2 Civ. B123456

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Nathan T., et al, Persons Coming Under the Juvenile Court Law.

LOS ANGELES COUNTY DEPT. OF CHILDREN AND FAMILY SERVICES

Petitioner and Respondent,

v.

Trisha T.,

Objector and Appellant.

No. 2 Civ. B123456

[Los Angeles County No. CK 54321]

Opening Brief of Appellant Trisha T.

Appeal From an Order of the Superior Court of California
In and For the County of Los Angeles
Before the Hon. Robin Kesler, Referee

Cornelius Fine, Attorney at Law
(SBN 11112314)
520 South Pole Ave., Ste. 250
South, CA 10031
(213) 243-0300/fine@spole.com

Attorney for Appellant Tricia T., Under Appointment by the Court of Appeal

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In re Nathan T., et al, Persons Coming Under the Juvenile Court Law.

LOS ANGELES COUNTY DEPT. OF CHILDREN AND FAMILY SERVICES

Petitioner and Respondent,

v.

TRICIA T.,

Objector and Appellant.

No. 2 Civ. B123456

[Los Angeles County

No. CK 54321]

Opening Brief of Appellant Tricia T.

The Issues Presented

This appeal is from orders on jurisdiction and disposition on a dependency petition filed pursuant to Welfare and Institutions Code section 342. The only issues Tricia raises concern the juvenile court's failure to exact compliance with the inquiry and notice requirements of the Indian Child Welfare Act (25 U.S.C. §§ 1901, *et seq.* ["ICWA"]).

Statement of Appealability

The orders on jurisdiction and disposition on a section 342 proceeding are appealable under subdivision (b) of rule 5.585 and subdivision (a)(1) of section 395 as final orders after judgment that dispose of all the issues between the parties within the meaning of rule 8.204(a)(2)(B).[1]

Introduction

Appellant Tricia T. is the mother of Nathan[2] (born September 2004) and Tom (born December 2007.) Bob W. is identified as the alleged father of Nathan; Pedro A. is named as the alleged father of Tom. (2 CT 380.) The men are not parties to this appeal.

Because the only issue raised in this brief involves ICWA, the statements of the case and of the facts focus in the main on the procedural developments and factual picture relevant to the ICWA issues presented, with some deviation to place the events in context.

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[1] Unless otherwise indicated, all statutory references herein are to the Welfare and Institutions Code of California and all references to rules are to the California Rules of Court.

[2] Nathan is often referred to in the record as "Nathaniel." "Nathan" is used in this briefing because the initial petition was corrected on its face to change the spelling from "Nathaniel" to "Nathan." (1 CT 1.)

Procedural Overview: Statement of the Case

A. A section 300 juvenile dependency petition is filed, and the juvenile court orders the children's detention and instructs the Department to conduct an ICWA investigation

On August 17, 2012 by the respondent herein, Los Angeles County's Department of Children and Family Services filed a section 300 juvenile dependency petition as to Nathan and Tom. (1 CT 1-8.) The petition included Indian Child Inquiry attachments stating that each of the children may have Indian ancestry. (1 CT 7, 8.)

At the detention hearing, the juvenile court ordered the boys' removal from home and their placement in foster care. (1 CT 85, 86.) It also ordered the social worker to contact the maternal side of the family for information concerning American Indian heritage and to investigate Tricia's claim. (1 CT 87.) The worker was instructed to prepare a detailed supplemental report of the investigation results. (*Ibid.*)

B. The petition is amended and sustained, the children are adjudged dependents of the court, and are returned home with provision of family maintenance services

In September 2012, the juvenile court sustained an amended version of the dependency petition.[3] (1 CT 1-8, 212, 213.)

The January 2013 hearing on disposition resulted in the boys' return home with an order that the Department provide family maintenance services. (2 CT 381.) The court did not order family reunification services for the alleged fathers Bob W. (Nathan) or Pedro A. (Tom), finding that they were neither custodial parents nor had they requested custody. (2 CT 380.)

