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NEW DEPENDENCY CASE LAW

WIC 388; Reasonable Services

In re Damari Y.—published 6/12/2023; First Dist., Div. Two
Docket No. A166037
Link to case: https://www.courts.ca.gov/opinions/documents/A166037.PDF

AN EVIDENTIARY HEARING ON A PARENT'S SECTION 388 PETITION IS WARRANTED WHEN THE PETITION PROVIDES EVIDENCE WHICH CASTS DOUBT ON THE JUVENILE COURT'S FINDING THAT REASONABLE SERVICES WERE OFFERED AND THE PARENT WAS NOT PROVIDED WITH THE REQUIRED WRIT ADVISEMENTS FOR CHALLENGING THE ORDERS TERMINATING SERVICES.

The juvenile court took jurisdiction over Damari Y. during the COVID-19 pandemic. At his birth, both Damari and his mother tested positive for illegal drugs, and Damari's father was incarcerated. At the jurisdiction/disposition hearing, father requested DNA testing. Thereafter, the juvenile court deemed father to be a biological parent and ordered the agency to provide him with reunification services. At the six-month hearing, father's attorney reported difficulties in communicating with father at his place of incarceration, resulting in a continuance of the hearing. At the continued six-month hearing, the agency sought to terminate father's services due to his lack of communication with the social worker, but conceded it had not provided six months of services at that time. The juvenile court found the department had made reasonable efforts and continued father's services, scheduling

a combined six-month/twelve-month hearing. At that hearing, the agency renewed its recommendation to terminate father's services due to father's lack of communication with the social worker. Father was not present at the hearing. He was represented by his third attorney, who had never spoken to father, mistakenly believed the minor was a female, and submitted on the agency's recommendation to terminate father's reunification services. The juvenile court terminated father's services and set a section 366.26 permanency hearing, but failed to provide father with the requisite writ advisements for challenging the court's termination of his reunification services. On the eve of the section 366.26 hearing, father's fourth attorney filed a section 388 petition requesting to reinstate father's reunification services, and later, amended the petition to request the court modify its prior reasonable services finding. At the section 366.26/388 setting hearing, father's attorney informed the court about systemic communication issues at father's place of incarceration resulting in father being denied phone calls and regular mail service. The juvenile court nevertheless denied father's section 388 petition without a hearing, and terminated father's parental rights. Father appealed.

Reversed. Father's failure to file a writ petition contesting the termination of his reunification services was not fatal to his section 388 petition because father was not present at the hearing when the court terminated his reunification services, and the court failed to properly provide father with the requisite writ advisement. Moreover, justice requires the juvenile court set father's section 388 petition for a hearing. Father presented evidence regarding his desire to participate in reunification services, and evidence of communication failures which were outside of his control. Further, the child would benefit from knowing he was wanted. The circumstances of this case are unique. The entirety of the proceedings took place during the COVID-19 pandemic, which resulted in many of the hearings being held via videoconferencing. Throughout the duration of the case, father was transferred to three different prisons, and rotated through several different attorneys, resulting in communication difficulties. The agency never received any responses from its communications to father or the prison officials. These circumstances demonstrate that father was entitled to an evidentiary hearing on the merits of his section 388 petition because the evidence casts doubt on the court's reasonable services finding, and the father was not present or properly advised of his ability to file a writ petition challenging the termination of his reunification services when the section 366.26 hearing was set. (TL)

ICWA—WIC 224.2(b)

In re H.B.—published 6/20/23; Second Dist., Div. Eight
Docket No. B322472
Link to Case: https://www.courts.ca.gov/opinions/documents/B322472.PDF

SECTION 224.2(B) DOES NOT REQUIRE INQUIRY WITH EVERY EXTENDED FAMILY MEMBER; RATHER, THE DUTY OF INITIAL INQUIRY IS SATISFIED WHEN THE INFORMATION THE AGENCY OBTAINS HAS RELIABLY ANSWERED THE QUESTION OF WHETHER THE CHILD IS OR MAY BE AN INDIAN CHILD.

During the initial dependency investigation, mother denied possible Indian heritage. At the detention hearing, the paternal grandmother, paternal aunt and maternal great-grandmother were present. Neither parent appeared. The juvenile court found ICWA did not apply and none of the relatives were questioned as to possible Indian ancestry. At subsequent arraignment hearings, both parents submitted ICWA-020 forms denying Indian ancestry. The paternal grandmother, paternal grandfather and paternal aunt were also present during these hearings. Based on the parents' ICWA-020 forms, the juvenile court found no reason to know the child was an Indian child. At the adjudication hearing, the petition was sustained; the paternal grandmother, paternal step grandfather and maternal aunt were present. At the dispositional hearing, reunification services were ordered and a maternal step-sister was present. During the reunification period, the agency made contact with the maternal great-aunt, maternal great-uncle, and a maternal cousin. Following the termination of reunification services, the agency was ordered to interview all known living relatives regarding possible Indian heritage. Father, paternal grandfather and paternal grandmother denied any Indian heritage. Mother, the maternal grandmother and maternal great-uncle also denied any Indian heritage. Subsequently, the juvenile court found ICWA did not apply and terminated parental rights. Father timely appealed.

