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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Abbigail A., et al., Persons Coming Under the Juvenile Court Law.	**S220187** [Court of Appeal, Third Appellate District, no. C074264]
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Appellant, vs. **J.A., ET AL.,** Defendants and Respondents.	[Sacramento County no. JD232871-2]

MINORS' BRIEF

On Appeal From The Judgment
Of The Juvenile Court of Sacramento County

HONORABLE PAUL L. SEAVE, JUDGE

✧✧✧

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INTRODUCTION

At issue in this case is the validity of portions of two rules of court adopted by the Judicial Council in 2008, California Rules of Court,[1/] rules 5.482 and 5.484, dealing with compliance in California with the Indian Child Welfare Act (hereafter, ICWA). As relevant here, there are two separate requirements found in these rules, which must be distinguished, one from the other.

First, if the affected tribe responds to an ICWA notice of proceedings by "indicating that the child is eligible for

---

[1/] All following references to "rules" are to the California Rules of Court.

membership if certain steps are followed," then "*the court must proceed as if the child is an Indian child.*" (Rule 5.482(c); emphasis added.) Rule 5.484 elaborates on these ICWA compliance prerequisites, which include special evidentiary burdens (rule 5.484(a)), standards and preferences in placement of an Indian child (rule 5.484(b)), and a showing of "active efforts" (rule 5.484(c)); see 25 U.S.C.A. § 1912(d) and Welf. & Inst. Code, § 361.7).

It is this first requirement, that the trial court must "proceed as if the child is an Indian child," when the child is admittedly not (yet) an ICWA-qualified "Indian child," to which County Counsel, father's counsel, and mother's counsel, have primarily directed their arguments. It is also to this requirement that the Court of Appeal directed most of its analysis, as well as its order for disposition: "The judgment is reversed with directions to enter a new judgment that does not direct the application of ICWA provisions to the minors, until such time as they may qualify as Indian children under the ICWA . . . ." (Slip Opn., p. 14.) As just indicated, however, there is a separate component to these rules, to which the minors wish to specifically direct this Court's attention.

The second requirement adopted by the Judicial Council, as stated in rule 5.482(c), is that the trial court must "direct the appropriate individual or agency to provide active efforts under rule 5.484(c) to secure tribal membership for the child." Rule 5.484(c)(2), in turn, directs that court-ordered services "must include pursuit of any steps necessary to

secure tribal membership for a child if the child is eligible for membership in a given tribe . . . ." Thus, as a separate requirement, the Rules of Court provide for an order directed at both individuals *and* the social services agency to pursue steps necessary to secure tribal membership for an eligible child.

The juvenile court in this case specifically ordered the Department *and* minors' counsel to pursue the children's enrollment in the Cherokee Nation. (RT 54-56, 65.) Minors here will show that such an order is within the juvenile court's statutory authority. Additionally, rules 5.482 and 5.484, constitute a proper extension of this authority. Moreover, nothing in ICWA preempts such an order made in a state court.

Thus, Minors intend to show that, *even if* the first requirement, that the court must "proceed as if the child is an Indian child," when the child is admittedly not an ICWA-qualified "Indian child," is either contrary to State law or preempted by the ICWA, the second requirement – that the social services agency may be directed to pursue steps necessary to secure tribal membership for an eligible child – is *not* invalid. Minors specifically address this issue because it is raised in the Department's answering brief, and because Minors wish to ensure that this Court, when ruling on the issue presented for review, does not inadvertently undermine the trial court's authority to make an order that the parties assist in enrolling an eligible child in the tribe.

STATEMENT OF THE CASE AND FACTS[2/]

Respondent father (ROBM 2-9), the respondent mother (RABM 5-9) and the Department (AABM 11-18) have all provided adequate statements of the case and facts. Accordingly, no further summary of the case and facts will be provided by the minors here.

[2/] References to the Clerk's Transcript are abbreviated as "CT"; the Reporter's Transcript is referred to as "RT." Citations to briefing in this case are as follows: Respondent father's Opening Brief on the Merits (ROBM), Respondent mother's Answering Brief on the Merits (RABM), Appellant's Answering Brief on the Merits (AABM), and the Respondent father's Reply Brief on the Merits (RRBM).

ARGUMENT

I. The minors hereby adopt and support respondent father's arguments that rules 5.482 and 5.484 are valid, consistent with State law, and not preempted by the federal Indian Child Welfare Act.

The minors hereby join in the father's opening brief and reply brief on the merits. (Rule 8.200(a)(5).)