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[3] The petition alleged that both children came within subdivision (b) and that Tom came within subdivision (j). (1 CT 4-6.) The juvenile court sustained only one of the subdivision (b) allegations and dismissed the rest. (1 CT 4-6, 213.) Even so, the Department variously reported that the (j) count had been "modified" (2 CT 388-389), or that all of the allegations were sustained (2 CT 474-475), or recited the allegations in their entirely as part of the case's "legal history," without mention that all but one of those counts were dismissed (3 CT 827-828).

C. Family maintenance services are continued at the July 2013 review hearing and again at the October 2013 progress hearing

In July 2013, the juvenile court held a review hearing pursuant to section 364.[4] (2 CT 438.) It ordered the children to remain in Tricia's home with continued provision of family maintenance services, and set a progress hearing for October 25, 2013. (2 CT 438, 439.) In October, services were continued. (2 CT 461.)

D. In January 2014, a warrant is issued, a section 342 petition is filed, and the juvenile court orders the children's detention

On January 14, 2014, the juvenile court granted the Department's request for authorization to remove Nathan and Tom from Tricia's home. (2 CT 528-536, 537-555.)

On January 23, 2014, the Department filed a subsequent petition pursuant to section 342 in which it alleged that the boys came within subdivision (b) and that Nathan came within subdivision (j). (2 CT 463-470.) The ICWA attachments to the petition indicated that children have no known Indian ancestry. (2 CT 469, 470.)

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[4] In cases in which a dependent child is not removed from the physical custody of a parent, the juvenile court must review at least every six months the services provided and the progress made in eliminating the conditions or factors requiring court supervision. (Welf. & Inst. C. § 364.)

The juvenile court ordered the Department to detain the children and to provide family reunification services. (2 CT 569, 570.)

E. The section 342 petition is sustained at the March 2014 hearing on jurisdiction

At the March 11, 2014 jurisdiction hearing, Tricia submitted on an amended version of the section 342 petition. (1 RT 5; 3 CT 815-818, 821.) The court sustained an allegation that Nathan and Tom come within subdivision (b) of section 300 because they had suffered, or were at substantial risk of suffering, serious physical harm or illness due to their mother's conduct. (1 RT 5-6; 3 CT 657, 821.)

F. The April 2014 hearing on disposition results in the children's removal and order for family reunification services

A contested hearing on disposition was held on April 14, 2014. (1 RT 8-71; 3 CT 878-880.) The court read and reviewed the Department's reports for the hearing, heard Tricia's testimony, and admitted into evidence her letters from service providers.[5] (1 RT 22, 27-56, 64; 3 CT 878, 810-814.)

Upon making findings by clear and convincing evidence that the boys could not reasonably be protected from substantial danger if returned home, the juvenile court ordered the

[5] The minute order states that the court took judicial notice of all findings and orders in its file, but the reporter's transcript does not reflect that event. (3 CT 878.)

youngsters removed from Tricia's custody. (1 RT 65; 3 CT 878, 879.)

Family reunification services were ordered for Tricia. (1 RT 65-66; 3 CT 877, 879-880.) Those services included requirements that she submit to weekly on-demand drug testing, that she participate in a psychiatric evaluation, counseling, a twelve-step or aftercare program, and in a dual diagnosis program. (3 CT 877, 879.) Monitored visits were to take place for four hours, three times per week and were conditioned upon Tricia testing clean and remaining in her program. (1 RT 66; 3 CT 879.) The Department was given discretion to liberalize the visit terms. (1 RT 66-67; 3 CT 879.)

Tricia objected to the orders that she participate in programs and to the requirement that visits be monitored. (1 RT 67.) She noted that the court's findings in support of the orders were bottomed on false statements in the social worker's reports. (*Ibid.*)

G. Tricia timely notices this appeal from the orders on jurisdiction and disposition

On May 30 2014, Tricia timely noticed this appeal from the juvenile court's findings and orders on jurisdiction and disposition. (3 CT 881-882.)

Statement of Facts

A. Background: the events leading up to the filing of the initial juvenile dependency petition

In January 2010, the Department received a report that Nathan and Tom were abused and neglected, a referral that was determined to be inconclusive. (1 CT 11.) In May 2011, it received another referral after Nathan and five of his first grade classmates were engaged in sexual activity in a school bathroom. (*Ibid.*) Investigation of that claim revealed that an older cousin had improperly touched Nathan during a visit with his grandmother, that he was a sex abuse perpetrator as well as a victim, and that he had mental health issues. (1 CT 11, 22.) Tricia reported that she was bipolar but not taking medication. (*Ibid.*) Family preservation services were provided to the family from May 2011 until January 2012. (1 CT 11, 15.)

