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See dissenting opinion

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re Ashton C., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. S.R. et al., Defendants and Appellants.	E079831 (Super.Ct.No. RIJ2000558) OPINION

APPEAL from the Superior Court of Riverside County. Dorothy McLaughlin, Judge. Affirmed.

Elizabeth C. Alexander, under appointment by the Court of Appeal, for Defendant and Appellant S.R.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant R.C.

Minh C. Tran, County Counsel, Teresa K.B. Beecham, and Julie K. Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

S.R. (Mother) and R.C. (Father) appeal from the juvenile court's order terminating their parental rights to their son, Ashton C. Both parents argue that the order must be conditionally reversed because the Riverside County Department of Public Social Services (DPSS) violated its duty under California law to ask extended family members about whether Ashton might be an Indian child within the meaning of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.).[1] DPSS argues that the parents' argument is based on a statutory provision that does not apply to this case, because Ashton was never taken into temporary custody without a warrant pursuant to Welfare and Institutions Code section 306. (Unlabeled statutory references are to this code.) We agree with DPSS, and we therefore affirm.

BACKGROUND

Mother's parental rights to two previous children were terminated in 2013. Mother tested positive for opiates and methamphetamine when she gave birth to Ashton in September 2020.

On September 14, 2020, DPSS applied for a protective custody warrant as to Ashton. On the same day, the superior court issued the warrant, and the child was taken into protective custody. On September 16, 2020, DPSS filed a petition as to Ashton

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1 "[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.)

under section 300. The Judicial Council Indian Child Inquiry Attachment form (ICWA-010(A)) attached to the petition states that the social worker inquired about Indian ancestry and that the child has no known Indian ancestry.

Both parents were present at the detention hearing on September 17, 2020. Counsel for both parents confirmed orally on the record that the parents have no Indian ancestry. The court then inquired of each parent, and both parents confirmed orally on the record that they have no Indian ancestry. Mother also filed a Parental Notification of Indian Status form (ICWA-020), stating under penalty of perjury that none of the options on the form (which indicate the child may be an Indian child) applied.

The court found that DPSS had conducted a sufficient inquiry regarding whether Ashton may have Indian ancestry, and the court found that ICWA does not apply. The court found Father to be Ashton's presumed father and detained Ashton from both parents.

The jurisdiction/disposition report states that on October 5, 2020, the paternal grandmother "denied she or her family had Native American ancestry." The report also states that DPSS repeatedly tried to interview the parents concerning Native American ancestry but was unable to contact them.

At the jurisdiction and disposition hearing on October 30, 2020, the court again found that DPSS had made a sufficient inquiry regarding Indian ancestry and again found that ICWA does not apply. The court found true the allegations of the first amended

petition (which was filed the same day as the hearing), removed Ashton from parental custody, and ordered reunification services for both parents.

The status review report for the six-month reviewing hearing states that on January 4, 2021, the social worker asked both parents "about Native American ancestry and tribal affiliations," and both parents again said they had none. At the six-month review hearing on April 14, 2021, the court found that ICWA does not apply, DPSS had made sufficient inquiry, and no new information indicated that ICWA may apply. The court further found that (1) the parents had not participated regularly and made substantive progress in their services, (2) the parents had made no progress in addressing the issues that led to Ashton's removal, and (3) there was no substantial probability that Ashton might be returned to parental custody within another six months. The court accordingly terminated reunification services for both parents and set a selection and implementation hearing under section 366.26.

The report for the section 366.26 hearing states that on July 26, 2021, the paternal grandmother denied any Native American ancestry or tribal affiliation. The report also states that the parents did not request any visitation with Ashton during the reporting period and that the social worker attempted to contact the parents about visitation but was unable to reach them.

At the selection and implementation hearing on September 19, 2022, the court terminated the parental rights of both parents as to Ashton. Both parents timely appealed.

DISCUSSION

Both parents argue that DPSS and the juvenile court did not conduct an adequate initial inquiry to determine whether Ashton is an Indian child within the meaning of ICWA, because DPSS did not ask various extended family members whether they had any Indian ancestry. In response, DPSS argues that no such inquiry of extended family members was required, because the statutory provision on which the parents rely does not apply. We agree with DPSS.

