p. 500) with exercise of the department's authority under section 306, subdivision (a)(2) "to take children into temporary custody 'without a warrant' in certain circumstances." (*Robert F.*, at p. 497; see *Adrian L.*, at pp. 357-358 (conc. opn. of Kelley, J.).) According to *Robert F.* and the *Adrian L.* concurrence, "[a] department that takes a child into protective custody pursuant to a warrant does so under section 340, not section 306." (*Robert F.*, at p. 497.) After briefing in this case was completed, *In re Ja.O.* (2023) 91 Cal.App.5th 672, 677-678, review granted July 26, 2023, S280572 (*Ja.O.*), adopted the same reading of section 224.2, subdivision (b).

Recently, however, *Delila D.* declined to follow *Robert F.*, finding its holding "contrary to both the letter and spirit of Assembly Bill 3176." (*Delila D.* (2023) 93

Cal.App.5th 953, 962.) Instead, *Delila D.* concluded "there is only one duty of initial inquiry, and that duty encompasses available extended family members no matter how the child is initially removed from home." (*Ibid.*) Under *Delila D.*'s analysis of section 224.2, subdivisions (a) and (b), together with California Rules of Court, rule 5.481, social workers have "a duty of initial inquiry that begins at first contact, lasts throughout the proceeding, and includes 'but is not limited to' the reporting party, the child's parents and extended family members, and others who have an interest in the child, as those individuals become available during the case." (*Delila D.*, at p. 966.)

This conflict in authority is currently under review by our Supreme Court, with *Ja.O.* as the lead case. We find *Delila D.*'s thoughtful discussion of the statutory language and legislative history persuasive and adopt its reasoning and conclusions pending our Supreme Court's resolution of the conflict.

Applying *Delila D.* to this case, CFS's initial duty of inquiry—including the duty to inquire of extended family members who become available—was triggered when a social worker received the children from the peace officer who executed the detention warrant and CFS then maintained the children in temporary custody, as authorized by section 306, subdivision (a)(1). We decline to follow the reasoning of *Ja.O.*, *Robert F.* or the *Adrian L.* concurrence that would lead to a different result.

Our next questions, then, are whether the department satisfied that expanded duty of inquiry or, in the alternative, if any error in doing so was harmless. We conclude it did not satisfy this duty, and that this error was not harmless.

There is no question the department failed to ask certain identified extended family members about the children's potential Indian heritage. Specifically, the department contacted maternal grandfather, yet there is no record of them asking him about any potential Indian heritage. In addition, the department did not contact two paternal uncles and at least one paternal aunt, despite father identifying these siblings. All of these are extended family members under ICWA whom the department was obligated to ask about potential Indian heritage.

Moreover, the error was prejudicial. 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." (*Benjamin M.*, *supra*, 70 Cal.App.5th at p. 742, italics omitted.) This means a court must remand "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.) We conclude at least some of the four (and possibly five) identified but unasked family members would have readily obtainable information which "would likely have shed meaningful light on whether there is reason to believe" the children were Indian children. (*Ibid.*) At minimum the maternal grandfather has already been contacted and would likely have information regarding his branch of the children's family history which maternal grandmother might not. (*Id.* at p. 740, fn. 3; cf. *id.* at p. 745 [where parents were never married, mother had no "necessary logical reason to know" about father's

potential Indian heritage].) His information is thus both readily obtainable and relevant. It is also possible that one of the paternal aunts or uncles might have information which either identify or clarify a source of Indian heritage. Given this, the department was at least obligated to try to contact father's siblings, or else explain why the information they had was not readily obtainable.

Accordingly, we conditionally affirm but remand and direct the department to conduct a sufficient inquiry under ICWA.

DISPOSITION

The order terminating mother's parental rights is conditionally affirmed, and the court's finding that ICWA does not apply is vacated. The matter is remanded to the juvenile court with directions to comply with the inquiry provisions of ICWA and of 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 know that the children are Indian children, the order terminating parental rights will remain in effect. If the department has reason to know the children are Indian children, the court shall proceed accordingly.

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RAPHAEL
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.