The minors also wish to bring to the Court's attention the fact that the Bureau of Indian Affairs recently updated its Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, effective February 25, 2015. (80 Fed. Reg. 10146-10159.) Most relevant to the issues in this case, the Guidelines now provide as follows:

> B.1. When does the requirement for active efforts begin?
>
> (a) The requirement to engage in "active efforts" begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal.
>
> (b) *Active efforts to prevent removal of the child must be conducted while investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe.* (*Id.* at p. 10152; emphasis added.)

Thus, according to the Bureau of Indian Affairs (BIA), under the ICWA, the "active efforts" requirement should be applied as soon as it appears that the child is a member of a tribe, "or is eligible for membership in the tribe."

As father argues in his reply brief, the BIA Guidelines should be accorded great weight in construing the ICWA. (RRBM, Arg. II.F., pp. 21-22.) This is compelling support for the conclusion that rules 5.482 and 5.484 are consistent State law implementing the ICWA, as construed by the BIA.

II. The juvenile court has the authority to order minor's counsel and the social services agency to pursue an eligible child's membership in the tribe.

The trial court in this case correctly and succinctly observed that it was faced with two separate questions in applying rules 5.482 and 5.484:

> First of all, is there – does the Court have an obligation under the Rules of the Court to order the Department to make reasonable efforts to help the children secure tribal membership? And then, secondly, does the – is the Court obligated under these rules to act as if the Indian Child Welfare Act applies? (RT 38.)

Most of the briefing by the Department, the father, and the mother in this case has addressed the second question: whether the juvenile court is obligated to apply the ICWA,

when it is determined the child is eligible for membership in the tribe, even though the child is not yet an "Indian child" under the Act.

The minors here will address in greater detail the first question: does the juvenile court have the authority to order the Department to assist the child in securing tribal membership? Minors do so for two reasons: First, because the Department has argued, in its answering brief on the merits, that this provision in the subject rules is contrary to State law and preempted by the ICWA. (AABM Arg.III.D., pp. 88-91); second, *if* this Court is inclined to find that rules 5.482 and 5.484 conflict with Welfare and Institutions Code section 224.1, subdivision (a), (or the ICWA), Minors seek this Court's clarification that its finding *does not* amount to a determination that the trial courts lack the authority to order the social services agency and other parties to assist in enrolling an eligible child in the tribe.

A. Apart from rules 5.482 and 5.484, minor's counsel and the juvenile court have the duty and statutory authority to investigate and, if deemed in the minor's best interests, to pursue the child's membership in the tribe; this includes the court's authority to order the social services agency to assist.

Counsel appointed to represent the child in dependency proceedings, where Indian heritage has been established, has an independent duty to investigate the child's eligibility for membership in the subject tribe, and to evaluate and report to the court regarding the benefits to the child from pursuing membership/enrollment. Minors' trial counsel in this matter complied with this duty. Moreover, the court has the authority to order the parties to pursue membership.

To begin with, Welfare and Institutions Code section 317, subdivision (e)(1) stipulates that counsel for the minor "shall be charged in general with the representation of the child's interests." To that end, appointed counsel "shall make or cause to have made any further investigations that he or she deems in good faith to be reasonably necessary to ascertain the facts . . . ."

More to the point, subdivision (e)(3) of the same section specifically requires minor's counsel to investigate the child's interests even beyond the scope the dependency proceedings themselves, and to report to the court any other interests of the child that may need protection in another forum. Since eligibility for membership in an Indian tribe may be fairly

characterized as a matter *within* the scope of the dependency proceedings, it is patent that the benefits of such membership must be investigated and, if deemed in the best interests of the child, pursued by minor's counsel.

Father's opening brief on the merits, in the course of arguing that the primary responsibility for pursuing tribal membership for an eligible child must rest with the social services agency, asserts that section 317 expressly prevents a minor's attorney from assuming "the responsibilities of a social worker" and providing "nonlegal services to the child." (ROBM 30-31, citing § 317, subd. (e)(3).) Minors would point out that this provision, which, incidentally, says that a child's counsel is "not required" to assume a social work duties, is the same subdivision that *requires* counsel to investigate "the interests of the child beyond the scope of the juvenile proceeding, and report to the court other interests of the child that may need to be protected . . . ."

