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.

TRICIA T.,

Objector and Appellant.

No. 2 Civ. B123456

[Los Angeles County No. CK 54321]

Reply Brief of Appellant Tricia 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

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LOS ANGELES COUNTY DEPT. OF CHILDREN AND FAMILY SERVICES

Petitioner and Respondent,

v.

TRICIA T.,

Objector and Appellant.

No. 2 Civ. B256790

[Los Angeles County No. CK 92294]

Reply Brief of Appellant Tricia T.

Appellant Tricia T. offers the following reply to the brief filed by respondent herein, Los Angeles County's Department of Children and Family Services ("the Department"):

Introduction

In her opening brief, appellant Tricia T. argued that the juvenile court erred when it failed to exact compliance with the inquiry and notice requirements of the Indian Child Welfare Act (25 U.S.C. §§ 1901, *et seq.* ["ICWA"]). (AOB 11-26.)

In response, the Department makes a variety of claims, including that the information from the maternal relatives was too vague to trigger IWCA compliance, that compliance was not required as to tribes identified by paternal relatives because Bob W. was not established to be the biological father of Nathan, and the record is inadequate to establish whether the juvenile court complied with IWCA. (RB 9-21.) As demonstrated below, the Department's claims fall well short of their intended mark of refuting Tricia's arguments.

Naturally, Tricia's failure to address every statement the Department makes or to reassert arguments already presented in her opening brief is not intended to signal agreement with the Department or to signal abandonment of any of the arguments made in her opening brief.

Argument

I. The Department Does Not Address the Applicability of the De Novo Standard of Review But the Result Is the Same Even If the Substantial Evidence Standard Is Employed as the Department Suggests

In her opening brief, Tricia noted that, in cases in which the ICWA relevant facts are not disputed, the applicable standard of review is de novo. (AOB 18; *Guardianship of the Person of D.W.* (2013) 221 Cal.App.4th 242, 250.)

The Department does not discuss de novo review, but instead simply asserts that a juvenile court's no-ICWA finding is governed by the substantial evidence standard of review. (RB 14.) That standard is employed in the cases cited by the Department, *In re Rebecca R.* and *In re Aaliyah G.* (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1429-1430; *In re Aaliyah G.* 109 Cal.App.4th 939, 942.) But, those cases involve the disputed factual issue whether an ICWA inquiry was ever made during the proceedings, which were conducted before the Rules of Court required the filing of a parental notification of Indian status form (currently rule 5.481(a)(2) and form ICWA-020). (*Ibid.*)

Here, the relevant ICWA facts are not disputed. The issue presented is whether those facts triggered the duties to make further inquiry and to give notice to the Bureau of Indian Affairs ("BIA") and the identified tribes. (AOB 18.) But, even if the issues are framed as substantial evidence questions, the outcome is the same because there is sufficient evidence to establish that

the requirements for notice and further inquiry were triggered, and insufficient evidence to establish compliance with those requirements.

II. Contrary to the Department's Claims, the Information Provided by Tricia and Her Relatives Was Not Too Vague or Speculative To Trigger ICWA Notice and the Need for Further Inquiry

The Department seeks to excuse the failure to follow-up with information it received concerning the Indian ancestry of the children's maternal relatives by claiming that the information was "too vague and speculative" to trigger notice. (RB 14-16.) It points to the facts that (i) one aunt believed there may be Cherokee ancestry while Tricia and another aunt believed a great-grandfather was an Indian from Nebraska, and (ii) that a social worker reported at the time of the section 342 petition that Tricia indicated that the children do not have Indian ancestry. (*Ibid.*)

A. Nothing said by the Department serves to refute Tricia's argument that the social worker's no-ICWA remark contained in the section 342 petition's attachment does not excuse the failure to comply with the ICWA inquiry and notice requirements

In making its claims, the Department does not address Tricia's argument that a no-ICWA box checked by a social worker did not relieve the court and the Department of the duty of inquiry and notice. (AOB 19-20.) Rather, it simply asserts that Tricia "recanted" her statement of possible Indian heritage and cites *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514. (RB16.) Left

unmentioned is Tricia's explanation in her opening brief why that case is decisively distinguishable from this one. (AOB 19-20.)

When a parent has indicated on an IWCA-020 form that she has one or more lineal ancestors who are (or were) members of a federally recognized tribe, the mere representation by a social worker that the parent later said she does not have Indian ancestry does not relieve the juvenile court or the child services agency of the duties of inquiry and notice. (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167 ["*Gabriel G.*"].)