By statute, the county welfare department and the juvenile court have an "'affirmative and continuing duty to inquire' whether a child in a dependency proceeding 'is or may be an Indian child.'" (*In re Ricky R.* (2022) 82 Cal.App.5th 671, 678 (*Ricky R.*), quoting § 224.2, subd. (a).) "The duty to inquire consists of two phases—the duty of initial inquiry and the duty of further inquiry." (*Id*. at p. 678.) 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 applies in every dependency proceeding." (*In re Ricky R., supra*, 82 Cal.App.5th at p. 678.) 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." (§ 224.2, subd. (a).) In addition, "[f]ederal regulations require state courts to ask each participant 'at the commencement' of a child custody proceeding 'whether the participant knows or has reason to know that the child is an Indian child.' (25 C.F.R.

§ 23.107(a) (2022).)" (*Ricky R.*, at pp. 678-679.) Similarly, "[s]tate law requires the court to pursue an inquiry '[a]t the first appearance in court of each party' by asking 'each participant present in the hearing whether the participant knows or has reason to know that the child is an Indian child.' (§ 224.2, subd. (c).)" (*Id*. at p. 679.)

In some cases, California law requires the county welfare department to do more at the initial inquiry stage. Specifically, under 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. Thus, the duty of initial inquiry requires DPSS to ask extended family members about the possible Indian status of a child only if DPSS has taken that child into temporary custody pursuant to section 306. (*In re Robert F.* (2023) 90 Cal.App.5th 492, 497 (*Robert F.*), review granted July 26, 2023, S279743; *In re Ja.O.* (2023) 91 Cal.App.5th 672, 677-678 (*Ja.O.*), review granted July 26, 2023, S280572; *In re Adrian L.* (2022) 86 Cal.App.5th 342, 357-358 (conc. opn. of Kelley, J.) (*Adrian L.*).)

Section 306 permits a social worker to take a child into temporary custody "without a warrant" in emergency situations, namely, when "the social worker has reasonable cause to believe that the child has an immediate need for medical care or is in immediate danger of physical or sexual abuse or the physical environment poses an immediate threat to the child's health or safety." (§ 306, subd. (a)(2).) Peace officers may also take children into temporary custody without a warrant when similar exigent circumstances exist (§§ 305, 305.6, subd. (a)), and section 306 also permits the social

worker to take temporary custody of a child "who has been delivered by a peace officer." (§ 306, subd. (a)(1).) By contrast, section 340 provides for the issuance of protective custody warrants, and on a weaker showing than is required for a warrantless detention under section 306. (§ 340, subd. (b)(2); *Robert F.*, *supra*, 90 Cal.App.5th at p. 501; *Ja.O.*, *supra*, 91 Cal.App.5th at p. 678; *Adrian L.*, *supra*, 86 Cal.App.5th at p. 357 (conc. opn. of Kelley, J.).)

Ashton was taken into protective custody pursuant to a warrant, so he was not taken into temporary custody pursuant to section 306. The expanded duty of initial inquiry under subdivision (b) of section 224.2 therefore does not apply. The parents' argument that DPSS failed to discharge its duty of initial inquiry as to extended family members consequently lacks merit.

In her reply brief, Mother argues that "to exclude inquiry of children removed by a warrant from ICWA inquiry eliminates huge numbers of children who may be Indian children and hurts the tribes." We do not find the argument persuasive, because our interpretation of section 224.2 does not exclude children removed pursuant to warrants from ICWA inquiry. Rather, it excludes such children from the *expanded* duty of initial inquiry under subdivision (b) of section 224.2. Such children are still subject to the duty of initial inquiry under subdivisions (a) and (c) of section 224.2. They are also subject to the duty of further inquiry under subdivision (e) of section 224.2 if there is reason to believe they are Indian children. Our interpretation of the statute merely limits the expanded duty of initial inquiry under subdivision (b) of section 224.2 to the children to

whom the Legislature said it applies, in keeping with relevant federal guidelines. (*Robert F., supra,* 90 Cal.App.5th at pp. 502–503; *Ja.O., supra,* 91 Cal.App.5th at pp. 680-681; *Adrian L., supra,* 86 Cal.App.5th at pp. 361-364 (conc. opn. of Kelley, J.).)

The parents raise two other arguments, but both of them fail. Father asserts that the lack of inquiry as to certain extended family members also violated DPSS's and the court's "continuing duty to inquire" about the child's Indian status under subdivision (a) of section 224.2. Father does not develop the argument or explain how, under the circumstances of this case, the continuing duty to inquire could have been violated even if the duty of initial inquiry was not. We conclude that there was no such violation. DPSS and the court discharged their duty of initial inquiry. That investigation revealed no evidence of any possibility that Ashton might be an Indian child within the meaning of ICWA. On the basis of that investigation, the court found that ICWA did not apply. Thereafter, neither DPSS nor the court received any new information suggesting that Ashton might be an Indian child, so there was no need to conduct any additional inquiry. We accordingly conclude that DPSS and the court did not violate their continuing duty to inquire.