In April 2012, the Department was notified that Tricia failed to pick Nathan up from school on time and, when she did arrive, she appeared to be under the influence of marijuana. (1 CT 12, 123, 204.) School officials reported that Nathan is a sweet child with no behavioral problems but that he appeared to be lacking adult care. (1 CT 12.)

The April incident resulted in a second voluntary maintenance plan. (1 CT 18, 21.) As part of that plan, Tricia agreed to participate in counseling, drug testing, substance abuse classes, domestic violence program, and parent education classes. (1 CT 20, 21.) She did not enroll in any of the programs. (1 CT 21.) In late July Tricia tested positive for cocaine and

marijuana and, in early August 2012, she again tested positive for cocaine. (1 CT 21.) She offered varying accounts for the positive results. (1 CT 21.) The Department took the children into custody. (1 CT 1, 21, 23.)

B. At the time of the initial dependency petition, Tricia gave notice of her Indian ancestry and the Department's investigation confirmed that the children may be Indians coming within ICWA

The Parental Notification of Indian Status executed by Tricia in August 2012 stated that her maternal grandmother Claudia F. (who was deceased) and maternal aunt Candis [sic] F. were members of a federally recognized tribe identified as "Nebraska." (1 CT 83.)

The Department's investigation made in response to the juvenile court's order that it make ICWA inquiries confirmed the Indian ancestry of Tricia's family. (1 CT 102-103; 2 CT 326.) On August 29, 2012, dependency investigator Woods contacted Tricia's sister, Tiphani, who believed that the family may have Cherokee ancestry and referred the investigating social worker to two of her mother's sisters (the children's maternal great aunts), Candice F. and Gail F. (*Ibid.*) On September 11, Woods telephoned Candice who knew her great-grandfather to be a "full-blood Native American from Omaha, Nebraska" but she did not have any other information about him. (1 CT 103; 2 CT 326.) Woods left a voice mail message for Aunt Gail but apparently did not follow up with that contact. (*Ibid.*)

Dependency investigator Woods also interviewed Nathan's paternal grandmother, Jocelyn W. (1 CT 103; 2 CT 326.) Jocelyn

reported that the maternal great-great-great-great grandmother, Mary C., was Choctaw Indian. (*Ibid.*) Mary had died a few years before and Jocelyn did not know her date or place of birth or where she had been buried. (*Ibid.*) Jocelyn also stated that her paternal great-great-great-great-great grandfather was "full-blooded Blackfoot Indian" but she had no other information about him. (*Ibid.*)

C. In December 2012 and July 2013, the Department reports that ICWA does or may apply

In December 2012 and again in July 2013, the Department reported that ICWA "does or may apply." (2 CT 325, 386.)

D. The October 2013 report variously states that ICWA may apply and that it does not apply

In October 2013, the Department stated both that ICWA does not apply and that it was "possible" that each of the boys are Indian children. (2 CT 442.) It referenced its December 2012 report "for additional information on American Indian Heritage." (*Ibid.*)

E. When the Department files the section 342 petition, it reports that ICWA does not apply

Family maintenance services continued until January 2014, when the Department learned that Tricia had allowed Tom to accompany an unrelated couple to the store, a couple which did not return the child for twelve days. (3 CT 475, 476.) Tricia did not have contact information for the pair and she had not

reported the child missing. (*Ibid.*)

The Department took Tom and Nathan into custody. (*Ibid.*)

When the Department filed the section 342 petition, it included faxed copies of an ICWA inquiry attachment stating that a worker had questioned Tricia and was told that neither of her children had known Indian ancestry. (2 CT 660, 661.)

F. The reports filed after the section 342 petition consistently state that ICWA does not apply

The Department's reports on detention, prelease investigation, and on jurisdiction/disposition all stated that ICWA does not apply to the proceedings. (2 CT 473, 574; 3 CT 625.)

