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NEW DEPENDENCY CASELAW

De Facto Parent

In re Abigail L.—published 2/15/22; Second Dist., Div. Seven

Docket No. B310601

Link to case: <https://www.courts.ca.gov/opinions/documents/B310601.PDF>

REMOVAL FROM CAREGIVER'S HOME DOES NOT MOOT A REQUEST FOR DE FACTO PARENT STATUS

In February 2019, when Abigail L. was eight weeks old, she was placed in Heather's foster home where she remained for almost two years. Heather provided for all of Abigail's physical and essential needs and was the only parental figure in Abigail's life. In August 2019, Abigail's half-sister Anahi was also placed in Heather's home. In January 2020, Heather filed a request for de facto parent status. At the hearing for the de facto parent status request, the court continued the hearing to the 366.26 hearing. In March 2020, following an allegation, which Heather denied, that she had slapped Anahi, Heather asked the agency to remove Anahi from her home. Anahi was eventually placed with her aunt and uncle in Arizona. In May 2020, Heather filed another request for de facto parent status. She stated that she had recently learned that the agency was considering moving Abigail to

Arizona with the relatives and Anahi. At the section 366.26 hearing the agency noted its concerns with Heather due to her decision to have Anahi removed; the agency was even investigating whether to rescind Heather's foster home certification. The court placed Abigail on an extended visit with the relatives in Arizona and denied the request for de facto parent status because the request had become moot following the extended visitation order. Heather appealed.

Reversed. On a sufficient showing the court may recognize the child's present or previous custodian as a de facto parent and grant them standing to participate as a party in the dispositional hearing or any hearing thereafter at which the status of the dependent child is at issue. The factors generally considered include whether (1) the child is psychologically bonded to the adult; (2) the adult has assumed the role of a parent on a day-to-day basis for a substantial period of time; (3) the adult possess information about the child unique from other participants in the process; (4) the adult has regularly attended juvenile court hearings; and (5) a future proceeding may result in an order permanently foreclosing any future contact between the adult and the child. The juvenile court's order placing Abigail with Anahi's aunt and uncle in Arizona did not make Heather's request for de facto parent status moot. Also, the allegations about Heather's difficulties with Anahi did not disqualify Heather from de facto parent status for Abigail. Thus, the juvenile court should have granted Heather's request for de facto parent status. (NS)

Beneficial Parental Relationship Exception – WIC 366.26

In re Katherine J.—published 2/17/22; Second Dist., Div. One
Docket No. B313191

Link to case: <https://www.courts.ca.gov/opinions/documents/B313191.PDF>

UNDER THE SECOND PRONG OF THE BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION, THE JUVENILE COURT MAY CONSIDER THE NEGATIVE IMPACT OF A PARENT'S UNRESOLVED ISSUES ON THE CHILD'S EMOTIONAL ATTACHMENT TO THE PARENT

The agency filed a petition in 2016 regarding minor Katherine J. due to father's substance abuse issues and domestic violence with mother. The juvenile court sustained the petition and ordered reunification services for both mother and father. Mother's reunification services were subsequently terminated, but Katherine was returned to father's care in 2018 after the court found that he substantially complied in addressing the issues which led to removal. Shortly after release, father began to regress with regard to his

substance use, culminating in a DUI arrest. After father refused to stop driving with Katherine in his car, the juvenile court ordered him to not transport Katherine while intoxicated and without a valid driver's license. Father continued to miss multiple drug tests and tested positive for cocaine. During this period, despite father's compliance issues, he and Katherine continued to have a positive bond according to the agency. In 2019, the agency filed a petition requesting removal of Katherine from father because of his reoccurring substance abuse issues. The court removed Katherine from father and placed her with maternal grandparents because father refused to move from paternal grandparent's home. In November 2019, while Katherine was with paternal grandmother at a Walmart, father approached them and got into an argument with paternal grandmother. Father then pushed paternal grandmother to the ground, injuring her. Although Katherine and father continued with monitored visits, Katherine later informed her therapist that she was scared of father and enrolled in additional mental health services. Because of this incident as well as father's continued non-compliance, the court terminated his reunification services. A contested .26 hearing was held in May 2021 in which father asserted the beneficial parent relationship exception. Father testified at the hearing about his strong bond with Katherine, the consistency of his visitation with her, and the primary parental role he acted in while she was in his care. The juvenile court found the exception did not apply because although father consistently visited Katherine, it only created an incidental benefit because father's continued substance abuse and assault of paternal grandmother created instability in Katherine's life, resulting in a parent-child relationship that was not beneficial to Katherine. The court also found that even if that kind of parental relationship was demonstrated, the detriment resulting from a termination of parental rights was not outweighed by the benefits of adoption and terminated both mother's and father's parental rights. Father appealed.

