Filed 2/3/15 In re J.T. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.T. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. T.T., Defendant and Appellant.	E061642 (Super.Ct.No. RIJ1300305) OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson, Judge. Reversed with directions.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

I

INTRODUCTION

Mother's substance abuse led to the Riverside County Department of Public Social Services, Child Protective Services (CPS) removing mother's four children from her care. Mother appeals the juvenile court order terminating her parental rights to J.T. (12 years old), S.T. (eight years old), A.T. (five years old), and Ja.T. (four years old) (collectively, the children).[1]

Mother contends CPS did not comply with California Rules of Court, rules 5.482(c) and 5.484(c)(2)[2] in making active efforts to enroll the children in the Cherokee Nation Tribe (Tribe). During the juvenile dependency proceedings, the Tribe informed CPS the children were eligible for membership and had received their application but additional documentation was necessary for enrollment. CPS failed to provide the requested documentation. Mother requests this case remanded with instructions CPS comply with rules 5.482(c) and 5.484(c)(2), requiring active efforts to secure tribal membership for the children. CPS argues it is not required to enroll the children in the Tribe because rules 5.482(c) and 5.484(c)(2) are invalid, since they are inconsistent with state and federal statutory law. CPS further argues it complied with rules 5.482(c) and 5.484(c)(2) by making active efforts to secure tribal enrollment for the children in the Tribe.

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[1] Mother has two older children by a different father, who are not the subject of this appeal and are no longer minors.

[2] Undesignated rule references are to the California Rules of Court.

We conclude rules 5.482(c) and 5.484(c)(2) are valid to the extent CPS is required to make active efforts to secure tribal enrollment for the children in the Tribe. We further conclude substantial evidence shows that CPS did not comply with this requirement. Judgment is therefore reversed for the limited purpose of allowing CPS to make an active effort to secure tribal membership for the children and, if successful, to allow the Tribe to intervene.

II

FACTUAL AND PROCEDURAL BACKGROUND

This juvenile dependency case originated in Orange County. Between March 2006 and June 2012, there were seven referrals for general neglect and sexual abuse. The children were taken into the custody of social services in 2009, after mother permitted the children to have unmonitored contact with their father, who allegedly sexually abused one of the children. There was also a restraining order between mother and father because they had engaged in domestic violence. Father suffered from bipolar disorder and was suicidal. Mother reunited with the children in 2010. In April 2012, father committed suicide.

After father died, the family was evicted from mother's apartment, mother checked into a rehabilitation facility, and the children were left in the care of their paternal grandparents (grandparents). On November 6, 2012, the children were detained in protective custody, when grandparents were no longer able to care for them. The children were placed with their paternal aunt and uncle, the children's prospective adoptive parents.

On November 8, 2012, the Orange County Social Services Agency (OCSSA) filed a juvenile dependency petition in the instant case, on behalf of the children, under Welfare & Institutions Code section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling).[3] The petition alleged mother failed to obtain appropriate medical and dental care for the children; the family lived in a filthy home, with rabbit and cat feces throughout the home; and mother abused alcohol and prescription medication, which interfered with her ability to care and supervise the children.

In January 2013, the juvenile court found the children dependents of the Orange County Juvenile Court. Also in January 2013, mother moved to Riverside County and remarried a month later. The court transferred the case to Riverside County in March 2013.

Mother ultimately was unsuccessful in rehabilitating and reuniting with the children. As a consequence, the juvenile court terminated reunification services in January 2014, and terminated mother's parental rights on June 3, 2014.

III

INDIAN CHILD WELFARE ACT PROCEEDINGS

The sole issue raised in this appeal concerns Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) compliance. Mother contends CPS did not fully comply with ICWA requirements, since CPS did not make active efforts to enroll the

[3] Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

children in the Tribe. The failure to complete the membership application process impeded the Tribe's ability to intervene in the case.

A. Factual Background Regarding ICWA Compliance

During the detention hearing in November 2012, mother denied having any American Indian heritage but stated father might have Indian heritage. Mother's parental notification of Indian status form also stated father might be a member of, or eligible for membership in, the Tribe.

