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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

DIVISION TWO

Guardianship of SEBASTIAN R. et al.,
Minors.

AUDREY H.,
Plaintiff and Respondent,

v.

CANDICE H.,
Defendant and Appellant;

ROUND VALLEY INDIAN TRIBES et
al.,

Real Parties in Interest.

A132981

(Mendocino County Super. Ct.
No. SCUKCVPG10-25687)

The Round Valley Indian Tribe (the Tribe) removed Sebastian R. (Sam), T.R., D.R., and L.R., the children of Candice H. (mother), after a neighbor called to report suspected neglect. The Tribe contacted Audrey H. (great-grandmother), the paternal great-grandmother of the four children. Great-grandmother took the children into her home and filed a request in the Mendocino County Superior Court for a temporary guardianship over the children. The probate court granted this request. Subsequently, the probate court pursuant to former Probate Code section 1513, subdivision (c), referred the matter to the Mendocino County Department of Health and Human Services Agency (the

agency) for a dependency investigation.¹ The social worker for the agency decided not to file a dependency petition pursuant to Welfare and Institutions Code section 300, and the probate court granted, over mother's objection, the permanent guardianship request of great-grandmother.

Mother appeals the grant of permanent guardianship to great-grandmother. She contends that the probate court had a sua sponte duty to request the juvenile court to review the decision by the social services agency not to commence dependency proceedings. She also maintains, among other things, that the probate court did not comply with the requirements of the Indian Child Welfare Act, title 25 of the United States Code section 1901 et seq. (ICWA). We are not persuaded by mother's arguments and affirm the judgment.

BACKGROUND

Removal of the Children

Mother and Sebastian R. (father) are both members of the Tribe, and have four children together. They separated in August 2010. The four children, Sam, T.R., D.R., and L.R. lived with mother after the separation.

On December 9, 2010, mother's neighbor contacted the police and the ICWA advocate because she was concerned about the four children's welfare. The Tribe removed the children and contacted great-grandmother in order to have her care for the children. Great-grandmother was also an enrolled member of the Tribe. Great-grandmother immediately applied to the court for guardianship of the children.

Petition for Temporary Guardianship

On December 16, 2010, great-grandmother filed a petition for a temporary guardianship of Sam, Jr., T.R., D.R., and L.R. At that time, Sam was six years old, T.R.

¹ Unless otherwise specified, all further references to Probate Code section 1513 are to former Probate Code section 1513, which was in effect at the time the probate court made its referral to the agency. In 2012, the Legislature rewrote this statute and we express no opinion as to the construction of the current statute.

was four years old, D.R. was two years old, and L.R. was less than a year old. Sam had cerebral palsy, lung disease, and severe asthma.

Great-grandmother alleged that the four children had been removed from mother's home because the children had been left at home alone with a mentally incompetent woman who was also a drug addict and alcoholic. The home did not have any heat—except for the kitchen oven—and the children were hungry. She further alleged that mother was “a known long-term drug addict, and alcoholic.” Four-year-old T.R., according to great-grandmother, was acting as the mother to the younger children; she was preparing the food, and changing the babies' diapers.

As of December 16, 2010, mother had not returned home; nor had she—to great-grandmother's knowledge—contacted any person to check on the children's welfare. Great-grandmother declared that she did not give notice to mother of the ex parte hearing regarding her request for a temporary guardianship because she “did not know the whereabouts” of mother.

Great-grandmother declared that she had worked for the Social Security Administration for 30 years and had reared three other grandchildren, who were “now law abiding, productive adults.” She also stated that she had been a foster mother to several unrelated children and that she had no criminal record. She maintained that she did not use drugs or alcohol and had a home with sufficient space for the children. Great-grandmother stated that father was currently in a rehabilitation program and would be living with her when released on December 29, 2010.

On December 20, 2010, father, a Tribe member, filed a form designating great-grandmother as the children's Indian custodian.

The probate court held an ex parte hearing on great-grandmother's request for a temporary guardianship on December 21, 2010. The court granted great-grandmother's petition for a temporary guardianship of the four children.