Affirmed. A review of the record supports the juvenile court's finding that father did not demonstrate the existence of a substantial, positive emotional relationship with Katherine. Although case law warns against summarily finding that a parent has not occupied a "parental role" as a reason to terminate parental rights, the juvenile court here explained why father's lack of a parental role negatively impacted his relationship with Katherine. While father had consistent, positive contact with Katherine through visitation, father's unresolved substance abuse issues, including his DUI and subsequent refusal to not drive Katherine in his car, destabilized her life and demonstrates a lack of parental concern for Katherine. Furthermore, father's recent violent contact with paternal grandmother traumatized Katherine and "compromis[ed] father's attempts to maintain a strong, positive emotional attachment with her." (SW)

ICWA—WIC 224.2

In re H.V.—published 2/18/2022; Second Dist., Div. Five

Docket No. B312153

Link to Case: <https://www.courts.ca.gov/opinions/documents/B312153.PDF>

THE DUTY TO INQUIRE UNDER ICWA REQUIRES INTERVIEWS OF EXTENDED FAMILY MEMBERS AND OTHERS WHO HAVE AN INTEREST IN THE CHILD

Prior to detention, the agency inquired of mother's Indian ancestry, and mother did not give the social worker any reason to believe the child was or might be an Indian child. In preparing the detention report, the agency interviewed two maternal relatives, although it is unclear whether those relatives were asked about the child's Indian ancestry. For the detention hearing, mother filed a Parental Notification of Indian Status form (ICWA-020), claiming she did not have Indian ancestry as far as she knew. At the detention hearing where mother was present, the juvenile court found that mother did not have Indian ancestry as far as she knew. The juvenile court asked mother if she knew whether alleged father, I.G., whose whereabouts were unknown, had Indian ancestry, and mother communicated that alleged father did not have Indian ancestry. The court found no reason to know that alleged father had Indian ancestry and indicated the court would revisit the issue if alleged father appeared. The court advised mother to inform the court and social worker if she had any updated Indian ancestry information for herself or alleged father. Nearly two months later, mother again denied to the agency that she had Indian ancestry. At the jurisdiction and disposition hearing, the juvenile court sustained allegations involving mother's violent altercation with a female companion in minor's presence. Mother appealed from the court's jurisdiction and disposition orders, contending that the juvenile court and agency failed to comply with their duties under ICWA.

Conditionally affirmed but remanded with instructions. On this record, the agency failed to discharge its first-step inquiry duty. Section 224.2 creates three distinct duties regarding ICWA in dependency proceedings. First, from the agency's initial contact with a minor and his family, the statute imposes a duty of inquiry to ask all involved persons whether the child may be an Indian child. (WIC 224.2, subs. (a), (b).) Second, if that initial inquiry creates a "reason to believe" the child is an Indian child, then the agency "shall make further inquiry regarding the possible Indian status of the child." (WIC 224, subd. (e).) Third, if that further inquiry results in a reason to know the child is an Indian child, then the formal notice requirements of section 224.3 apply. Here, the record reflects that the only person with whom the

agency spoke about the child's possible Indian ancestry was mother. The first-step duty under ICWA required the agency to interview, among others, extended family members and others who had an interest in the child, which the agency failed to do. Even though mother does not affirmatively assert Indian ancestry on appeal, this does not change the fact that the agency's inquiry into the child's Indian ancestry was inadequate and must be remedied pursuant to the instructions provided by this Court. In a dissenting opinion, Justice Baker criticizes the "Byzantine scheme of inquiry, further inquiry, reason to know, and reason to believe that is challenging to even summarize...and impossible to satisfy," given the statutes repeated references to "including but not limited to." The lack of a bright line rule in the statute results in the agency having no way to reliably know when it has discharged its continuing duty to investigate whether a minor could be an Indian child. Justice Baker concludes that, under the deferential standard of review that governs, the juvenile court's finding that ICWA does not apply should be left undisturbed. (AMC)

ICWA—WIC 224.2

In re Darian R.—published 2/24/22; Second Dist., Div. One
Docket No. B314783

Link to case: <https://www.courts.ca.gov/opinions/documents/B314783.PDF>

THE FAILURE TO CONDUCT AN INITIAL ICWA INQUIRY OF MOTHER'S EXTENDED FAMILY WAS NOT PREJUDICIAL BECAUSE MOTHER LIVED WITH THE RELATIVES AND NO MEANINGFUL INFORMATION WAS LIKELY TO BE GLEANED

Parents had a prior dependency case in 2015 with their three children where the ICWA was found to not apply. Subsequently, a new petition was filed in 2019 alleging parents were abusing methamphetamines. In the detention report, mother denied Native American ancestry and father was not asked. A maternal aunt and maternal grandfather, with whom mother lived off and on, were interviewed for the detention report but there was no mention of any ICWA inquiry. Later in the jurisdiction/disposition report, father was interviewed and denied any Native American heritage. Both parents filed parental notification of Indian status forms indicating "no Indian ancestry as far as I know." The juvenile court found that ICWA did not apply, in part due to the finding in the prior case. In August 2021, the juvenile court terminated parental rights. Mother timely appealed.