OCSSA stated in the jurisdiction/disposition report, filed in December 2012, that ICWA might apply to the children. OCSSA reported that a social worker sent an email in November 2012, stating the following: "The [] children first came into custody in 2009. The Cherokee Nation determined that the children were eligible for membership through the paternal great[-]great[-]grandfather . . . . Enrollment applications were completed and sent to the Cherokee Nation at that time. Dependency for the children was terminated in 7/2010. It is unclear if enrollment was ever completed. Father is now deceased. Mother was unsure if children were ever enrolled. Per my conversation with Amanda Neugin with the Cherokee Nation, ICWA 30s will be completed and enrollment will be confirmed or not. [¶] Family and tribal information was obtained and documented in the 'Notice of Child Custody Proceeding for Indian Child'/ICWA 30 form." The email further stated that in November 2012, notice was sent to the Bureau of Indian Affairs, the Secretary of the Interior, and the Tribe. OCSSA also spoke to the parents and all available relatives regarding possible Indian heritage.

On December 14, 2012, OCSSA filed a Notice of Child Custody Proceeding for

Indian Child, indicating father and the children's grandfather had Cherokee Nation ancestry but had not enrolled in the Tribe. The form further stated the children's paternal great-grandfather had Cherokee Nation ancestry and it was uncertain whether he had enrolled in the tribe. The Tribe membership roll numbers of the children's paternal great-great-great- grandfather and paternal great-great-great-great-grandfather were provided on the form.

On December 26, 2012, OCSSA received a response letter from the Tribe, stating that the children could be traced to tribal ancestry. The children were therefore eligible for enrollment in the Tribe by having direct lineage to an enrolled member. Enclosed with the Tribe's response was a membership application for the children, which was to be completed and signed by the party having custody of the children or his/her representative. The letter further stated the Tribe could not intervene unless the children or eligible parent applied for and received membership.

In May 2013, CPS filed another Notice of Child Custody Proceeding for Indian Child, stating the Tribe was notified of the disposition hearings in May 2013.

By letter dated April 25, 2013, the Tribe once again informed CPS that the children could be traced to tribal ancestry. The children were therefore eligible for enrollment in the Tribe by having direct lineage to an enrolled member. Enclosed with the Tribe's response was a membership application for the children, which was to be completed and signed by the party having custody of the children or his/her representative. The letter further stated the Tribe could not intervene unless the children or eligible parent applied for and received membership.

Enclosed with the April 25, 2013 letter, was an undated notice from the Tribe, stating that father had previously submitted enrollment applications, which had been pending in the Tribe's registration department, and that, in order to continue that enrollment process, the registration office required (1) a custody order signed by a judge showing the state has custody and (2) a copy of the caseworker's ID badge.

On June 3, 2013, the Tribe sent CPS a letter again stating that the children could be traced to tribal ancestry and the children were therefore eligible for enrollment in the Tribe. The letter further stated that the Tribe's first notice with a membership application was mailed 30 days ago. The Tribe did not receive a response and therefore was sending another application. The Tribe noted it was not currently empowered to intervene because the children were not members of the Tribe.

The Tribe sent CPS another similar letter with an application on June 28, 2013. The letter further stated that the Tribe would not send additional applications to CPS and if the children were subsequently enrolled, CPS would be required to send a new notice, since the current notification was being closed because of lack of a response.

CPS's six-month status review report filed on November 27, 2013, stated that CPS was "currently in the process of completing applications for enrollment as to the children." CPS added that the Tribe had been noticed of the December 10, 2013 six-month status review hearing.

CPS stated in the section 366.26 hearing report filed on May 8, 2014, that ICWA applied, the children might be Cherokee, and enrollment applications were previously completed and sent to the Tribe in 2009. CPS further stated it was "currently in the

process of completing applications for enrollment" as to the children. In addition, the Tribe had been provided notice of the May 2014 section 366.26 hearing, which was continued to June 3, 2014. Mother's parental rights were terminated without the Tribe intervening.

B. Enrollment in the Tribe

Mother argues CPS failed to comply with rule 5.482 (c), which requires CPS to use active efforts to secure the children's tribal membership. Mother asserts that CPS did not make any effort to enroll the children, other than attempting to complete the application form. CPS did not submit additional paperwork the Tribe requested for completion of the application.

Even though mother was not present at the section 366.26 hearing and her attorney did not argue noncompliance with the requirement CPS actively secure tribal membership, the objection was not waived or forfeited because ICWA is intended to safeguard the interest of the tribe that may wish to claim the child as a member, and that interest may not be waived, forfeited, or lost by reason of any omission or failure by an individual. (*In re Z.N.* (2009) 181 Cal.App.4th 282, 296-297 ["failure to give tribal notice is not an issue forfeited by a parent's failure to object."].)