Mother's Ex Parte Request to Terminate the Temporary Guardianship

On December 23, 2010, mother filed an ex parte request to terminate the temporary guardianship. She asserted that she was not given notice of the temporary

guardianship hearing. Mother attached a copy of restraining orders against father that were dated October 15, 2009; these orders protected mother and the older three children from father's harassment. Mother also attached a safety plan she signed with the ICWA director. The safety plan stated, among other things, that mother would do random drug tests at the request of the Tribe's ICWA program or Yuki Trails and that she would attend two meetings a month at Yuki Trails.

On December 28, 2010, the probate court held the ex parte hearing on mother's request to terminate the temporary guardianship. The court ordered an investigation by Louis C. Bates, Ph.D., a court investigator, to determine the necessity of a guardianship. The court appointed counsel for the children and ruled that the temporary guardianship orders were to remain in effect. When mother asked about the criminal protective orders against father, the court responded that the protective orders did not bar contact between the children and him, and they did not prevent father's living in the home with great-grandmother. They were "peaceful contact order[s]," which provided that father was not to harass, annoy, threaten, or batter mother or the four children.

Appointment of Counsel and Notice to the Tribe

On January 6, 2011, mother filed an ex parte request for counsel and visitation with the children. On January 10, 2011, the probate court appointed an attorney for mother, and ordered supervised visitation for two hours once a week. Mother told the court that both parents were members of the Tribe. The court ordered great-grandmother, with the assistance of minors' counsel, to provide notice to the Tribe.

At the hearing on January 25, 2011, the court stated that great-grandmother had provided notice to the Tribe. The minors' attorney reported that she had met with the children and that they appeared to be doing well under the care of great-grandmother and father.

The probate court held a review hearing on February 2, 2011. The court stated that ICWA applies to a probate guardianship but advised that its application to probate guardianships was a developing area of the law and it was unclear when the ICWA procedural requirements were to be met. The court explained: "Unlike a dependency

case, there is not an investigating agency that can file a detention report with the court to indicate what's been done. We have an investigator who prepares a report at the conclusion of the case. And at the outset we have the confidential bargaining screening form. . . . [¶] So procedurally the cases—the types of cases are not analogous. And a probate guardianship case simply doesn't have the front-end information that a dependency case has. So it will be interesting to see what the Courts of Appeal find in these kinds of situations. I am not prepared to make a finding regarding active efforts today. . . .”

The probate court appointed counsel for great-grandmother and found great-grandmother to be the children's Indian custodian “by designation of a parent and also by operation of state law given the temporary guardianship order.” The court maintained the temporary guardianship with great-grandmother. The court did not modify the visitation for mother but stated that the parties could agree to additional or longer visits.

A Second Petition for Guardianship by Mother's Relatives and Mother's Petition to Terminate the Temporary Guardianship

On March 14, 2011, mother's sister (aunt) and her sister's husband (uncle), filed a petition for guardianship of the children. Mother was living with aunt and uncle. Mother also filed a document consenting to their guardianship.

At the hearing on March 16, 2011, the probate court denied mother's oral motion to terminate the temporary guardianship.

Two days later, on March 18, 2011, mother filed a written petition to terminate great-grandmother's temporary guardianship. That same day, great-grandmother filed opposition to the guardianship application of aunt and uncle. On March 22, 2011, the probate court appointed counsel to represent father.

At the hearing on March 28, 2011, the parties agreed to proceed by declarations and stipulations in addition to oral testimony. The parties stipulated that father had completed a court-ordered 60-day residential treatment program; that father had engaged in court-ordered anger management sessions; that father had engaged in parenting classes; that mother and father had admitted using illegal drugs while living together; that

mother had not engaged in drug-related treatment until March 24, 2011; and that mother had completed four drugs tests that were negative for all substances. They also stipulated that mother had refused a drug screen on December 1, 2010, and that her four drug tests had not been random or observed.

Great-grandmother and mother testified at the hearing. Great-grandmother described the extensive care that Sam needed because of his cerebral palsy. She stated that the children's paternal aunt and grandmother helped with the children while she worked. Mother testified that she did not use drugs during any of her pregnancies. She claimed that she had gone to the store to get milk for the baby and left the children with her mother and her niece the night they were removed from her home. She admitted that the children were removed on December 9, 2010, and that she did not contact the ICWA advocate until December 20, 2010.