Minors agree with father that the department has the greater resources and experience in dealing with other agencies, including Indian tribes, and properly may be required to take the lead in accomplishing tribal enrollment for an eligible child. Nonetheless, pursuing tribal enrollment entails legal work by minor's counsel, not simply social work. (See, e.g., Abbott, et al., Cal. Juvenile Dependency Practice (Cont.Ed.Bar 2015), The Indian Child Welfare Act, § 9.50, pp. 783-784 [a sample form for minor's counsel to request enrollment of the child in the tribe].) Minors therefore

disagree with father to the extent he may be suggesting that minor's counsel has no role to play in this endeavor. Of course, in this case, minors' trial counsel vigorously advocated for the children's enrollment in the Cherokee Nation. (See., e.g., 2CT 436-438.)

The juvenile court is also given broad authority to make orders in the best interests of the child. For a child adjudged a dependent child, the court "may make *any and all reasonable orders* for the care, supervision, custody, conduct, maintenance, and support of the child, including medical treatment . . . ." (Welf. & Inst. Code, § 362, subd. (a); emphasis added.) Indeed, section 317, although generally dealing with the appointment and responsibilities of counsel, admonishes that "The court shall take whatever appropriate action is necessary to *fully protect the interests of the child.*" (Welf. & Inst. Code, § 317, subd. (e)(7); emphasis added.)

If the juvenile court decides that further action is necessary to secure or protect the child's interests, it may "[a]uthorize and direct the child's attorney to initiate and pursue appropriate action." (Rule 5.660(g)(3)(B).)

According to one authoritative guide on juvenile dependency practice,

> If the child is an Indian child within the meaning of the ICWA (25 U.S.C. 1903(4)) but is not yet an enrolled member of the tribe, the child's attorney should request that the tribe enroll the child as a member. . . . Enrollment in the tribe may carry with it a number of benefits to the child, including

> federal rights to health care and educational benefits, an interest in tribal gaming proceeds, and other benefits that are available only to enrolled members of a recognized tribe. (Abbott, et al., Cal. Juvenile Dependency Practice, *supra*, Representing Children, § 12.30, p. 1100.)

Although this discussion regarding a child's counsel's ICWA obligations is prefaced by the assumption that the child is already an "Indian child" under ICWA, albeit not yet enrolled (presumably because a parent is a member of the tribe), the logic extends equally to the situation where the child is not yet an "Indian child" as defined by ICWA, but is eligible for membership. This is especially true in light of the authorities discussed above.

At least one published decision in California has found that minor's counsel, and the juvenile court, are obligated to investigate and consider the benefits to the affected child from enrolling that child in his or her tribe, where the child is eligible for membership. In *In re Barbara R.* (2006) 137 Cal.App.4th 941, a division of the Fourth District considered a contention by the mother that there was a conflict of interest with minors' counsel, or ineffective assistance of counsel, in the context of Indian tribal rights. One of the minors was eligible for membership in the Sycuan Band of the Kumeyaay Nation, but there was a possibility that she might lose her entitlements by proceeding with terminating parental rights.

Citing section 317, the appellate court in *Barbara R.*

acknowledged that the child's counsel was obligated to investigate the child's tribal entitlements. The court found, nonetheless, that there was sufficient evidence to infer that the minors' counsel "properly performed his official duty under section 317, subdivision (e), to investigate other interests of the child beyond the scope of the juvenile proceeding." (*In re Barbara R., supra*, 137 Cal.App.4th at p. 953, citing Evid. Code, § 664.)

There was a strong dissent in *Barbara R.* to the majority's assertion that minors' counsel properly performed his duty to investigate and report to the court the child's tribal entitlements. Justice Benke observed that the child stood to receive a monthly stipend of $1,500 to be placed in a trust until age 18, an increased monthly stipend after age 18, a free higher education, housing on reservation land, and lifetime medical and dental coverage. (*Id.* at p. 956.) According to the dissent, minors' counsel acknowledged he did not know the scope of the benefits the child was entitled to, nor whether she would lose those benefits if the juvenile court terminated parental rights. Counsel repeatedly argued that those matters were irrelevant to the proceedings. By not fully investigating the nature of the benefits and whether those benefits were in jeopardy, and by failing to put that information before the court, Justice Benke felt minors' counsel's representation of the eligible child should have been found deficient. (*Id.* at pp. 958-959.)

In any event, *Barbara R.* stands for the proposition that a

minor's counsel, when representing a child who may be eligible for membership, is charged with the duty to investigate the child's eligibility and entitlements. Counsel must then report to the juvenile court, so that the court may order counsel and the agency, if appropriate, to pursue tribal membership. Notably, *Barbara R.* was decided in 2006, before rules 5.482 and 5.484 were adopted by the Judicial Council in 2008.