Finally, Mother argues that DPSS violated its duty to report on its ICWA inquiry efforts, because DPSS "provided no further updates on the ICWA after October 30, 2020, in its Jurisdiction/disposition report." The argument is meritless. DPSS did continue to inquire about ICWA after the jurisdiction and disposition hearing and did report on those efforts, including updates in the status review report for the six-month review hearing and

the report for the section 366.26 hearing. Mother has not shown any violation of DPSS's duty to report on its ICWA inquiry efforts.

Another panel of this court has declined to follow *Robert F.* (*In re Delila D.* (2023) 93 Cal.App.5th 953 (*Delila D.*)), and the California Supreme Court has granted review to decide the issue. For the reasons explained in *In re Andres R.* (August 23, 2023, E079972) __ Cal.App.5th __ [2023 Cal.App. LEXIS 638], we continue to agree with *Robert F.* and *Ja.O.*, and we are not persuaded by the criticisms of *Robert F.* that were expressed in *Delila D.* (The majority opinion in *Delila D.* never cites *Ja.O.* and does not address its analysis.)

For all of the foregoing reasons, we conclude that neither parent has shown error by either DPSS or the juvenile court.

DISPOSITION

The order terminating parental rights is affirmed.

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MENETREZ
J.

I concur:

MILLER
Acting P. J.

[*In re Ashton C.*, E079831]

Slough, J., Dissenting.

Following two recent opinions from our court— *In re Robert F.* (2023) 90 Cal.App.5th 492 (*Robert F.*) and *In re Ja.O.* (2023) 91 Cal.App.5th 672 (*Ja.O.*)—the majority concludes there are two types of initial inquiries applicable to social workers under California's ICWA[1]-implementing laws. They conclude there is an expanded duty, which is contained in Welfare and Institutions Code section 224.2, subdivision (b) (section 224.2(b)) and applies only when a child has been removed from home without a warrant. The other duty is set forth in section 224.2, subdivision (a) and applies in all other cases. (Maj. opn. *ante*, at p. 7.) For the reasons set out in *In re Delila D.* (2023) 93 Cal.App.5th 953, I respectfully disagree with the majority. In my view, the duty set out in section 224.2(b) and rule 5.481 of the California Rules of Court applies when a child has been removed from home and is therefore at risk of being placed in foster care. The procedural circumstances under which the child is removed have no business defining the scope of a social worker's investigative duties under ICWA.

Section 224.2(b) was enacted as part of Assembly Bill No. 3176 (2017-2018 Reg. Sess.) (A.B. 3176), which added several new ICWA-related provisions to the Welfare and Institutions Code that became effective January 1, 2019. (Stats. 2018, ch. 833, §§ 1-39.) Our Legislature's dual purposes in enacting A.B. 3176 were to (1) increase tribes' opportunity to be involved in child custody cases involving Indian children and (2) bring

[1] Indian Child Welfare Act (25 U.S.C. § 1901 et seq.)(ICWA).

California law into compliance with 2016 federal ICWA regulations imposing minimum requirements to state court emergency proceedings involving Indian children. (*In re S.S.* (2023) 90 Cal.App.5th 694, 699-702; Cal. Health and Human Services Agency, Enrolled Bill Rep. on Assem. Bill No. 3176 (2017-2018 Reg. Sess.) prepared for Governor Brown (Aug. 31, 2018 & Sept. 4, 2018) pp. 1-2 (Enrolled Bill Report).) To achieve these goals, A.B. 3176 imposed new substantive, time-sensitive ICWA-related requirements for the temporary custody and detention of Indian children and expanded the initial inquiry to include "extended family members, others who have an interest in the child, and the party reporting child abuse or neglect." (§ 224.2(b); see also §§ 306, 319; Stats. 2018, ch. 833, §§ 1-39.)[2] And, after A.B. 3176 went into effect, the Judicial Council revised rule 5.481 of the California Rules of Court to implement the expanded duty of initial inquiry. That rule now provides: "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) (rule 5.481).)

In my view, section 224.2(b) and rule 5.481 create a clear mandate: where a child has been removed from home or is at risk of being removed from home, the social worker

[2] Unlabeled statutory citations refer to the Welfare and Institutions Code.

must ask available extended family members whether the child is or may be an Indian child.