At the end of the hearing, the probate court stated that it was not entirely clear what the status of the children was with regards to ICWA. The court elaborated: "I believe they likely are Indian children. However, I must note that the temporary guardian did comply with the notice requirements more than 60 days ago and we've had no response from the Tribe. As you know, only the Tribe is able to make a determination that children are Indian children. So it is a little bit up in the air at this point."

The probate court added that even if ICWA applied, it was difficult to imagine that a great-grandparent could "make so-called active efforts to keep the children in their home." However, to the extent, ICWA requires that, the court found that great-grandmother met that requirement. The court stated that great-grandmother supported father and had helped care for the children when the parents needed her help. The court noted that it was "hard to say" whether these were "active efforts" but explained that great-grandmother did not have drug treatment resources that she personally could offer the parents.

The probate court elaborated: "In any event, even if this isn't sufficient under the law, I'm finding that making active efforts before removal would have been futile given what the evidence shows. Mother went to ICWA. She made a safety plan and then she

chose not to comply with it for several months. It's hard to say whether somebody else offering different services would have had a better result in light of what actually transpired.”

The probate court stated that it found mother's testimony about drug use “completely incredible” because she constantly contradicted herself regarding the dates she was sober. The court noted that it was the ICWA advocate that determined the children were not safe in mother's home and that they had to be removed. The court found that mother did not show that the children were unsafe with great-grandmother even though father resided in her home with the children. Father was on probation for child cruelty but the court stressed that he had a subordinate role and was not the custodial parent. Father was attending his domestic violence class and maintaining contact with probation. The court concluded that the children were in need of a temporary guardian and that the guardianship with great-grandmother should remain in effect pending the investigation by Bates.

Tribe Intervention

The Tribe filed its notice of intervention on April 21, 2011. The Tribe stated that all four children were Indian children and subject to ICWA.

The Report of the Guardianship Investigator

On April 27, 2011, Bates, the guardianship investigator, filed his guardianship report. Bates noted that ICWA applied to all four children, and that both parents are members of the Tribe. Bates had spoken with Donna Christian, the intake worker for Child Protection Services (CPS). She stated that there had been a total of 11 referrals involving the children when mother and father were together, beginning in October 2004.

Bates reported that the four children were currently living with great-grandmother in her three-bedroom mobile home and father also resided in the home. Bates observed father, great-grandmother, and the children, and noted that the children “seemed safe and happy.” Father believed that the children should remain with great- grandmother and mother believed the children should be returned to her.

Mother told Bates that great-grandmother was attempting to take the children away from her by requesting a guardianship because father had failed to obtain full custody of the children when he had applied to the family court for full custody in October 2010. She “was adamant that she wanted the children returned to her and that they were unjustifiably removed from her care.” Mother was very angry and stated that if the children were not returned to her care she wanted them placed with aunt, mother’s sister. She maintained there was a conspiracy between the ICWA advocate and great-grandmother to remove the children from her and to place them with great-grandmother. Mother acknowledged a past drug problem but claimed she had been sober since May 2010. Mother, however, could not provide Bates with any evidence of sobriety; at this point in time, she had not attended 12-step meetings or a treatment program.

Mother had supervised visits one day a week. Bates observed visits between mother and the children at the tribal center on March 18, and April 8, 2011. Bates concluded that overall the visit on March 18 between mother and the children went well. However, when mother took the children into the kitchen, she questioned them about coming home and said, “You want to come home with me, don’t you.” During the second visit on April 8, L.R. was clinging to her mother and did not want to let go. Mother again talked about the children’s residing with her in the future. Bates also expressed some concern with mother’s failure to follow through with some safety concerns related to the children’s behavior and falling. He concluded that “[o]verall the visit went well and [mother] demonstrated an ability to manage all four children effectively.”

Bates interviewed T.R. She said that “things were good with her father” and, when asked about the situation when she was living with her mother, T.R. “got a distressed look on her face and replied that she didn’t want to go back to [mother’s home].” T.R. spoke about a man named “Dietry.” She reported that he lived with mother and sometimes fought with mother. T.R. disclosed that her mother and Dietry would “party with their friends, [and] the children [would be] left alone with no supervision.”