There is one other case that may appear to have reached a contrary conclusion, *In re Jose C.* (2007) 155 Cal.App.4th 844, from the Fifth District. There, the mother's principal argument on appeal was that her children were Indian children within the meaning of ICWA because they had been determined to be eligible for membership with the Caddo Nation, and the Tribe had sole authority to determine their membership. This argument was easily disposed of: although the children were eligible for membership, they were not Indian children within the ICWA's definition. (*Id.* at pp. 847-849.)

As a secondary argument, the mother argued that the juvenile court erred in not requiring that the minors be enrolled in their tribe. According to the court, the mother had provided no authority for the proposition that a court must enroll eligible minors in a tribe, nor any authority for the proposition that a court had the authority to do so. (*Id.* at p. 849.) It thus appears that the argument made to the court in *Jose C.* is very different from Minors' argument here. Only the

tribe has the authority to enroll a member. As the Fifth District held, the juvenile court has no authority to enroll an eligible child in the tribe. This is very different from the trial court's authority to order the agency or other interested individuals to pursue membership/enrollment in the tribe.

The Court of Appeal then observed, in a footnote, that the requirements of the ICWA were set forth in detail in the federal statutes, and the California Legislature had recently enacted statutes detailing how California should proceed in complying with the ICWA requirements. (*Id.* at p. 849, fn. 2, citing Welf. & Inst. Code, §§ 224–224.6.) The court in *Jose C.* reasoned that if the Legislature had wanted to set forth requirements for the trial court to enroll eligible minors, it could have done so. Because it had not done so, the court was "not in a position to engraft such a requirement into the statutes." Finally, the court cautioned that "enacting such a requirement would need to be closely scrutinized to prevent interference in tribal determinations of membership." (*Id.* at p. 849, fn. 2.)

Evidently the court in *Jose C.* did not have before it the decision in *Barbara R.*, published the year before. Nor, apparently, were the provisions of section 317 and 362 brought to its attention.

The court in *Jose C.* was correct when it declared then that there was no authority for the proposition that the juvenile court has a mandatory duty to order enrollment of a child eligible for membership in a tribe. Only the tribe may enroll a

child. Moreover, as already noted, *Jose C.* was decided before rules 5.482 and 5.484 were adopted. Based on the authorities already discussed, however, Minors contend that the Fifth District was wrong to the extent it was suggesting that the juvenile court lacked any the authority to order minor's counsel and the agency to pursue enrolling the children. To borrow a phrase used by Justice Butz in her opinion in this case (Slip opn., p. 13), the absence of a specific provision in the Legislature's re-enactment of ICWA's provisions seems a rather "weak reed upon which to lean" in arguing that the juvenile court lacks any the authority to order minor's counsel and the agency to assist with an eligible child's enrollment.

Minors have established that child's counsel have the statutory authority and duty to investigate and, if deemed in the minor's best interests, to pursue the child's membership in the tribe, to include asking the juvenile court for an order directing the social services agency to assist. And the court possesses the statutory authority to make such an order.

Having established this authority and responsibility, we next turn to consider the effect of the Judicial Council's adopting, in 2008, rules 5.482 and 5.484.

B. The requirement to actively pursue membership for an eligible child, as provided in rules 5.482 and 5.484, is valid as an extension of the juvenile court's statutory authority to make such an order, and is not contrary to State law or preempted by the ICWA.

When a dependent child is removed from the custody of the parent or parents and not placed with a previously non-custodial parent, the social services agency receives legal custody of the child. (Welf. & Inst. Code, § 361.2, subd. (e).) Thus, the agency is in a far superior position to *facilitate* enrollment by ordering necessary birth and death records and taking other steps, including interfacing with the relevant tribe or tribes, obtaining and completing required forms, etc. It is therefore critically important that the juvenile court is empowered to order the agency to assist with the enrollment process.

In 2008, the Judicial Council adopted two rules, which combined together require the juvenile court in dependency cases, among other things, to order the social services agency and other parties, including minor's counsel, to take reasonable steps to secure tribal membership for an eligible child. All or portions of these rules have been quoted numerous times in the briefs on the merits; nonetheless, certain excerpts bear repeating to make an important point about the particular wording of the rules.

As most relevant to the argument here, rule 5.482(c)

provides, in part:

> If . . . a tribe responds indicating that the child is eligible for membership if certain steps are followed, the court must . . . direct the appropriate individual or agency to provide *active efforts* under rule 5.484(c) to secure tribal membership for the child. (Emphasis added.)

Thus, rule 5.482 couches the trial court's obligation to pursue tribal membership in terms of "active efforts."