We apply the substantial evidence standard of review to the juvenile court's ICWA findings. (*Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 643-646.) The interpretation of statutes and court rules, however, is a question of law, which we review de novo. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 81; *California Court Reporters Assn. v. Judicial*

Council of California (1995) 39 Cal.App.4th 15, 22.)

Mother argues the juvenile court and CPS failed to comply with ICWA's "active efforts" requirements. Section 1912, subdivision (d), of ICWA provides: "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." (Italics added.) The ICWA "active efforts" requirement is implemented in California by section 361.7.

Section 361.7, subdivision (a), states: "Notwithstanding Section 361.5, a party seeking an involuntary foster care placement of, or termination of parental rights over, an *Indian child* shall provide evidence to 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." (§ 361.7, subd. (a), italics added.) Section 361.7 further provides: "What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers." (§ 361.7, subd. (b).)

Section 366.26 states that "[t]he court shall not terminate parental rights" "[i]n the case of an Indian child" if "[a]t the hearing terminating parental rights, the court has found that active efforts were not made as required in Section 361.7." (§ 366.26, subd.

(c)(2)(B)(i).) Although the phrase "active efforts" is not defined by either federal or state statute, California courts have construed "active efforts" to be "essentially equivalent to reasonable efforts to provide or offer reunification services in a non-ICWA case . . . . (*In re Michael G.* [(1998) 63 Cal.App.4th 700] 713-714)." (*Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 998; see *Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016.)

There is no claim in this case that active efforts were not made to provide or offer mother remedial services and rehabilitative programs, aimed at preventing the family's breakup. Rather, mother contends CPS did not make active efforts to enroll the children in the Tribe, which is required under rules 5.484(c)(2) and 5.482(c). CPS argues rules 5.484(c)(2) and 5.482(c) are invalid because they improperly expand the requirement of "active efforts" to include pursuit of any steps necessary to secure tribal membership.

Under our state charter, the Judicial Council is authorized to adopt rules of court that are "not . . . inconsistent with statute." (Cal. Const., art. VI, § 6, subd. (d).) "'The Judicial Council shall establish rules governing practice and procedure in the juvenile court not inconsistent with law.'" (*In re C.B.* (2010) 190 Cal.App.4th 102, 135, fn. 11 (*C.B.*).)

A rule of court inconsistent with legislative intent is invalid even absent an express legislative prohibition on the promulgation of a rule on the subject. A rule can also be inconsistent even though it operates harmoniously with a statute. (*California Court Reporters Assn. v. Judicial Council of California*, *supra*, 39 Cal.App.4th at pp. 23, 25-26 [rejecting Judicial Council's claims to the contrary]; *id.* at p. 22 [Judicial Council's

rulemaking authority subordinate to Legislature]; accord, *In re Robin M.* (1978) 21 Cal.3d 337, 346; cf. *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011 [courts not bound by Judicial Council's interpretation of statute].) Rules 5.484(c)(2) and 5.482(c) are not inconsistent with state or federal legislation to the extent they require the juvenile court and CPS to make active efforts to enroll children, who are eligible for membership, in an Indian tribe.

Rule 5.484(c) states: "In addition to any other required findings to place an Indian child with someone other than a parent or Indian custodian, or to terminate parental rights, the court must find that active efforts have been made . . . to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and must find that these efforts were unsuccessful. [¶] (1) The court must consider whether active efforts were made in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe. [¶] (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." (Italics added.)

Rule 5.482(c) provides that "[i]f after notice has been provided as required by federal and state law a tribe responds indicating that the child is eligible for membership if certain steps are followed, *the court must proceed as if the child is an Indian child* and direct the appropriate individual or agency to provide active efforts under rule 5.484(c) to secure tribal membership for the child." (Italics added.)