Affirmed. The agency clearly erred in not questioning maternal aunt or maternal grandfather about Native American ancestry as required in WIC 224.2, but reversal is only necessary if the error is prejudicial. A failure to

ask extended family members about Indian ancestry is prejudicial if “there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child.” (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 744.) The failure to inquire of maternal aunt and maternal grandfather was not prejudicial because it would not have led to any meaningful information on the question of whether these children were Indian children. Both parents were interviewed regarding Native American ancestry and denied any. Since mother lived with her relatives at various times, she had access to any additional information regarding Indian ancestry and had been ordered to continue to provide the juvenile court with any new information related to the ICWA. Unlike the mothers in *Benjamin M.* and *In re Y.W.* (2021) 70 Cal.App.5th 542, who had no relationship or access to the extended family who should have been interviewed, here, mother had a close relationship and plenty of access to her relatives. Finally, the court had previously made an undisputed finding that ICWA did not apply in the earlier case as to the same three children with the same parents. (SH)

ICWA—WIC 224.2

In re S.S.—published 2/24/2022; Second Dist., Div. One
Docket No. B314043

Link to case: <https://www.courts.ca.gov/opinions/documents/B314043.PDF>

IT WAS HARMLESS ERROR FOR THE SOCIAL WORKER TO FAIL TO INQUIRE OF MATERNAL GRANDMOTHER WHETHER SHE HAD NATIVE AMERICAN ANCESTRY SINCE THE MATERNAL GRANDMOTHER AND COUNSEL WHO REQUESTED PLACEMENT WITH HER HAD AN INCENTIVE UNDER ICWA TO REVEAL ANY FACTS SUGGESTING NATIVE AMERICAN ANCESTRY BUT DID NOT DO SO, SUGGESTING NO SUCH INFORMATION EXISTS

A dependency petition was filed for S.S., which included a statement that the social worker made an “Indian child inquiry” and that there was no known Indian ancestry. Mother failed to appear for the detention hearing, and S.S. was detained from her care. The following week, mother told the social worker that she did not want S.S. placed with the maternal grandmother and there were no other relatives available. She did not wish to provide information on father’s identity. The jurisdiction/disposition report indicated that mother previously denied Indian ancestry and that ICWA did not apply. At the jurisdiction/disposition hearing mother made her first and only appearance. She filed an ICWA-020 form indicating she had no Indian ancestry as far as she knew. Father’s identity was never revealed. The juvenile court found that the ICWA did not apply and removed S.S. from

mother's care. Three months later, maternal grandmother asked the agency for visits with S.S. and informed the agency that she was interested in adopting her. A year after the jurisdiction/disposition hearing, mother's counsel requested that S.S. be placed with maternal grandmother. At the same hearing, her reunification services were terminated, and a section 366.26 hearing was set. Three months later, minor's counsel requested the agency assess maternal grandmother for placement. During the assessment, maternal grandmother told the agency that she wanted S.S. placed with her. The juvenile court denied the maternal grandmother's request for placement. At the section 366.26 hearing, the court terminated parental rights. Mother appealed.

Affirmed. The agency's failure to inquire of maternal grandmother whether she had Indian ancestry was not prejudicial since there were not readily obtainable facts that were likely to suggest the existence of Native American ancestry. When mother first spoke with the agency, she informed them that her family had no Native American ancestry, and the ICWA-020 form she submitted to court also said she had no Native American ancestry that she knew of. At that same hearing, the juvenile court found that the ICWA did not apply as to mother. Following the test set forth in *In re Benjamin M.*, "a court must reverse where the record demonstrates that the agency has not only failed in its duty of initial inquiry, but where the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child." (*In re Benjamin M.*, (2021) 70 Cal.App.5th 735, 744.) Here, maternal grandmother, minor's counsel, and mother's counsel all requested placement with maternal grandmother. Under ICWA, placement with a relative is a preferred placement. Given this, had there been any information suggesting S.S. was an Indian child, either maternal grandmother, minor's counsel, or mother's counsel was incentivized to inform the court. Since no information was provided to the court, it is implied that the maternal grandmother does not know of any information suggesting Native American ancestry. Under this standard, it was not prejudicial error to fail to ask maternal grandmother about possible Native American ancestry. (KH)