It is unfortunate that the Judicial Council chose to frame this requirement in terms of "active efforts," as that is a term of art in ICWA practice, and one that does not clearly encompass enrolling the child in the tribe. The term, active efforts, arises from 25 U.S.C.A. § 1912(d), which stipulates:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. (Emphasis added.)

This requirement, to prove that "active efforts" have been undertaken to prevent the breakup of the Indian family, is one that applies only when the child has been found to be an "Indian child" as defined by ICWA (25 U.S.C.A. § 1903(4)). In cases where the child is eligible for membership in the tribe, but the parent is not a member, as here, the child is not yet

an "Indian child," but will become an Indian child if certain steps are followed. Of course, on the other hand if the eligible child's parent is already a member of the tribe, then the child is already an Indian child under ICWA, with all ICWA protections in place.

The other rule, to which rule 5.482 specifically refers, is rule 5.484(c). That subsection of the rule restates and, in some particulars, elaborates on what constitute "active efforts" to preserve the Indian family, so as to comply with the ICWA. The troublesome part of this provision is found in rule 5.484(c)(2):

> *Efforts to provide services must include pursuit of any steps necessary to secure tribal membership for a child if the child is eligible for membership in a given tribe,* as well as attempts to use the available resources of extended family members, the tribe, tribal and other Indian social service agencies, and individual Indian caregivers. (Emphasis added.)

The term, "services" refers back to the requirement found in 25 U.S.C.A. § 1912(d), for "remedial services and rehabilitative programs" designed to prevent breaking up the Indian family.

The Judicial Council's addition of this requirement – to secure tribal membership for the child – probably makes sense and would likely be unobjectionable even to the Department, *if* we are dealing with a situation where the eligible child's parent is already a member of the tribe. As

already explained, in this event, the child is already an Indian child under ICWA, and enrolling the child simply completes the process of affiliating the subject child with the tribe.

On the other hand, in cases where the child is eligible for membership in the tribe, but neither parent is an enrolled member, as here, the child is not yet an "Indian child" under ICWA. In such a case, the "active efforts" requirement under ICWA has not been triggered. But acknowledging this reality does not logically lead to the conclusion advanced by the Department in this case.

According to the Department, the requirement to order reasonable efforts by the social services agency to assist in securing membership for the child is contrary to State law and/or preempted by the ICWA. (AABM Arg.III.D, pp. 88-91.) The gist of appellant's complaint, however, is that the Judicial Council has improperly characterized this requirement as one of the "active efforts" required by the ICWA. Clearly, it is not. But this constitutes, at most, unfortunate drafting by the rules' drafters.

Nowhere does the Department explain why the requirement to order the agency or other involved individuals to assist in securing the child's enrollment or membership – standing by itself – is contrary to State law or preempted by the ICWA. As the minors have carefully detailed above, such a requirement is valid under California law.

It may be that these rules should be rewritten. Minors

strongly urge this Court, however, to refuse to hold that the juvenile court is powerless to order the agency or other appropriate individuals to assist in securing an eligible child's membership in the tribe.

CONCLUSION

Rules 5.482 and 5.484 are consistent with the Bureau of Indian Affairs recently updated Guidelines for State Courts on applying the ICWA, and are therefore not contrary to State law and the ICWA. This Court should reaffirm the trial court's authority to order minor's counsel and the social services agency to pursue an eligible child's membership in the tribe. The trial judge in this case had it right: the court properly ordered that minors' counsel and the agency take reasonable steps to enroll the children in the Cherokee Nation, and, in light of that order, correctly decided that they should proceed with ICWA protections in place.

Dated: April 9, 2015 Respectfully submitted,

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Attorney for the Minors
By Appointment of the Supreme Court Under Assistance From the Central California Appellate Program

CERTIFICATE OF COMPLIANCE –
RULES 8.360(b), 8.412(a)

In re Abbigail A., et al., no. S220187

I certify that this brief is proportionately spaced, has a typeface of 13 points and contains 4,402 words, excluding the tables, this certificate, and any attachment permitted under rule 8.360(b), according to the WordPerfect X6 software program with which it was prepared. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Davis, California on April 9, 2015.

_____
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Case No. S220187

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Yolo, and an active member in good standing of the State Bar of California. I am not a party to the above-numbered action, and my business address is shown above.

On April 9, 2015, I served this MINORS' BRIEF on the parties in the action by placing a true copy, enclosed in a sealed envelope and with postage fully paid, in the United States Post Office mail box at Davis, California, addressed as follows:

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[continued . . .]

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 9, 2015, at Davis, California.

_____

KIMBALL J.P. SARGEANT