B. Contrary to the Department's claim, the maternal family's identification of tribes – even without compliance with the duty to conduct further inquiry -- was sufficiently specific to trigger IWCA notice

In her opening brief, Tricia explained that notice was required to be given to the Cherokee tribes and that, as to the full-blooded Indian ancestor from Nebraska for whom a tribe was not identified, notice was required to be given to the Bureau of Indian Affairs. (AOB 22-23.)

In its response, the Department claims no notice was required to be given to the Cherokee tribes because that designation lacked specificity and because other maternal relatives mentioned the Nebraska Indian ancestor. (RB 14-16.) Its claim is bottomed in the mistaken notion that the maternal relatives can have only one Indian ancestor and that one relative's assertion of Cherokee ancestry is trumped and rendered vague and speculative by the assertion by two other relatives that a great-grandfather was a full-blooded Native American from Omaha, Nebraska. (RB 14, 16; 1 CT 83, 102-103.) Along the

way, it engages in further speculation, assuming that Candis F. and Candice D. are the same person. (RB 14, fn. 6.)

Although the Department's discussion of the maternal family's identification of Indian ancestors does not contain citation to any legal authority, it appears from the cases noted in a preceding section its brief ("The IWCA") that it may have intended to rely on cases mentioned there to support its assertion that the maternal relatives' information is too vague and speculative. (RB 12-13, 14-16.) As demonstrated below, those cases are readily distinguishable because none involve the circumstances presented here:

• In *In re Hunter W.,* the parent indicated that she may have Indian heritage through her father but she did not provide his contact information although it appeared to be available, she did not name the tribe, and she did not mention any other relative who might have information. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1468 [*"Hunter W."*]) This court rejected the juvenile court's conclusion that a biological connection between the child and the Indian ancestor was required but affirmed the no-ICWA finding. (*Ibid.*) It explained that the mother had not provided enough data to trigger the Act and that she failed to cite any authority to support her contention that notice is required even if a tribe is not identified. (*Ibid.*)

This case presents a much different factual picture. Here, Tricia stated her belief that she had an Indian ancestor from Nebraska though a relative, Candis F., and additional information from her family indicated that the ancestor was from Omaha (which, as pointed out in Tricia's opening brief, is the home of two

federally recognized tribes). (1 CT 83; AOB 18.) Moreover, another family member believed the family had Cherokee ancestry through another relative, Candice D. (1 CT 103.) And, in her opening brief, Tricia pointed to authority requiring IWCA notice be given to the BIA in cases in which the name of a tribe is unknown requires notice - a point conceded by the Department. (AOB 23; RB 18.)

• *In re J.D.*, cited by the Department (at pages 12-13) is also readily distinguishable from the circumstances presented here. (*In re J.D.* (2010) 189 Cal.App.4th 118.) There, in the course of the permanent plan selection hearing, the Department reported that a finding had not been made concerning the father's Indian heritage. (*Id.,* at p. 123.) It explained that the only information available was the paternal grandmother's statement that, when she was little kid, her grandmother had mentioned that the family had Indian ancestry. (*Ibid.*) There were no living relatives to provide additional information, there was no indication what tribe might be involved, and there were no other factors (such as evidence that the family lived on a reservation or attended an Indian school) to support the notion that the family may have Indian ancestry. (*Id.,* at pp. 123, 124, 125.) Division One of this court affirmed the juvenile court's conclusion that there was no reason to know that the child would come within IWCA because the available information was too vague, attenuated, and speculative. (*Id.*, at p. 125.)

Here, there are living relatives who can provide additional information concerning the children's ancestry on their mother's side, a tribe (Cherokee) was named, and another ancestor was

described as a full-blooded Indian from Omaha, Nebraska where there are two federally recognized tribes. (1 CT 83, 102-103; AOB 18, 22, 23.)

• The third case cited by the Department, *In re O.K.*, is also readily distinguishable from this one. (RB 13; *In re O.K.* (2003) 106 Cal.App.4th 152 ["*O.K.*"].) There, a grandparent indicated that one of the children "may have Indian in him." (*O.K., supra,* 106 Cal.App.4th at p. 157.) The Third District affirmed the juvenile court's finding that there was no reason to know the child may be Indian because the grandparent's remark was not based on any known Indian ancestor but rather on the "nebulous assertion" that the family was "from that section." (*Id.*, at pp. 155, 157, 158.)

In short, the information provided by Tricia and other maternal relatives is not vague or speculative. All the family members interviewed by the social worker confirmed that they had Indian ancestry. (1 CT 83, 102-103.) And, there were additional family members, Gail H. and Candis F., who was thought to have detailed information. (*Ibid.*) Even so, the social worker said nothing about Candis. She made only two attempts to telephone Gail and left a single voice mail message, but apparently made no further efforts to call or to undertake verification of the number or reach that relative by other means. (1 CT 102-103.)