An "Indian child," is defined under Title 25 United States Code section 1903 as "any unmarried person who is under age eighteen and is either (a) a member of a tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," (25 U.S.C. § 1903(4)) "e*xcept as may be specifically provided otherwise*." (25 U.S.C. § 1903.) Similarly, under California law, section 224.2, subdivision (a), provides that "*unless the context requires otherwise*," the term "Indian child" is defined as provided in section 1903 of ICWA. (§ 224.1, subd. (a), italics added; accord, *In re Jack C.* (2011) 192 Cal.App.4th 967, 977-978 (*Jack C.*)

In the instant case, the children were not Indian children under ICWA, even though the Tribe's response indicated they were eligible for membership, because they were neither members of the Tribe nor were they biological children of a member of the Tribe. (25 U.S.C. § 1903, subd. (4); *C.B., supra*, 190 Cal.App.4th at p. 135.) In *C.B., supra*, 190 Cal.App.4th 102, the court questioned "whether rule 5.482(c) and rule 5.484(c) are consistent with the controlling statute." (*C.B.*, at p. 135.) Without deciding the issue or elaborating, the *C.B.* court concluded that, regardless, the record supported the conclusion the Department of Family and Children's Services (DFCS) made active efforts to secure tribal membership for the child. (*Id.* at p. 136.)[4]

The court in *In re Jose C.* (2007) 155 Cal.App.4th 844, 849 (*Jose C.*), concluded

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4 The California Supreme Court recently granted review of *In re Abbigail A.* (2014) 176 Cal.Rptr.3d 850 (rev. granted 9/10/14, S220187), in which the Court of Appeal held that "rules 5.482(c) and 5.484(c)(2) are inconsistent with state law and consequently could not authorize the application of the ICWA in the present proceedings to minors who are not Indian children within the meaning of the ICWA." (*In re Abbigail A.* (2014) 226 Cal.App.4th 1450, 1461.)

that the mother of children eligible for Indian membership "has not provided any authority for the proposition that a court must enroll eligible minors in a tribe or any authority for the proposition that a court has the authority to do so. The Caddo Nation had proper notice of the eligibility of these minors for enrollment and chose not to do so. The ICWA does not require more on the part of the court." The *Jose C.* court noted that "[t]he requirements of the ICWA are set forth in detail in the federal statutes and California has recently enacted statutes detailing how California should proceed in complying with the ICWA requirements. (See §§ 224-224.6.) If the Legislature wanted to set forth requirements for the trial court to enroll eligible minors, it could have done so; having failed to do so, we are not in a position to engraft such a requirement into the statutes." (*Jose C.*, at p. 849, fn. 2.) *Jose C.* is not dispositive here because it was decided before the 2008 promulgation of rules 5.482 and 5.484, which clearly state that the court and county welfare department are required to make active efforts to enroll a child eligible for membership in an Indian tribe.

Although the federal ICWA definition of "Indian Child" limits the term to children who either are members of a recognized Indian tribe or have parents who are members, rules 5.482(c) and 5.484(c) do not conflict with the state and ICWA definition or improperly expand the definition of Indian child to include children eligible for membership. Rules 5.482(c) and 5.484(c) merely require CPS to take active measures to enroll children eligible for Indian membership so that the children will receive ICWA protections and benefits. This must be done before terminating parental rights when a tribe has confirmed a child is eligible for membership, so as to allow the tribe an

opportunity to intervene. Rules 5.482(c) and 5.484(c) do not define such a child as an Indian child but do require diligent efforts be made to enroll a child so that the child will have an opportunity to qualify as an Indian child under ICWA.

Although a child may not be a member of a tribe, when there is evidence the child is eligible for membership, the higher standard of protection provided in rules 5.482(c) and 5.484(c) is permissible. As explained in *Jack C., supra*, 192 Cal.App.4th at page 977, "In certain respects, California's Indian child custody framework sets forth greater protections for Indian children, their tribes and parents than ICWA. (*In re Damian C.* [(2009) 178 Cal.App.4th 192,] 197 [legislative purpose was to broaden the interpretation of current laws]; see, e.g., §§ 224, subd. (d), 224.3, subd. (e)(1), 305.5.) Both federal and state law expressly provide that if a state or federal law provides a higher level of protection to the rights to the parent or Indian guardian of an Indian child, the higher standard shall prevail. (25 U.S.C. § 1921; Welf. & Inst. Code, § 224, subd. (d) [the higher standard of protection also applies to the rights of the child's Indian tribe].)" The higher level of protection provided in rules 5.482(c) and 5.484(c)(2), requiring CPS to make active efforts to obtain membership for an eligible child, furthers the ICWA objective of protecting the best interests of Indian children and promoting the stability and security of Indian tribes and families, and is not inconsistent with ICWA or state statutory law. (25 U.S.C. § 1902.)

