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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re CHRISTIAN P. et al., Persons Coming Under the Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. SANDRA D., Defendant and Appellant.	B236528 (Los Angeles County Super. Ct. No. CK87644) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [CHANGE IN JUDGMENT]

THE COURT:

A Petition for Rehearing/Modification was filed by Respondent on August 7, 2012. For good cause shown, the opinion filed in this cause on July 23, 2012, is modified as follows:

1. On pages 17-20, the language of section "3. *DCFS Failed to Fully Comply with ICWA*," beginning with the first paragraph starting, "Mother contends that DCFS failed to conduct . . . " and continuing through the last sentence of that section

ending, " . . . remand the case to the trial court," is deleted. The following language is inserted in its place:

Mother contends that DCFS failed to provide the Navajo Nation with all available information required to effectuate meaningful notice pursuant to ICWA. She asserts that the trial court erred when it found that DCFS had complied with these notice requirements and that ICWA did not apply. She seeks a remand of the case with instructions to the trial court to order DCFS to comply with ICWA.

The United States Congress enacted ICWA to respond to a crisis in which large numbers of Indian children were being removed from their families for placement in non-Indian homes. [Citation.] ICWA was designed to protect the best interests of Indian children and promote the stability and security of Indian tribes and families by establishing minimum federal standards for the removal of Indian children from their families by state courts and the placement of such children in foster or adoptive homes. [Citation.] At the heart of ICWA are its jurisdictional provisions over child custody proceedings[7] involving Indian children domiciled both on and off the reservation. [Citations.]" (*In re Jack C.* (2011) 192 Cal.App.4th 967, 975-976.)

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[7] The term "child custody proceeding" is defined for these purposes to include: (1) " 'foster care placement' which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; [¶ (2)] 'termination of parental rights' which shall mean any action resulting in the termination of the parent-child relationship; [¶ (3)] 'preadoptive placement' which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and; [¶ (4)] 'adoptive placement' which shall mean the permanent

"Among ICWA's procedural safeguards is the duty to inquire into a dependent child's Indian heritage and to provide notice of the proceeding to any tribe or potential tribes, the parent, any Indian custodian of the child and, under some circumstances, to the Bureau of Indian Affairs." (*In re G.L.* (2009) 177 Cal.App.4th 683, 690.) To comply with these notice requirements, DCFS was required to (1) identify any possible tribal affiliations and send notice to those tribes; and (2) submit copies of such notices, including return receipts, and any correspondence received from the tribes to the trial court. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739-740.)

"The [trial] court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings. [Citation.] We review the trial court's findings for substantial evidence. [Citation.]" (*In re E.W.* (2009) 170 Cal.App.4th 396, 403-404.) " 'While the record must reflect that the court considered the issue and decided whether ICWA applies, its finding may be either express or implied.' [Citations.]" (*Id.,* at p. 404.)

DCFS concedes that the trial court's ruling regarding the adequacy of the ICWA notices sent in this case was erroneous. Specifically, DCFS admits that it failed to comply with section 224.2, subdivision (a)(5)(C), which states, "All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment

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placement of an Indian child for adoption, including any action resulting in a final decree of adoption." (25 U.S.C. § 1903, subd. (1); see also § 224.1, subd. (d).)

numbers, and any other identifying information, if known," shall be included in the notice provided pursuant to ICWA. As a result, our inquiry here is to determine the effect of DCFS's failure to provide adequate notice at this stage in the proceedings. We have determined that reversal of neither the judgment nor the dispositional order is necessary in this case.

We recognize that there has been a split of authority and agree with the more recently decided cases on point concluding that "a notice violation under ICWA is not jurisdictional in the fundamental sense, but instead is subject to a harmless error analysis. [Citations.]" (*In re G.L.*, *supra*, 177 Cal.App.4th at p. 695; see also, *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1410-1411; but see *In re Desiree F.* (2000) 83 Cal.App.4th 460, 474-475; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) " 'To hold otherwise would deprive the [trial] court of all authority over the dependent child, requiring the immediate return of the child to the parents whose fitness was in doubt.' [Citation.] An appellant seeking reversal for lack of proper ICWA notice must show a reasonable probability that he or she would have obtained a more favorable result in the absence of the error. [Citations.]" (*In re G.L.*, *supra*, 177 Cal.App.4th at p. 695-696.)

Mother neither argued nor pointed to any facts that support the conclusion that she would have obtained a more favorable result in the absence of the error. Therefore, rather than reversal, the proper remedy here is a limited remand to allow DCFS to comply with ICWA, with directions to the trial court that depend on the outcome of

such notice. (*In re Brooke C.*, *supra*, 127 Cal.App.4th at p. 385; see also, *In re Veronica G.* (2007) 157 Cal.App.4th 179, 188; *Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 267 [limited remand still appropriate after amendments to section 224.2].)

As we've stated before, "[w]e are growing weary of appeals in which the only error is [DCFS's] failure to comply with ICWA. [Citation.] Remand for the limited purpose of ICWA compliance is all too common. [Citation.] The ICWA's requirements are not new. Yet the prevalence of inadequate notice remains disturbingly high." (*Justin L. v. Superior Court* (2008) 165 Cal.App.4th 1406, 1410.)

2. On page 21, the paragraph under, "***DISPOSITION***," is deleted in its entirety and replaced with the following:

The judgment and dispositional order are affirmed and the matter is remanded for the limited purpose of directing the trial court to order DCFS to comply with the notice provisions of ICWA, the relevant case law interpreting ICWA and the views expressed in this opinion, and to file all required documentation with the trial court for its inspection. If, after proper notice, a tribe claims that Christian and Antonio are Indian children, the trial court shall proceed in conformity with all provisions of ICWA. And, the children, their mother, and their tribe may petition the trial court to invalidate any orders that violated ICWA. (*In re Veronica G.*, *supra*, 157 Cal.App.4th at p. 188; 25 U.S.C. § 1914.) If, on the other hand, no tribe makes such claim, prior defective notice becomes harmless error.

The judgment has been changed.

The petition for rehearing is denied.