T.R., according to Bates, was clear throughout the interview that she wanted to live with her great-grandmother and father.

Bates spoke to numerous people, including Lauren Whipple, the resident manager for the tribal housing program. She also had been a neighbor of the family when mother and father were living together. She stated that the primary reason eviction proceedings were started in September 2010 against mother was because of gunshots emanating from mother's home. She divulged that there had been "partying" at the home; she characterized "the situation as 'wild.'" Whipple asserted that the problems in the home continued after father left. She opined that mother and father could be competent parents if they were not using alcohol and drugs.

Bates concluded that the "main problem in this case is drug and alcohol abuse by both parents" and that both parents were in the early stages of recovery after many years of drug and alcohol abuse. He stressed that a second issue was violence. Father had a long history of violence and others alleged that mother was verbally aggressive when under the influence. Bates also expressed concern about the special needs of Sam. Bates admonished, "He is a severely disabled child with multiple problems that will never get better, but they [could] get worse if . . . not treated regularly." The CPS records indicated that mother had medically neglected her children for the past five years.

Bates also addressed the importance of the bond between young children and their mother. In particular, he noticed that L.R. demonstrated "clingy behavior" during both visits with mother and would cry when mother put her down. Bates concluded that it was clear that L.R. was missing a strong bond with mother and needed more contact with her.

Bates concluded that a guardianship was necessary in light of Sam's special needs and the facts that both parents were early in their recovery and unstable in their life situations. He recommended that great-grandmother be granted the permanent guardianship because she had an adequate home, had a strong desire to make sure the children were safe, had demonstrated the skills needed to manage the children, and had provided care such that the children appeared happy and content in her home.

The Tribal Resolution and Intervention

On May 2, 2011, the Tribe's council filed its resolution supporting mother's efforts at reunification with her four children. The Tribe also requested longer visits between mother and the children.

On May 12, 2011, the Tribe intervened.

Addendum to Bates's Report

Bates filed an amended guardianship report on May 6, 2011, after he learned about the competing guardianship petition of aunt and uncle. In his assessment of this application for a guardianship, Bates noted that aunt is the older sister of mother and also a member of the Tribe. Bates visited the home of aunt and uncle and observed that their home was large, well maintained, and comfortable. He noticed a bond between aunt and uncle and the children.

Bates's expressed concern that aunt had done nothing for a significant period of time even though she had known there were problems in mother's home. Aunt had known about the drug use of mother and father, the violence between mother and father, and the missed medical appointments for Sam. Aunt had tried to intervene by taking mother and Sam to doctor appointments, but had not tried to change the situation or stop the dysfunction.

Aunt claimed that great-grandmother was involved with the harvesting and sale of marijuana. Aunt told Bates that mother was now competent and that the children should be returned to mother. Mother was now living with aunt and uncle and Bates believed that aunt and uncle might not set adequate limits and boundaries with mother.

Bates concluded that moving the children and disrupting their lives when they seemed happy in the home of great-grandmother would not benefit the children.

The Dependency Referral and the Continuance of the Probate Guardianship Trial

On May 19, 2011, the probate court applied pursuant to Probate Code section 1513, subdivision (c), to have the social worker at the agency commence proceedings in the juvenile court as the four children were abused or neglected or at risk of abuse or neglect as defined by Welfare and Institutions Code section 300. The application

included the allegations in the probate guardianship that mother had left the children at home with an incompetent caretaker, that the older child required special care and attention because he has cerebral palsy and asthma, that on December 9, 2010, the Tribe police and ICWA advocate found marijuana and drug paraphernalia in mother's residence, that the children were occasionally hungry, that the residence lacked adequate heating, and that mother was facing eviction from her residence.

On June 8, 2011, Bates, according to a declaration filed on July 8, 2011, by mother's attorney, notified all the parties by e-mail that he had received a voice message from Cynthia E. Silva, the social worker at the agency, regarding the referral pursuant to Probate Code section 1513, subdivision (c). The message indicated that the agency "was not going to open a case, [and] that [the agency was] 'certainly not yanking those kids out of great-grandmother's home.' "

On June 15, 2011, mother filed an application requesting continuance of the June 16, 2011 trial date due to her grandfather's pending heart surgery. The probate court granted mother's request and set the trial date to July 15, 2011.