Title 25 United States Code section 1902 states, regarding ICWA, that "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by

the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." "ICWA, federal guidelines implementing ICWA, and any state statutes, regulations or rules promulgated to implement ICWA shall be liberally construed to effectuate its purpose and preferences. (Bureau of Indian Affairs: Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584, A.1., (Nov. 26, 1979) (Guidelines).)" (*Jack C., supra*, 192 Cal.App.4th at p. 977.)

"The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) To further these goals, tribes are entitled to take jurisdiction over or intervene in state dependency proceedings. (25 U.S.C. § 1911(a) & (c).) As noted in *Jack C., supra*, 192 Cal.App.4th at page 977, "The reorganization of statutes and codification into state law of various provisions of ICWA, the [Bureau of Indian Affairs] Guidelines and state court rules affirmed the state's interest in "'protecting Indian children and the child's interest in having tribal membership and a connection to the tribal community.'" [Citation.]"

Consistent with this state interest in protecting an Indian child's interest in tribal membership, rules 5.482 and 5.484 impose an affirmative duty on the juvenile court and the county welfare department to make an active effort to obtain tribal membership for a child when the tribe has notified the county welfare department that the child is eligible.

To the extent the rules require CPS to make a reasonable, active attempt to obtain tribal membership for a child, we conclude the rules do not expand or conflict with the state or federal statutory definition of an Indian child. The rules' requirement that CPS "provide active efforts under rule 5.484(c) to secure tribal membership for the child" (rule 5.482(c)) furthers the objective of ICWA and has no bearing on the ICWA definition of "Indian child."

The rules are consistent with state legislation, such as section 224, subdivision (a)(1) and (2). Subdivision (a)(1) states that "the State of California has an interest in protecting Indian children who are members of, *or are eligible for membership in, an Indian tribe*. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and other applicable law, designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community." (Italics added.)

Subdivision (a)(2) of section 224 states: "It is in the interest of an Indian child that *the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected*, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has

resided or been domiciled." (Italics added.) Rules 5.482 and 5.484 appropriately require the courts and juvenile dependency agencies to make active efforts to enroll a child who is eligible for membership in a tribe. This requirement is not inconsistent with federal ICWA law or state statutory law.

In the juvenile dependency case, *Jack C., supra,* 192 Cal.App.4th 967, the court stated that, to the extent there was any ambiguity in the children's Indian status, California law, including rules 5.484 and 5.482, imposes procedural protections for non-enrolled Indian children. (*Jack C.,* at p. 981.) The *Jack C.* court stated that "Rule 5.482(c) does not, as the Agency contends, impermissibly expand ICWA beyond its jurisdictional limits. ICWA expressly permits state or federal law to provide a higher standard of protection to the rights of the Indian child and his or her parent or Indian guardian than the protection of rights provided under ICWA. (25 U.S.C. § 1921.) Thus ICWA does not preempt such higher state standards. [Citation.] Rather, rule 5.482(c) promotes the timely resolution of dependency matters by avoiding protracted litigation concerning the applicability of ICWA. (See *In re Kahlen W.* [(1991) 233 Cal.App.3d 1414,] 1425 ['[ICWA] is intended, as is state law, to protect the best interests of the child, and thus timely disposition is paramount.'].)" (*Jack C.,* at p. 981.)

The *Jack C.* court found that the record indicated the juvenile court was aware the children would be enrolled in the Band as soon as the Band received the father's certified birth certificate. The *Jack C.* court therefore concluded the juvenile court should have proceeded as if the children were Indian children when it considered whether to transfer jurisdiction to the tribal court. (*Jack C., supra,* 192 Cal.App.4th at pp. 981-982.)

In the instant case, unlike in *Jack C.*, the Tribe did not determine that the children were Indian children under ICWA, without being members of the Tribe. Rather, the Tribe expressly stated that the children were required to become enrolled members before the Tribe would intervene and their membership application had not been completed. Nevertheless, *Jack C.* supports the proposition that the juvenile court and CPS were required under rules 5.484 and 5.482 to make active efforts to obtain tribal membership for the children before terminating parental rights. (*Jack C., supra,* 192 Cal.App.4th at p. 981.) CPS's noncompliance with the "active efforts" requirement under rules 5.484 and 5.482 requires this matter to be remanded to the juvenile court to allow CPS to take active and diligent action in completing the children's membership application, by providing the information and documents requested by the Tribe.

