Filed 2/23/24 In re Ryder S. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re RYDER S., a Person Coming Under the Juvenile Court Law.	B330204
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.M. and H.S., Defendants and Appellants.	(Los Angeles County Super. Ct. No. 22CCJP01821)

APPEAL from an order of the Superior Court of Los Angeles County, Philip L. Soto, Judge. Affirmed.

Emery El Habiby, by appointment of the Court of Appeal, for Defendant and Appellant M.M.

Anne E. Fragasso, by appointment of the Court of Appeal, for Defendant and Appellant H.S.

Dawyn R. Harrison, County Counsel, Kim Nemoy, Assistant County Counsel, and Brian Mahler, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

M.M. (mother) and H.S. (father) appeal from the juvenile court's order terminating parental rights (Welf. & Inst. Code, § 366.26)[1] over their child Ryder S. (born May 2022). Mother and father's sole contention on appeal is that the Los Angeles County Department of Children and Family Services (DCFS) and the juvenile court failed to comply with the "initial duty to inquire" under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) and related California statutes (§ 224 et seq.). We agree that DCFS and the juvenile court erred, but we conclude that the errors were harmless. Accordingly, we affirm.

The parties are familiar with the facts and procedural history of the case, so we do not restate those details in full here. Below, we discuss only the facts and procedural history germane to the issue on appeal.

DISCUSSION

A. *Applicable Law and Standard of Review*

ICWA[2] reflects "a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and

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

[2] Our state Legislature incorporated ICWA's requirements into California statutory law in 2006. (*In re Abbigail A.* (2016) 1 Cal.5th 83, 91.)

families by establishing minimum federal standards that a state court . . . must follow before removing an Indian child from his or her family." (*In re Austin* J. (2020) 47 Cal.App.5th 870, 881.) Both ICWA and the Welfare and Institutions Code define an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); § 224.1, subds. (a) and (b) [incorporating federal definitions].)[3]

The juvenile court and DCFS have "an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . may be or has been filed, is or may be an Indian child." (§ 224.2, subd. (a); see *In re Isaiah W.* (2016) 1 Cal.5th 1, 9, 11–12.) 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. The phase at issue here is the initial duty to inquire.

The duty to inquire whether a child is an Indian child begins with "the initial contact," i.e., when the referring party reports child abuse or neglect that triggers DCFS's investigation. (§ 224.2, subd. (a).) DCFS's initial duty to inquire includes asking 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. (*Id.*, subd. (b).) Similarly, the juvenile court must inquire at each parent's first appearance whether he or she "knows or has reason to know that the child is an Indian child." (*Id.,* subd. (c).) The juvenile court must also require each parent to complete the parental

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[3] "[B]ecause 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.)

notification of Indian status form (ICWA-020). (Cal. Rules of Court, rule 5.481(a)(2)(C).) The parties are instructed to inform the court "if they subsequently receive information that provides reason to know the child is an Indian child." (25 C.F.R. § 23.107(a); § 224.2, subd. (c).)

Here, the juvenile court found ICWA did not apply, stating there is "no reason to believe [the case] is an ICWA case." We review the court's ICWA finding for substantial evidence. (*In re Josiah T.* (2021) 71 Cal.App.5th 388, 401; *In re S.R.* (2021) 64 Cal.App.5th 303, 312.)

B. *Initial Inquiry*

Mother and father contend that the juvenile court and DCFS failed to sufficiently inquire into father's potential Indian ancestry as required under section 224.2. We agree.

As discussed, section 224.2, subdivision (b) imposes on DCFS a duty of initial inquiry, which includes asking the parents and extended family members whether the child may be an Indian child.

Here, DCFS failed to interview father or any paternal extended family members about whether Ryder may be an Indian child. Though DCFS interviewed father about the allegations in the section 300 petition, there is no evidence DCFS asked father about Indian ancestry, or his relatives' contact information. We acknowledge father's whereabouts became unknown later in the proceedings. However, DCFS discovered father was in local custody at least two months before the section 366.26 hearing. Despite locating father, there is no evidence demonstrating DCFS tried to contact father during this time. We, therefore, conclude that DCFS did not conduct a proper initial inquiry.