The Department claims that the failure to make any further inquiry should be excused because those efforts would have been futile in view of the dearth of information obtained from the family members contacted by the social worker. (RB 16.)

because the family members the social worker did contact did not have detailed information. (RB 16.) Naturally, it is precisely because some family members may have more data than others and because some may undertake to gather more details that the an affirmative and continuing duty of inquiry is imposed on the Department. (Welf. & Inst. C. § 224.3, subd. (a); *In re A.G.* (2012) 204 Cal.App.4th 1390, 1396.) The assertion that further inquiry would be futile is simply speculation. (RB 16.)

III. Nothing Said by the Department Serves To Refute Tricia's Argument that the Information Provided by Bob's Mother Triggered the IWCA Notice Provisions Even Though the Biological Relationship of Bob and Nathan Had Not Been Established

In her opening brief, Tricia explained that the Department's affirmative duty to make reasonable efforts to obtain information for the purpose of ascertaining the child's Indian status should reasonably include investigation into a child's biological paternity where, as here, the person thought to be the biological father has, or may have, Indian ancestry. (AOB 20-21.) The Department offers no explanation why that duty should not include investigating whether a paternity determination had been made, particularly where there is evidence that paternity proceedings may be pending. (1 CT 81.)

Also left unaddressed by the Department is Division Two's opinion in *In re Gabriel G.* which held that the ICWA notice requirements are triggered when there is an indication that an alleged father may in fact be the biological parent and he has or

may have Indian ancestry. (AOB 21; *Gabriel G., supra,* 206 Cal.App.4th at p. 1166.)

IV. The Department's Improperly Buried Suggestions that a No-IWCA Finding Should Be Inferred and that the Record Is Inadequate Are Ill-Considered

Buried in the Department's discussion of the maternal relatives' disclosure of Indian ancestry are its suggestions (i) that a no-IWCA finding may be inferred, and (ii) that Tricia should have moved to augment the record with reporter's transcripts of eleven hearings because it is "possible" that the juvenile court addressed IWCA issues in the course of those proceedings. (RB 17-18.)

A. The Department is required to raise the issues it suggests under a separate heading

The Department's infer-a-finding and inadequate-record assertions are not presented under a separate heading but are simply tucked into its claim that the information received from the maternal relatives was vague and speculative. (RB 17-18.) If it believed those topics are worthy of consideration, then it should have complied with rule 8.204(a)(1)(B). That rule requires each point made in a brief be contained in a "separate heading or subheading summarizing the point." (Cal. Rules of Court, rule 8.204(a)(1)(B); *In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

B. An IWCA finding may not be inferred because the record does not demonstrate that the juvenile court properly considered the IWCA evidence

The Department appears to ask this court to infer that the juvenile court made a finding that IWCA does not apply to this case. (RB 17.)

In support of that request, it cites the opinion of Division Two of the Fourth District in *In re E.W.* (2009) 170 Cal.App.4th 396, 403 ["*E.W.*"]. (RB 17.) The Department does not mention the salient points in that opinion, including (i) there is a conflict in the cases concerning the propriety of inferring that the juvenile court made an implicit IWCA finding, and (ii) the *E.W.* court limited its embrace of decisions allowing an implicit ICWA ruling to suffice to only those cases in which the reviewing court can be confident that (i) the issue was considered by the juvenile court and, (ii) there is "no question" that an explicit ruling would conform to the implicit one. (*E.W., supra*, 170 Cal.App.4th at pp. 404, 405.)

Naturally, a finding may not properly be inferred in a case like the present one where the notice and further inquiry requirements were triggered but the juvenile court failed to require that notice be given or require that the Department make reasonable efforts to obtain all reasonably available information for the purpose of ascertaining the children's Indian status. (AOB 18-23; *E.W.,* supra, 170 Cal.App.4th at pp. 404, 405.)

That this is not a fit case for inferring an IWCA finding is underscored by the Department's other buried contention, that is, that the record is too incomplete to permit an evaluation

whether the juvenile court considered IWCA evidence and made a finding. (RB 17-18.)

C. There is no reason to think that reporter's transcripts from other hearings will reveal that the juvenile court made IWCA inquiries and findings, and the Department's suggestion that an appellant should be required to engage in a fishing expedition whenever an IWCA compliance issue is raised is ill-considered

Although the Department appears to request that this court make a no-IWCA finding, it also complains that the record is inadequate and posits that Tricia should have moved to augment the record to include eleven hearings that are not part of the normal record on appeal. (RB 17-18; rule 8.407(b).) The Department agrees that the minutes entered in the course of the proceedings do not reflect that the juvenile court evaluated the IWCA evidence or made an IWCA finding. (RB 17-18.)