Argument

I. The Orders On Disposition Should Be Reversed and the Matter Remanded with Instructions that the Juvenile Court Exact Compliance with the Inquiry and Notice Requirements of the ICWA and California's Implementing Provisions

The juvenile court and the Department were made aware early on in the proceedings of the possibility that the children have Indian ancestry. (1 CT 7, 8.) Even so, the Department did not follow-up on information obtained in response to the court's order that it conduct further inquiry and no effort was undertaken to give notice in accordance with ICWA and California's implementing provisions.

A. ICWA: The statutory backdrop

Congress enacted the Indian Child Welfare Act to promote the stability and security of Indian tribes and families by establishing minimum standards applicable to child custody proceedings involving Indian children, including juvenile dependency actions undertaken pursuant to section 300. (25 U.S.C. §§ 1901, *et seq.*; Welf. & Inst. C. § 224; *Mississippi Choctaw v. Holyfield* (1989) 490 U.S. 30, 34-35, 49; I*n re Desiree F.* (2000) 83 Cal.App.4th 460, 473 [“*Desiree F.*”].)

Section 224.2 of the Welfare and Institutions Code and Rules 5.480 through 5.487 of the Rules of Court set forth the procedures the juvenile court must follow in cases such as the present one in which when a minor before it is, or may be, an "Indian child" coming within the Act.

An "Indian child" is defined by ICWA as any unmarried person under the age of eighteen and who 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; Welf. & Inst. C. § 224.1, subd. (a).) The determination whether a child comes within ICWA is uniquely within the province of the tribe. (*In re Junious M.* (1983) 144 Cal.App.3d 786, 793; Welf. & Inst. C. § 224.3(e)(1) [A determination by an Indian tribe or testimony by a person authorized by the tribe to make the determination that a child is or is not a member of or eligible for membership in that tribe is conclusive.].)

If a court has reason to know that a child may be an Indian child as defined by ICWA, the court is required to proceed with

dependency hearings “as if the child were an Indian child.” (25 U.S. C. § 1912; Rule 5.482(d)(2).)

The child's Indian status is of particular importance at the disposition and permanent plan hearings. Foster care placement of an Indian child may not be ordered unless, for example, the court finds by clear and convincing evidence, supported by testimony of a qualified expert witness, that continued custody by the parent is likely to cause the child serious emotional or physical damage. (25 U.S.C. § 1912; Rule 5.484(a).) Prior to removal, the court must find that active efforts have been made to provide remedial services and rehabilitative programs designed to preserve the breakup of the family and that those efforts were unsuccessful. (25 U.S.C. § 1912; Rule 5.484(c).) If removal does occur, particular placement preferences must be followed with priority given to a member of the Indian child's extended family. (25 U.S.C. § 1915; Welf. & Inst. C. § 361.31; Rule 5.484(b).)

The determination that a child is an Indian may also affect the child's placement after termination of parental rights. If the child is removed from a pre-adoptive home or if a completed adoption is later set aside, decisions about where a child should be moved must follow a specified order of preference. (Welf. & Inst. C. § 361.31; Rule 5.484(b).) The placement must be in the least restrictive setting possible, within reasonable proximity to the Indian child's home, and capable of meeting any special needs the child may have. (Welf. & Inst. C. § 361.31.)

The failure to comply with the ICWA requirements can have far-reaching and serious consequences. For example, the permanence and stability for the child the dependency scheme is

designed to achieve may be undermined even after termination of parental rights because of failure to comply with the Act. (Welf. & Inst. C. § 224, subd. (e) [provides for invalidation of orders that violate the Act].)

B. The all-important ICWA inquiry and notice provisions

At the very heart of ICWA are the requirements concerning inquiry and notice. Without sufficient inquiry into the family's background and communication of that information in the ICWA notices of the proceeding, it is impossible for a tribe (or, in the absence of a known tribal affiliation, the Bureau of Indian Affairs "BIA") to know of the proceedings and to exercise its rights, including the right to make a knowing and intelligent determination whether a child is an Indian coming within the Act and the right to intervene. The requirements are to be "strictly construed" because of their "critical importance" to the integrity of the Act. (*In re A.G., supra,* 204 Cal.App.4th at pp. 1396-1397.)