Robert F. and *Ja.O.*, the opinions on which my colleagues rely, conclude instead that circumstances predating the initial petition hearing under section 319 dictate the scope of the initial inquiry. If the child was removed without a warrant, the initial inquiry includes available extended family members, but if they were removed with a warrant (or not removed prior to the initial petition hearing), the inquiry does not include extended family members. *Robert F.* and *Ja.O.* argue that it makes sense to impose such a dichotomy in dependency proceedings because "[t]he warrantless detention of an Indian child . . . triggers [the] especially time-sensitive requirements" A.B. 3176 added to section 306, and those requirements do not apply to children removed by protective custody warrant. (*Robert F.*, *supra*, 90 Cal.App.5th at p. 501, citing § 306, subd. (d); see also *Ja.O.*, *supra*, 91 Cal.App.5th at p. 681 ["because warrantless detentions trigger various time-sensitive ICWA-related requirements that are otherwise inapplicable (§ 306, subd. (d)), it makes sense in such cases to expand the duty of initial inquiry—confirming whether the child in such a case is an Indian child is particularly urgent"].) I do not find this reasoning persuasive.

As an initial matter, A.B. 3176 did not add new ICWA-related requirements to section 306 only. The amendment also added new requirements to section 319, which governs the detention of children at the initial petition hearing. (See Stats. 2018, ch. 833, §§ 19 [amending § 306 to add ICWA-related requirements] & 22 [amending § 306 to add

ICWA-related requirements].) For example, as amended by A.B. 3176, section 319 now provides that if a court "knows or there is reason to know the child is an Indian child," it may not detain the child at the initial petition hearing *unless* it "finds that detention is necessary to prevent imminent physical damage or harm" and "state[s] on the record the facts supporting this finding." (§ 319, subd. (d); Stats. 2018, ch. 833, § 22.) Additionally, if the court does order an Indian child detained at the initial petition hearing, the ICWA placement preferences codified in § 361.31 apply to the child's temporary placement unless the court finds "good cause" to deviate from them. (§ 319, subd. (h)(1)(C).) Thus, if a child removed by warrant may be detained from parental custody at the initial petition hearing prior to jurisdiction, A.B. 3176's requirements will apply if there is reason to know the child is an Indian child.

Thus, contrary to the views expressed in *Robert F.* and *Ja.O.*, the first sentence of section 224.2(b) is not intended to limit or define the initial inquiry that applies throughout a dependency proceeding. Rather, it is intended to frontload a social worker's investigative duties in cases where the child may be detained at the initial petition hearing. Because new requirements now apply to the detention of Indian children at the initial petition hearing, it makes sense that the Legislature wanted to ensure that social workers provide juvenile courts with enough ancestry information *in advance of that hearing* to enable the court to determine whether those requirements are triggered.

The majority places significance on the fact that section 340 requires "a weaker showing" of risk to the child than the exigent circumstances required for warrantless

removals. (Maj. opn. *ante*, at p. 7.) But the basis for removing a child from home has nothing to do with the ICWA investigation. Rather, because the ICWA-related requirements in section 319 apply to *both* categories of children—those removed under exigent circumstance and those removed by warrant—there is no reason to treat the latter category differently for purposes of the investigation. (See § 315 ["If a child has been taken into [temporary] custody . . . and not released to a parent or guardian, the juvenile court shall hold a hearing (which shall be referred to as a 'detention hearing') to determine whether the child shall be further detained"].) Simply put, the need to determine whether a child who may be detained at the initial petition hearing is an Indian child is as urgent for children removed by warrant as it is for children removed without one.

Furthermore, the need to determine whether a child is an Indian child does not diminish in urgency once a case moves past the initial petition hearing stage. If anything, it becomes even more important to determine whether ICWA applies once a child has been adjudged a dependent and removed from parental custody at disposition, as the possibility of permanently separating the child from their family is more concrete than at the initial petition stage.

In my view, *Robert F.*'s holding leads to the irrational result that procedural circumstances predating the initial petition hearing dictate the scope of the initial inquiry throughout the entire proceeding. The result is irrational because the way in which a child

is initially removed from home has no bearing on whether they may have Native American ancestry.

For all these reasons, I disagree with the majority's conclusion that the department was not required to ask available extended family members whether Ashton is or may be an Indian child. Because, as mother points out, the department failed to ask the paternal grandfather, aunt, and uncle whether Ashton has Native American ancestry, I would conditionally reverse the order terminating parental rights and remand for the juvenile court to direct the department to complete its investigation.

SLOUGH
J.