Affirmed. Father asserted the agency failed to meet their duty of initial inquiry under ICWA; his claim of error was based on the agency's failure to inquire with the maternal grandfather, paternal step-grandmother and maternal stepsister. As to the paternal step-grandmother and maternal stepsister, the agency was not required to include them in their initial ICWA inquiry because they did not fall under the definition of an "extended family member" pursuant to section 224.2(b). Father's challenge involving the maternal grandfather was also rejected. Mother had lost contact with the maternal grandfather and was unable to provide the agency any contact information. Under such circumstances, the agency's ability to conduct an exhaustive ICWA inquiry was deemed "constrained." The agency's duty of initial inquiry did not include, "the names of unidentified family members or … individuals for whom no contact information has been provided." Further, whether

additional inquiry is warranted depends heavily on how much information the agency already possesses—the more family members the agency has inquired of, the less the benefit that is likely to obtain from additional inquiry. In this case, the agency inquired with the parents, the paternal grandparents, maternal grandmother and the maternal great-uncle, the maternal grandfather's brother. The agency inquired of the child's possible Indian ancestry from both sides of the family and it contacted every person identified by the family. Thus, the juvenile court had an adequate basis to conclude the child was not an Indian child. (MO)

ICWA—25 U.S. Code 1901 et seq.

Haaland v. Brackeen et al.—published 6/15/23; U.S. Supreme Ct.
Docket No. 21-376
Link to case: https://www.supremecourt.gov/opinions/22pdf/21-376_7l48.pdf

[1] ICWA IS CONSISTENT WITH CONGRESS'S EXCLUSIVE AUTHORITY TO LEGISLATE WITH RESPECT TO INDIAN TRIBES; [2] THE ACTIVE EFFORTS, PLACEMENT PREFERENCE, AND RECORDKEEPING PROVISIONS OF ICWA DO NOT IMPLICATE THE ANTICOMMANDEERING PROHIBITION OF THE TENTH AMENDMENT; [3] PETITIONERS DO NOT HAVE STANDING TO BRING EQUAL PROTECTION AND NONDELEGATION CLAIMS CHALLENGING ICWA'S PLACEMENT PROVISIONS.

Three separate child custody proceedings implicating ICWA are the basis for this appeal. (1) A dependency case involving then 10-month-old A.L.M., who was placed with the Brackeens. The Brackeens, residents of Texas, sought to adopt A.L.M., who was a member of the Navajo Nation, but the Navajo Nation requested placement of A.L.M. with non-relative tribal members residing in New Mexico. After a contested hearing in state court, the Brackeens' adoption petition was denied, but the Brackeens were subsequently able to finalize adoption of A.L.M. after the Navajo Nation withdrew from consideration. The Brackeens also sought to adopt A.L.M.'s sister. (2) An adoption case concerning Baby O. Baby O.'s mother identified the Librettis, who resided in Nevada, as adoptive parents for her newborn daughter. The Pueblo Tribe intervened in the adoption proceedings and enrolled Baby O. as a member of the tribe. The tribe requested to have Baby O. reside with placements on the tribal reservation in El Paso, Texas. Subsequently, the Pueblo Tribe withdrew from the case and the Librettis finalized their adoption of Baby O. (3) A dependency case involving Child P. Maternal grandmother belonged to the Ojibwe tribe. Child P. resided in foster care for two years before being placed with the Cliffords, who indicated an interest in adopting her. The tribe intervened and Child P. was subsequently placed with maternal grandmother. The Cliffords sought to pursue the adoption, but the juvenile court denied their motion based on ICWA.

These collective individual petitioners – a birth mother, foster parents, and adoptive parents from these three child custody cases, as well as the State of Texas and two other states who later dropped out of the case – filed a suit in federal court against the United States and other federal parties in order to challenge ICWA. The district court granted Petitioners' motion for summary judgement on their constitutional claims, but a Fifth Circuit panel reversed. The Fifth Circuit then reheard the case en banc, affirming in part and reversing in part. Petitioners' writ for certiorari was granted to address their constitutional claims regarding ICWA.