C. Active Efforts to Obtain Tribal Membership

CPS argues that, even if rules 5.484(c)(2) and 5.482(c) are proper, CPS complied with them by making active efforts to secure tribal membership. We disagree. Unlike in *C.B., supra,* 190 Cal.App.4th 102, in which the court held the county welfare department took active efforts to secure tribal membership, here, there is substantial evidence CPS did not do so.

In *C.B., supra,* 190 Cal.App.4th 102, the county DFCS submitted a membership application but was unable to comply with the tribe requirement that state certified birth/death certificates be provided to establish lineage to the enrolled tribal member. The children's paternal grandmother refused to provide the required documents because she did not want the children enrolled in the tribe and had withdrawn her own enrollment.

(*Id.* at p. 137.) The children's paternal great-aunt, however, obtained certified copies of birth and death certificates to support the children's Cherokee Nation application. (*Ibid.*) The juvenile court concluded the paternal great-aunt, not DFCS, was required to send the certificates to the tribe, and the DFCS was to assist her by providing needed information and a cover letter. (*Ibid.*) After this was done, the tribe sent another application and requested the original state certified birth/death certificates. The DFCS social worker completed the membership application and provided the great-aunt with a cover letter to include with the certificates.

The court in *C.B.* found that "The Department's ongoing efforts to work with family members to obtain the supporting documentation and its provision of the cover letter to a cooperative and willing extended family member were consistent with taking the 'steps necessary to secure tribal membership' for eligible children and attempting to use 'the available resources of extended family members' as stated in rule 5.484(c)(2). The Department was not required to do more under the circumstances." (*C.B., supra,* 190 Cal.App.4th at p. 139.)

The children's parents argued the DFCS should have tried to obtain the birth/death certificates itself. The *C.B.* court concluded that, "[e]ven if that were possible, we think it is unreasonable to interpret rule 5.484(c)(2) as requiring the DFCS to use its limited resources to attempt to obtain numerous certified copies of birth and death certificates from various states to support a membership application of a dependent child." (*C.B., supra,* 190 Cal.App.4th at p. 139.) The *C.B.* court further concluded that it had no reason to conclude the Cherokee Nation did not have the children's applications or that the

paternal great-aunt did not promptly follow through by mailing the birth/death certificates, using the cover letter prepared by a social worker. The *C.B.* court therefore concluded "[t]he record does not disclose that the Department failed to take any reasonable steps necessary to secure tribal membership for the children and substantial evidence supports the court's 'active efforts' finding." (*Ibid.*)

The instant case is distinguishable from *C.B.* in that, here, there is substantial evidence CPS did not make active efforts to obtain tribal membership for the children. The record shows that CPS did not diligently respond to the Tribe's requests that CPS complete enclosed applications and have them signed by the party having custody of the children or his/her representative. The Tribe sent CPS four letters, dated December 26, 2012, April 25, 2013, June 3, 2013, and June 28, 2013, informing CPS of the need to provide a membership application on behalf of the children. At the six-month review hearing in November 2013, and section 366.26 hearing in June 2013, CPS indicated it was "in the process of completing applications for enrollment as to the children." CPS received four requests to complete an enrollment application, beginning in December 2012, and still had not done so over six months later. The record does not show any reason for CPS not providing the Tribe with a completed, signed enrollment application by the time of the section 366.26 hearing in June 2013.

We therefore conclude CPS failed to comply with rules 5.482(c) and 5.484(c) by not taking reasonable, active steps to secure tribal membership for the children. Such error was not harmless. Active efforts to obtain membership for the children likely

would lead to the children becoming Tribe members subject to ICWA protections, and would enable the Tribe to intervene if it so chose.

IV

DISPOSITION

The order terminating parental rights is reversed. The juvenile court is directed to order CPS to make active efforts to secure membership for the children in the Tribe, in compliance with rules 5.482(c) and 5.484(c)(2). If, after such compliance, the Tribe claims that the children are Indian children under ICWA or enrolls the children in the Tribe, the juvenile court shall set a new section 366.26 hearing and it shall conduct all further proceedings in compliance with ICWA and all related federal and state law. If, on the other hand, the juvenile court determines CPS has made active efforts to secure membership and the children are not enrolled in the Tribe, the original order terminating parental rights, which in all other respects is affirmed, shall be reinstated.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.