In California, the duty of inquiry and provision of notice falls upon child services agencies such as the Department in this case, although the ultimate responsibility for compliance lies with the court. (*In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1108; *Desiree F., supra*, 83 Cal.App.4th 460, 461.)

At a parent's first appearance in a dependency case, the court must order the completion of a specific form, "Parental Notification of Indian Status," declaring whether he or she has Indian ancestry. (Rule 5.481(a)(2).) In addition, if there is reason to believe the child may be Indian, the social worker is required to

make further inquiry, including interviews of extended family members, to gain information about the child's possible Indian status. (Welf. & Inst. C. § 224.3, subd. (c).)

If the notification form reveals possible Indian status, or if it is known or there is reason to know from another source that a child is or may be an Indian, notice of the pending proceeding and the tribe's right to intervene is required to be given to the particular tribe or tribes identified. (24 U.S.C. § 1912(a); Welf. & Inst. C. § 224.2, subd. (b); Rule 5.481(b).) If the identity or location of the tribe cannot be determined, then notice must be given to the Secretary of the Interior's designated agent for ICWA service, the Sacramento Area Director of the BIA. (24 U.S.C. § 1912(a); Welf. & Inst. C. § 224.2, subd. (a)(4); *In re E.W.* (2009) 170 Cal.App.4th 396, 403.)

Notice must be given on the form designed for the purpose. (Welf. & Inst. C. § 224.2, subd. (b); Rule 5.481(b)(1); Judicial Council Form ICWA-030.) The completed ICWA notice form must be sent by registered or certified mail with a return receipt requested to all tribes of which the child is or may be a member, or eligible for membership. (Welf. & Inst. C. § 224.2, subd. (a); Rule 5.481(b)(1).) Notice is required prior to every hearing until a determination is made that ICWA does not apply. (Welf. & Inst. C. § 224.2, subd. (b); Rule 5.481(b)(2).)

The notice form asks for much more detailed information than that requested of the parent by the court in the parental notification of Indian status form. For example, the notice provides space to include tribal information and family history, including the names (maiden, married, and aliases), addresses

(current and former), and birth dates of the child's parents, grandparents, and great-grandparents. (§224.2, subd. (5).)

The notice is meaningless if it does not provide the tribes and the BIA a "meaningful opportunity" to make a determination whether a child is an Indian coming within ICWA. (*In re D.T., supra*, 113 Cal.App.4th at p.1455.) To that end, child services agency (such as the Department in this case) is required to make an affirmative effort to gather as much information as reasonably possible to complete the ICWA notice form and must include all relevant details known to it. (Welf. & Inst. C. § 224.3, subd. (c); *In re D.T., supra*, 113 Cal.App.4th at p. 1455.) That is, the agency has an "affirmative and continuing duty" to inquire about and, if possible, to obtain all available information about the maternal and paternal grandparents and great-grandparents, "including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data." (Welf. & Inst. C. § 224.3(a); *In re A.G., supra,* 204 Cal.App.4th at p. 1396.)

Any time additional family or tribal information comes to light, it is necessary to renew notice efforts, even in cases in which the juvenile court has already determined that ICWA does not apply to the proceedings. (Welf. & Inst. C. § 224.3, subds. (a) and (f).)

Unless the identity of the tribe is unknown, all notices must be addressed to the tribal chairperson or to the tribe's agent for acceptance of ICWA notice if one has been designated. (Welf. & Inst. C. § 224.2, sub (a)(2); Rule 5.481(b)(4); *In re J.T.* (2007) 154 Cal.App.4th 986, 994.) Agents designated by tribes to accept

ICWA service are published periodically in the Federal Register. (See, 25 C.F.R. 23.12 (a) and (d).)

The completed notice form (which contains an affidavit that the form was mailed) as well as all return receipts evidencing delivery and any responses received are required to be filed with the juvenile court in advance of the hearing. (Welf. & Inst. C. § 224.2, subd. (c); Rule 5.482(b); see also, *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739-740, fn. 4.)