Further, section 224.2, subdivision (c) requires the juvenile court to inquire at each parent's first appearance whether he or she "knows or has reason to know that the child is an Indian child." Here, the court did not ask father about Indian ancestry at his first appearance. Accordingly, we conclude the court did not comply with its statutory duty.[4]

Based on our conclusions, we must next determine whether the errors were harmless.

C. *Harmless Error*

"Where, as here, there is no doubt that [DCFS's and the court's] inquiry was erroneous, our examination as to whether substantial evidence supports the juvenile court's ICWA finding ends up turning on whether that error . . . was harmless—in other words, we must assess whether it is reasonably probable that the juvenile court would have made the same ICWA finding had the inquiry been done properly. [Citation.] If so, the error is harmless and we should affirm; otherwise, we must send it back for the Department to conduct a more comprehensive inquiry." (*In re Dezi C.* (2022) 79 Cal.App.5th 769, 777 (*Dezi C.*), review granted Sept. 21, 2022, S275578.)

California appellate courts have crafted several different tests to decide whether a defective initial inquiry is harmless. (*Dezi C., supra*, 79 Cal.App.5th 777–782.) Until our Supreme Court weighs in on the matter, we will apply the rule set forth in *Dezi C.* Under that standard, "failure to

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[4] Mother also contends the court failed to comply with its duty because it did not clarify "ambiguities" about father's potential Indian ancestry. We reject this contention because the record does not contain any such ambiguities. Father denied Indian ancestry, the maternal relatives DCFS interviewed were unaware of father having any Indian ancestry, and in a prior dependency case involving Ryder's full sibling, the court also found ICWA did not apply.

conduct a proper initial inquiry into a dependent child's American Indian heritage is harmless unless the record contains information suggesting a reason to believe that the child may be an 'Indian child' within the meaning of ICWA, such that the absence of further inquiry was prejudicial to the juvenile court's ICWA finding." (*Id.* at p. 779.) Following *Dezi C.*, we conclude any error in failing to interview father or paternal extended family members about Indian ancestry was harmless.

Here, the record is devoid of any indication Ryder may have Indian ancestry through father. Rather, father signed an ICWA-020 form, indicating he had no known Indian ancestry. The juvenile court also acknowledged receipt of the ICWA-020 form and found ICWA did not apply. At the section 366.26 hearing, the court asked father's counsel whether he had any reason to believe "that there[] [was] an ICWA issue in the case," and counsel stated he did not. Further, neither father nor mother proffered any new information regarding ICWA status during the juvenile court proceedings, or on appeal.

There is also no indication that father would lack knowledge of his family history, as there is no evidence in the record showing he was adopted. (Cf. *Dezi C., supra*, 79 Cal.App.5th at p. 779 [failure to inquire of extended family members may not be harmless if the record indicates that one or both of the parents were adopted and hence their self-reporting of no ancestry may not be fully informed]; see also *In re Ezequiel G.* (2022) 81 Cal.App.5th 984, 1015 [in many cases, a child's parents will be a reliable source for determining whether the child or parent may be a tribal member].)

The maternal extended family members DCFS interviewed were also unaware of father having Indian ancestry.

Lastly, we note neither father nor mother proffer on appeal evidence that a particular paternal family member might know more about father's

ancestry. Thus, we conclude DCFS and the court's failure to comply with their respective section 224.2 duties of initial inquiry is harmless error. (See *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431 [affirming the juvenile court's order terminating parental rights and stating, "[t]here is nothing whatever which prevented [father], in his briefing or otherwise, from removing any doubt or speculation. He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA. He did not"].)

DISPOSITION

The order is affirmed.

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ZUKIN, J.

WE CONCUR:

COLLINS, Acting P. J.

MORI, J.