On July 8, 2011, mother filed a request under Welfare and Institutions Code section 331 in the juvenile court to have it review the investigation by the agency social worker. The juvenile court considered mother's request at a morning hearing on July 13, 2011. At this hearing, the ICWA representative told the court that the Tribe supported a dependency case being opened to offer both parents reunification services since the parents had made progress.

After hearing argument by mother's counsel that the social worker's sole reason for deciding not to file a dependency petition was that the children were safe in great-grandmother's home, the juvenile court expressed some concern: "And, you know, the statutory framework here is one that in a situation where a referral is made it does seem to favor the handling of matters like this through the juvenile court, through the dependency proceedings, and I kind of have a problem with the idea that the department makes a determination that dependency proceedings aren't warranted—if that's what they did and I don't know that that's what they did and I'm not actually reaching that issue—if

that decision is founded on the theory that the children are now either in a temporary situation or even a temporary guardianship with people other than the parents and are therefore safe and therefore a dependency proceeding is not made.”

The court, however, did not reach the merits of mother’s argument as it found she lacked standing and her request was untimely. The juvenile court explained that only the party who had asked the agency to file dependency proceedings could seek review of the decision not to file a dependency petition. During the hearing, the juvenile court explained that the time had lapsed even for the probate court to request review of the agency social worker’s decision. The statute required a request for review to be filed within 30 days of the referral to the agency. The probate court had made the referral on May 19, 2011, which was more than 30 days prior to the current date of July 13, 2011.

In the afternoon of July 13, 2011, the probate court held a hearing to consider mother’s ex parte request to continue the trial date of the guardianship to July 15, 2011. Mother raised an objection to the juvenile court’s decision that morning not to accept jurisdiction over the matter. After reviewing its file, the probate court noted that the decision by the social worker in response to the application to commence proceedings in the dependency court had been filed. The probate court observed that the agency social worker wrote that she had decided not to commence proceedings in juvenile court because “the children were found to be well cared for in the home of their current guardian” The probate court told mother that it was not going to review the decision of another judge and would not reconsider the juvenile court’s decision to reject jurisdiction over the matter. The probate court denied mother’s request to continue the guardianship hearing.

Contested Hearing on Petitions for Guardianship and Mother’s Notice of Appeal

The contested hearing on the petitions for guardianship began on July 15, 2011. The parties agreed to accept the following as stipulated testimony: Mother abused drugs while her children were in her custody and through March 2011. This abuse included the intravenous use of methamphetamine, and the use of alcohol and marijuana. Mother and father had a domestically violent relationship and ended their relationship in August

2010. In December 2010, mother left her children at home with an inappropriate caretaker. Mother acknowledged that she and father failed to attend consistently to Sam's medical needs. Mother agreed that her son had missed excessive days of kindergarten, primarily because of mother's own depression. Mother had enrolled in Pinoleville Vocational Rehabilitation Program on March 24, 2011, and was tested for drugs. In April, mother tested positive for marijuana; she did not test positive for methamphetamine in any of the tests. On June 24, 2011, mother received a certificate of completion from the substance abuse program, Pinoleville Pomo Nation Wellness Recovery Program (Pinoleville Recovery). Additionally, mother had completed two parenting classes and had called the agency on May 19, 2011, requesting voluntary services. The agency indicated that it was likely that it would provide mother with voluntary services after the birth of her fifth child.

T.R.'s therapist, Melanie Ulvila, testified. Ulvila, a licensed clinical social worker certified in parent-child interaction therapy and positive parenting principles, had been working as a therapist for Consolidated Tribal Health Project since October 2010. The court designated Ulvila as an expert in the area of child therapy and social work without any objection from any party.

Ulvila testified that she had been working with T.R. since April 7, 2011. It was reported to Ulvila that T.R. had exhibited parentified behaviors and Ulvila worked with T.R. on reassuring her that she did not need to worry about caring for her siblings and that the adults in her life would now do that. T.R. told Ulvila that she was living with her great-grandmother because her mother left her alone while she "was out partying." T.R. expressed concern that her younger siblings were hungry when she was caring for them. In late April or early May, T.R. shut down and stopped being verbal. This coincided with the period when T.R. was visiting her mother more frequently. Ulvila believed that the increased visits with her mother impacted T.R.'s behavior because great-grandmother reported that mother had told T.R. not to talk to her therapist. On May 26, T.R. disclosed to Ulvila that her mother had instructed her not to talk to her therapist. At that same session, T.R. exhibited more aggressive behaviors and threw a toy on the floor, which

broke. Ulvila diagnosed T.R. as suffering from Disruptive Behavior Disorder stemming from having lived in a chaotic early environment.