No proceeding, except for the detention hearing, may be held "until at least 10 days after receipt of notice" by the tribe (or the BIA in the absence of a known tribe or if the parent is unknown or has not been located). (Welf. & Inst. C. § 224.2(d).) Moreover, the juvenile court is prohibited from making a determination that ICWA is inapplicable to a juvenile dependency proceeding until "proper and adequate notice" was received by the entities entitled to it and sixty days have passed since receipt without a "determinative response." (Welf. & Inst. C. § 224.3, subd. (e)(3).)

The importance of the inquiry and notice procedures cannot be understated. It is intended to accomplish at least three purposes: to provide notice of the hearing, to provide all information reasonably available that might be of assistance in determining whether the child is Indian, and to provide notice of, and opportunity to exercise, the tribe's right to intervene. (See, *In re D.T.* (2003) 113 Cal.App.4th 1449, 1455.)

C. The issue of ICWA notice is reviewed using a de novo standard of review

In cases in which the ICWA relevant facts are not disputed, the applicable standard of review is de novo. (*Guardianship of the Person of D.W.* (2013) 221 Cal.App.4th 242, 250.)

D. The juvenile court failed to exact compliance with the ICWA inquiry and notice provisions upon learning that Nathan and Tom may be Indian children coming within the Act

In this case, the tribes identified by Tricia and her family are the Cherokee and a tribe from Omaha, Nebraska. (1 CT 102-103.) Nathan's paternal grandmother believed she had both Choctaw and Blackfeet ancestors. (1 CT 103.)

1. The tribes potentially involved here are federally recognized and are entitled to notice pursuant to ICWA and California's ICWA implementing provisions

The ICWA applies only to federally recognized tribes. (25 U.S.C. §1903.) The tribes identified by name in this case (Cherokee, Choctaw, and Blackfeet) fall into that category. (1 CT 103; 79 Fed. Reg. 3225, 3232, 3233, 3238 (Jan.17, 2014).) And, although Tricia's family was not able to name the Nebraska tribe believed to be part of their ancestry, there are two federally recognized tribes in the Omaha area: the Omaha Tribe and the Ponca Tribe of Nebraska. (1 CT 103; 79 Fed. Reg. 3225, 3233 (Jan.17, 2014).)

2. The form attached by the social worker to the section 342 petition stating that Tricia reported no Indian heritage does not excuse the failure to comply with the inquiry and notice requirements

The section 300 petition and the Parental notification of Indian Status form completed by Tricia at the time of the August 2012 detention hearing on that petition reported that the children were or may be Indians coming within ICWA. (1 CT 7, 8, 83.) In January 2014, when the section 342 petition was filed, the social worker attached forms indicating that Tricia told her that the boys had no known Indian ancestry. (2 CT 469, 470.) The detention and subsequent reports filed in connection with the 342 petition each stated that ICWA does not apply to the proceeding. (2 CT 473, 574; 3 CT 625.)

Although there is authority for the proposition that the child services agency is relieved of the obligation to make inquiry and give notice if a parent recants an assertion of Indian ancestry, the situation presented here is readily distinguishable. In *In re Jeremiah G.*, the Third District held that the obligation to give ICWA notice when the parent first stated on the parent's notification form that Indian heritage was a "possibility" that "need[ed] to be researched," and a few weeks later executed a second form stating that he did not have Native American heritage. (*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1518, 1519, 1521(*Jeremiah G*).)

The facts in *Jeremiah G.* are decisively distinguishable from those in this case:

First, it is not clear that Tricia recanted her claim of Indian heritage. The form submitted by the social worker states that she

asked Tricia about Indian heritage but, by that time, the Department had already reported that ICWA "does not apply" even though no such finding had been made by the juvenile court. (2 CT 442.) It may well be that Tricia simply reported what she had already been told by the Department. And, unlike the parent in *Jeremiah G.,* she did not execute additional Parental Notification of Indian Status forms denying Indian ancestry. (*Jeremiah G., supra,* 172 Cal.App.4th at pp. 1518, 1519.)