Affirmed in part, reversed in part, vacated and remanded in part. [1] Congress's power to legislate with regard to Indian tribes through ICWA is "plenary and exclusive" as established under the Indian Commerce Clause of Article I and the Treaty Clause of Article II. Additionally, Congress maintains the authority to regulate Indian affairs through the inherent structure of the Constitution as well as the federal government's established moral obligation towards Indian tribes. While the responsibility for addressing family law issues primarily resides with the States, when it interferes with federal regulations, Congress can specifically preempt those same state laws. Petitioners' arguments do not address these precedents. [2] Although the Tenth Amendment bars Congress from commanding the States to enforce a federal regulatory program, ICWA's regulations concerning active efforts and placement preferences do not implicate the Tenth Amendment as it applies equally to both state and private actors. ICWA's recordkeeping provisions are likewise consistent with the Tenth Amendment as the state's duties to record information to comply with ICWA are ancillary to the state's primary obligation to conduct child custody proceedings. [3] The individual petitioners and the State of Texas do not have standing to bring their equal protection and nondelegation claims as they did not demonstrate any likely injury to be addressed by judicial relief. Moreover, the state officials who implement ICWA are not parties to this suit and the federal parties who were sued do not enforce or carry out the provisions of ICWA. In a concurring opinion, Justice Gorsuch reviewed the historical inequities experienced by Indian tribes, including the forced abduction and removal of Indian children from their families which led to the enacting of ICWA, as well as the importance of ICWA in preserving Indian tribes and cultures. (SW)

Placement—WIC 388, 361.3, 16002

In re D.P.—published 6/30/23; Fourth Dist., Div. One
Docket No. D081396
Link to Case: https://www.courts.ca.gov/opinions/documents/D081396.PDF

THE ADOPTIVE PARENTS OF SIBLINGS ARE NOT RELATIVES PURSUANT TO SECTION 361.3 AND THEREFORE NOT ENTITLED TO THE RELATIVE PLACEMENT PREFERENCE.

In August 2021, newborn, D.P., was detained from mother and father due to substance abuse. Parental rights were previously terminated for D.P.'s two older siblings who now live with their adoptive parents in Michigan. D.P.'s adult half-sibling also lived with the adoptive family. In August 2021, the agency contacted the siblings' adoptive parents who confirmed they were interested in placement for D.P. and ensured their foster care license was updated. At three days old, in August of 2021, D.P. was placed in the resource family home of A.G. and K.P. In January 2022, at the jurisdiction and disposition hearing, the juvenile court ordered an expedited Interstate Compact on the Placement of Children (ICPC) evaluation for the siblings' adoptive parents' home. The siblings and their adoptive parents began virtual visits in March 2022, and the ICPC was approved in July 2022. Also in July 2022, the juvenile court granted A.G. and K.P.'s request for an order designating them as D.P.'s de facto parents. In August 2022, reunification services were terminated for the mother and father. When terminating reunification services, the juvenile court noted that the siblings' adoptive parents do not fall within the definition of a relative pursuant to WIC 361.3(c)(2) and, while they began having in-person visits, the agency was ordered not to change D.P.'s placement absent a special hearing. In October 2022, the siblings' adoptive parents filed a WIC 388 Petition and requested that D.P. be placed in their care. The agency submitted on the 388 Petition and requested that D.P. be placed with her biological siblings. The juvenile court set an evidentiary hearing on the WIC 388 Petition in December 2022. At the evidentiary hearing, paternal relatives and the social worker testified. The juvenile court denied the siblings' adoptive parents WIC 388 Petition finding it was not in D.P.'s best interest. The siblings' adoptive parents and D.P. appealed.

Affirmed. WIC 361.3(a) requires preferential consideration be given to a relative's request for placement of a dependent child. Pursuant to WIC 361.3(d) the preference applies at the disposition hearing, and thereafter, whenever a new placement of the child must be made. The requesting relative should be the first placement considered and investigated pursuant to WIC 361.3(c)(1). However, WIC 361.3 does not create a guarantee of placement, or even an evidentiary presumption in favor of placement with the relative. D.P.'s siblings' adoptive parents failed to make a substantive argument pursuant to WIC 361.3 in the juvenile court and were, therefore, precluded from raising the issue on appeal. Regardless, the siblings'

adoptive parents are not D.P.'s relatives pursuant to WIC 361.3(c)(2). The siblings' adoptive parents are related to D.P.'s siblings by adoption, but not to D.P. herself by adoption. Furthermore, the siblings' adoptive parents are not related to D.P. within the fifth degree of kinship. Even if the siblings' adoptive parents were relatives under the statute, the relative placement preference did not apply because D.P. did not need a new placement. The juvenile court did not abuse its discretion when determining that the proposed change in placement was not in D.P.'s best interest. The primary consideration was D.P.'s stability and continuity. D.P. had a secure attachment to her de facto parents, they were meeting her needs, and D.P. would be traumatized if she had to move to a new family with whom she had a limited relationship, and whose future relationship was uncertain given the age gap between the siblings. Substantial evidence supported the juvenile court's decision that D.P. should remain with the de facto parents. (EG)