Ulvila believed that T.R. probably had “formed a pretty significant attachment to her great-grandmother.” Ulvila maintained that T.R. needed to continue to live in this environment and she opined that it would be detrimental to her if she were removed from her great-grandmother’s home. When asked whether T.R. should testify, Ulvila stated: “Well, the fact that she won’t meet with me one-to-one in a play session in an office and has shut down, I can’t imagine a five-year-old getting on a stand and talking in front of a group of people. I think that would be traumatizing and really inappropriate.” She elaborated that T.R. would feel a loyalty to her mother and it would be unfair to put her in a situation where she would be asked to answer questions that she might feel “went against” her mother. T.R. told Ulvila that she wanted to live with her great-grandmother.

At the beginning of the hearing, counsel for the minors had moved to prevent T.R. from testifying. Following Ulvila’s testimony, the probate court granted this motion.

Kenneth Wright, the tribal president and council member, testified. He agreed that the use of methamphetamine was not socially or culturally appropriate among members of the Tribe and that the tribal community and the rest of society viewed drug abuse similarly. He was present when the Tribe council wrote the letter in support of reunification services for mother. He said that he supported both mother and great-grandmother as they are both tribal members. He supported reunification services for mother because he did not want to break the family bond. The Tribe wanted the children to be returned to their parent. He clarified that he would not want the children to be returned until the parent had been sober for a substantial period. He then stated that he would be comfortable with returning the child to the parent if the parent had been engaged in services for some months and had a supportive social network.

Great-grandmother testified that Sam was two to three years behind in development when he first came to live with her and she believed that medical neglect was the cause. When the children first came to live with her, T.R. wanted to do

everything for her siblings. Great-grandmother stated that both she and father took the children to the doctors and dentists.

Michael Shepard, program manager and substance abuse counselor for Pinoleville Recovery, testified that mother attended the program two days per week. Mother told Shepard that she had a history of using marijuana and methamphetamine. She claimed that she did not have a drug problem but was requesting treatment just to get her children back or to prove to the court that she was clean. Mother underwent approximately 40 drug tests at Pinoleville Recovery, and they were all clean except for two, which were positive for marijuana. There was no testing for alcohol and the tests were not sent to a lab for confirmation. Mother received a certificate of completion for substance abuse treatment on June 24, 2011. She also received certificates for completing two parenting classes.

The parties stipulated that Elizabeth McFadden was an expert on substance abuse treatment. McFadden agreed that mother had done a lot of good work in the past four months. McFadden expressed concern that mother's drug tests were not random and had not been lab tested.

Over mother's objection, the court qualified Bates as an expert witness under ICWA. The parties stipulated that he was an expert on custody and visitation.

Bates explained that he had worked for CPS for four years when satisfying the hour requirements for his marriage and family therapist license. Bates stated that his focus when he worked for CPS was working with Native American families and 70 percent of his caseload involved Native American families. As a court evaluator, he had done about 15 to 20 custody or visitation evaluations involving the Tribe.

Bates testified that mother admitted to having a drug problem in the past, and claimed not to have used drugs since May 2010. Bates was asked whether the treatment of two sessions per week for a three- and one-half-month period was sufficient treatment for mother given her admission regarding the use of drugs. He responded, "Generally not." He opined that the best program, which mother had not completed, was 90 days in residential drug treatment followed by aftercare for about four to eight months.

Bates had observed mother interact with her four children and he believed that mother demonstrated the supervisory skill to take the appropriate protective actions with her children. He, however, expressed concern about mother's pregnancy, because adding a fifth child would increase the likelihood of her being neglectful with all five children.