Second, the duty to give notice did not stem solely from Tricia's claim of Native American heritage. Other of the children's maternal relatives confirmed their Indian ancestry. (1 CT 103.) And, members of the family of Nathan's father, Bob W., had also reported that they were lineal descendents of federally recognized tribes. (*Ibid.*)

3. Even though Bob W.'s role as Nathan's biological father was not established, his mother's report of Indian heritage triggered the duty to give notice to the tribes she identified

Bob W. was variously described in the Department's reports as Nathan's "father" and his "alleged father." (3 CT 677, 826.) What is certain is that, although the juvenile court denied Bob presumed father status, he was provided counsel and the Department questioned his mother and learned that he had Indian heritage. (1 CT 103; 2 CT 326, 380.)

In *In re E.G.* the Third District held that, unless and until biological paternity is established for an alleged father, the ICWA notice requirement does not come into play even if it is thought the man has Indian heritage because there is no reason to know

that the child before the court shares that heritage. (*In re E.G.* (2009) 170 Cal.App.4th 1530, 1532, 1533 (*E.G.*).) The *E.G.* must-establish-a-biological-connection approach was soundly rejected by Division One of the First District in *In re B.R.* and by this court in *In re Hunter W.* In both those cases, the courts noted that eligibility for membership in a tribe might well stem from adoption. (*In re B.R.* (2009) 176 Cal.App.4th 773, 784-785, including fn. 3; *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1468-1469; see also, *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408, fn. 2.)

In all events, *E.G.* is distinguishable here because, unlike the alleged father in that case, Bob has not been eliminated as the child's biological father. (*E.G.,* 170 Cal.App.4th at pp. 1532, 1533.)

Moreover, the Department has an affirmative duty to make reasonable efforts to obtain information for the purpose of ascertaining the child's Indian status. (Welf. & Inst. C. § 224.3, subd. (c); *In re D.T., supra*, 113 Cal.App.4th at p. 1455.) That duty should reasonably include investigating whether a paternity determination had been made, particularly where, as here, there is an indication that paternity proceedings may be pending. (1 CT 81.) When there is a suggestion that an alleged father may in fact be the biological parent, the ICWA notice requirements are triggered. (See, *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1166 [must give ICWA notice if man named on birth certificate claims Indian heritage].)

4. The juvenile court failed to exact compliance with the Department's continuing and affirmative duty to inquire into the family's Indian heritage

Although the Department did start to investigate the family's Indian heritage, its effort fell well short of complying with its duty to obtain all reasonably available information. (Welf. & Inst. C. § 224.3, subd. (c); *In re D.T., supra*, 113 Cal.App.4th at p. 1455.)

With respect to Tricia's report of Indian heritage, dependency investigator Woods learned that the sisters of the maternal grandmother might have information. (1 CT 83, 87, 102-103; 2 CT 326.) Although Woods spoke to one sister, she simply left a voice mail for the other and did not make any follow up calls or inquiries. (1 CT 103; 2 CT 326.)

With respect to Nathan's paternal lineage, there is no indication that Woods spoke to Bob. Rather, she reported that she had spoken with the paternal grandmother who said lineal ancestors were Indian but, other than the name of a recently deceased maternal relative and the names of the tribes, she did not provide other identifying information. (*Ibid.*) Woods apparently did not ask whether there were other family members who might have additional data.

5. The juvenile court failed to exact compliance with the ICWA notice requirements

Tricia's parental notification of Indian status forms revealed that she might have Indian heritage. (1 CT 83, 84.) The ICWA inquiry undertaken by investigator Woods, though lacking in thoroughness, nevertheless revealed that Nathan and Tom may

be Indians coming within the Act. (1 CT 102-103; 3 CT 326.)

Three federally recognized tribes were identified: Cherokee, Choctaw, and Blackfeet. (*Ibid.*) ICWA notice was required to be given to those tribes. (24 U.S.C. § 1912(a); Welf. & Inst. C. § 224.2, subd. (a)(2); Rule 5.481(b)(4); *In re J.T., supra,* 154 Cal.App.4th at p. 994.)

In addition, Tricia and her aunt Candice reported that one ancestor was a full-blooded Native American from Omaha, Nebraska. (1 CT 103.) Because the name of the tribe in Nebraska was unknown, the Department was required to give notice to the Bureau of Indian Affairs. (24 U.S.C. § 1912(a); Welf. & Inst. C. § 224.2, subd. (a)(4); *In re E.W.*, *supra,* 170 Cal.App.4th 396 at p. 403.)