The clerk of the court is charged with keeping the minutes of the court proceedings and it is presumed that the clerk performed that duty unless there is evidence to the contrary. (Evid. Code, § 664; Gov. Code, § 69844.) In the absence of a notation in the minutes that IWCA was considered at a particular hearing, a request to augment the record for numerous reporter's transcripts on the off chance that some mention of IWCA might have been made that was not recorded by the clerk would be nothing more than a costly fishing expedition that is likely to result in an empty net.

Naturally, if the Department believes that a finding or order is not properly reflected in the minutes, it could (and should) request to augment the record to bring any inconsistency to the attention of this court and the parties. It has not done so.

V. Reversal Is the Appropriate Remedy When the Juvenile Court Fails To Exact Compliance with the ICWA Requirements, and the Department's Claim that this Court's Practice Is To Affirm and Remand Is Mistaken

The Department posits that, in cases involving orders other than those terminating parental rights, in which the only error is an ICWA violation, this court has a longstanding practice of affirming the orders and simply remanding the matter with instructions that the juvenile court correct the violation and make an IWCA finding. (RB 21.) The authorities it cites in support, however, do not support the proposition that this court engages in that practice. Quite the reverse.

One case cited by the Department, *Hunter W.*, is simply inapposite. (RB 21; *Hunter W., supra,* 200 Cal.App.4th at p. 1467.) There, this court affirmed the juvenile court's no-IWCA finding, so the appropriate remedy for an IWCA reversal was not discussed. (*Hunter W., supra,* 200 Cal.App.4th at p. 1469.)

Two other cases cited by the Department, *In re Christian P.* and *In re Brooke C.*, do stand for the proposition that a reviewing court need not reverse findings and orders when IWCA violations occur. (*In re Christian P.* (2012) 208 Cal.App.4th 437 ["*Christian P.*"]; *In re Brooke C.* (2005) 127 Cal.App.4th 377 ["*Brooke C.*"].)

This court did not issue those opinions.

Brooke C. involved an appeal from an order on disposition in which the only error found was failure to comply with the IWCA notice provisions. (*Brooke C., supra,* 127 Cal.App.4th at p. 386.) Division Two of this court affirmed the dispositional order and remanded the matter with instructions that the juvenile court comply with IWCA. (*Ibid.*) If the child was found to come within the Act, the burden was then shifted to the parent and the tribe to petition the juvenile court to invalidate any orders which violated IWCA and California's implementing provisions. (*Ibid.*)

Division Three employed a similar remedy in *In re Christian P.*, an appeal from a dependency judgment and dispositional order in which an IWCA violation was the only error. (*Christian P., supra,* 208 Cal.App.4th at p. 452.) It affirmed the judgment and dispositional order, and remanded the case with instructions that the juvenile court comply with the IWCA notice provisions. (*Ibid.*) If the children were found to be Indian, then the juvenile court was instructed to conduct all future proceedings in accordance with the Act. (*Id.,* at pp. 452-453.) With respect to orders already made in violation of ICWA, the children, parents, or the tribe would have to petition to invalidate them. (*Ibid.*)

What the Department overlooks is that in the one IWCA error case it cites that was decided by this court, *Tina L. v. Superior Court*, a preemptory writ of mandate issued directing the juvenile court to vacate its order terminating reunification services and setting a section 366.26 hearing. (*Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 268-269.) This court instructed the juvenile court to comply with the inquiry and

notice provisions. (*Ibid.*) If the inquiry and notice compliance resulted in a finding that the children were not Indians coming within the Act, it was to reinstate the previous findings and orders. (*Ibid.*) On the other hand, if the children were found to be Indian, then the juvenile court was directed to conduct new hearings in conformity with IWCA and California's implementing provisions. (*Ibid.*)

Worthy of note, is that, in *In re S.E.*, this court specifically rejected Division Two's approach in *Brooke C.* when reversing an order of guardianship for failure to comply with the IWCA notice provisions. (*In re S.E.* (2013) 217 Cal.App.4th 610, 617.)

Conclusion

For the reasons set forth in Tricia's opening brief and in this one, the order on disposition should be reversed and the matter remanded with instructions that the juvenile court exact compliance with the ICWA inquiry and notice provisions. If the children are determined to be Indian, then a new hearing must be conducted in conformity with the requirements set forth in IWCA

and California's implementing provisions. If the children are determined not to be Indian, then the findings and orders are to be reinstated.

Dated: February 2, 2015

Respectfully submitted,

Cornelius Fine,
Counsel for Appellant Tricia T.

Word Count Certificate

I, Cornelius Fine, certify that the number of words in the body of this brief reported by the word-counting tool in my word processing program is 3466, inclusive of footnotes.

Cornelius Fine