E. Failure to exact strict compliance with the ICWA inquiry and notice provisions is not harmless error

It is well settled that failure of the juvenile court to secure compliance with ICWA's inquiry and notice provisions is prejudicial error (although substantial compliance has been held sufficient in circumstances not applicable here[6]). (See, *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267; *In re I.G.* (2005) 133 Cal.App.4th 1246, 1254; *Desiree F.*, supra, 83 Cal.App.4th at pp.

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[6] For example, in *In re Christopher I.*, the court held that it would lead to an "absurd result" to require strict compliance with ICWA in a case involving an infant in a persistent vegetative condition caused by physical abuse inflicted by the father. The father refused to remove life support. The delay created by the need to perfect ICWA service would serve no purpose but to increase the infant's misery. (*In re Christopher I.* (2003) 106 Cal.App.4th, 533, 545-546, 564-565.)

474-475.) And, rightly so. Failure to obtain all reasonably available information, failure to give notice to the tribes potentially involved, inclusion of misinformation on a notice form, misaddressing of the notices, failing to assure that receipts of delivery are on file, and the like are all critical errors that may deprive the tribe of any meaningful opportunity to determine the child's status and of its right to participate in the proceedings. (See, *In re D.T., supra*, 113 Cal.App.4th at pp. 1454, 1455; *In re Samuel P., supra*, 99 Cal.App.4th at p. 1268.)

In addition to the prejudice resulting to the tribes from failure to comply strictly with the inquiry and notice provisions is the potential for serious prejudice of the minor's rights. Incomplete or incorrect information in a notice leaves the juvenile court's orders open to challenge and invalidation, thereby undermining the purpose of the statutory scheme applicable to dependency proceedings, that is, to provide a child with a permanent stable living situation with as little delay as possible. (25 U.S.C. § 1914; see, generally*, In re Marilyn H.* (1993) 5 Cal.4th 295, 307, et seq.; *In re I.G., supra*, 133 Cal.App.4th at p. 1254.)

Failure to comply strictly with the notice provisions may also cause a child to be deprived of affiliation with a tribe. The potential benefits stemming from that affiliation are not limited to important cultural, familial, and psychological ones. There may be significant economic benefits as well because many tribes, including, for example, the Cherokee Nation in this case, have substantial business assets that provide income and employment for tribal members. (www.cherokee.org.)

Tribal members may be entitled to benefits provided or underwritten by the tribe. For example, the Cherokee Nation benefits include housing assistance, health care, child development programs, family assistance, and scholarships. (See, www.cherokee.org.)

In short, the juvenile court and the Department are charged with protecting the interests of dependent minors like Nathan and Tom. If those entities fail to comply fully with the ICWA inquiry and notice requirements – as happened in this case - the youngsters will be denied Indian status to which they may be entitled. That injustice can readily be avoided by timely and complete compliance with the straightforward provisions of the ICWA provisions.

Conclusion

As demonstrated above, the Department and the juvenile court gave crucial provisions of the ICWA very short shrift – a problem that, unfortunately, is all too common.

In 2005, the court in *In re I.G.* observed that failure to comply with various aspects of ICWA has been a "continuing problem in juvenile dependency proceedings conducted in this state...." (*In re I.G., supra,* 133 Cal.App.4th at pp. 1254-1255.) In November 2013, there was cause again for a court to lament that, "[d]espite extensive case law and many other writings on the subject, dependency courts and social services departments continue to ignore the dictates of the act, often failing to provide proper notice of a dependency proceeding involving an Indian

child…and, in other instances, disregarding the substantive mandates of the law. [Citations omitted.]" (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 700-701.)

As this case demonstrates, the problem of juvenile court's failing to exact compliance with the ICWA inquiry and notice provisions continues. The appropriate remedy is to reverse the order on disposition and remand with instructions to comply with those requirements. (See *In re Autumn K., supra,* 221 Cal.App.4th at p. 717.)

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Respectfully submitted,

Cornelius Fine, Attorney for
Appellant Tricia T.)

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Cornelius Fine