Bates's principal concern related to the care of Sam because mother had missed his medical appointments in the past; he needed medical attention and services on an ongoing basis. Bates also was worried about mother's ability to get the children to school. He did believe that L.R. and D.R. needed to spend more time with mother, as they were missing mother and were demonstrating separation anxiety. He agreed that the children's relationship with their mother was a vital component of their future healthy development.

Bates testified that he did not believe the children could be safely returned to mother's custody at this time. He believed that there was clear and convincing evidence that the continued custody of the children by mother would likely result in either serious emotional or serious physical damage to the children.

Bates also observed father's care of the four children while they were in great-grandmother's home. During his first visit at the home, great-grandmother told father what to do and he followed her instructions. Father was the only person caring for the children during Bates's second visit. Bates expressed surprise at father's ability to manage all four children at the same time. He did have concerns about father's ability to care for the children if father were under the influence.

Bates admitted that father had a number of convictions for spousal abuse. Bates also acknowledged that in 2009, father had a conviction for inflicting corporal injury and cruelty to a child. Since 2009, father had three probation violations. Father's first violation was admitted alcohol abuse and the second was for growing and smoking marijuana. The third violation, which occurred while father was residing in the home of great-grandmother, involved father's admitting to his probation officer that he consumed a beer. Bates stated that he "absolutely" had concerns about father's caring for the children as he had a drinking problem.

Bates observed that the four children seemed very comfortable with great-grandmother and followed her directions. T.R. told him that she wanted to remain with great-grandmother and father. He stated that mother's inappropriate instructions to T.R. that she should not talk to her therapist created confusion for T.R. and could be emotionally difficult for her. He feared that T.R. would again exhibit parentified behavior if she were returned to mother's care, especially since mother was having another child.

The four children, according to Bates, were comfortable with aunt and uncle. He had no concern regarding their ability to care for the children.

Bates believed that the guardianship should be a minimum of 12 months. If mother were to receive voluntary services from the agency, Bates commented that would not alter his recommendation.

Reuben Becerra, a tribal council member at large and ICWA advocate for the tribal council, qualified as an ICWA expert. The tribal council, according to Becerra, had been monitoring the family since the fall of 2009. The primary concern of the council was the parents' failure to obtain the necessary medical care for Sam.

Becerra acknowledged that both parent had problems related to drug and alcohol abuse. Nevertheless, the Tribe's position was that mother had proven that she was clean and sober and the Tribe supported reunification with mother as long as she remained clean and sober. The Tribe believed that custody should be divided equally between mother and father. The Tribe would not support permanent guardianship and would support only a temporary guardianship because it supported reunification with mother.

Uncle testified that he had been married to mother's sister for 18 years and he was the tribal chairman of the Potter Valley Band of Pomo Indians for the past 10 years. He had never suspected that mother was using drugs. He was surprised that mother had tested positively for marijuana in April 2011, because she had been living in his home at that time. He admitted that he would not be able to recognize whether she was under the influence.

Mother testified and denied advising T.R. not to speak to her therapist. She acknowledged being early in recovery, but expressed pride in where she was and in the fact that she had not missed any drug tests; she had been clean from methamphetamines for almost five months. She admitted that she had been offered voluntary services during February 2009, and that she had declined those services. She also acknowledged that in the past she had not consistently made sure that Sam's needs were being met. She assured the court that she would do what was needed in the future.

The probate court admitted letters from various people and heard testimony from mother's friends that validated mother's interactions with her children. The court also received a letter from a certified substance abuse counselor that mother's treatment had been sufficient.

After hearing testimony from numerous witnesses, asking some follow-up questions, and taking documents, the court heard argument by mother's counsel that mother would have preferred the matter to have proceeded as a dependency case. The probate court asked counsel for the minor and for great-grandmother to respond to the issue of whether it should ask the juvenile court "to take one more look at this because" the probate court did "see these parents beginning to make progress." The probate court added, "And maybe with the support of social services and a supervised dependency case, they might get there."

Counsel for great-grandmother argued that this process had already lasted seven months—significantly longer than a "normal guardianship proceeding"—and mother had not made the requisite showing. The court responded, "It's a big if, anyway. All this court could do would be to refer to the juvenile court. The juvenile court could decide on its own and in its own discretion whether it even felt that further review by CPS was appropriate." Counsel for the minors added that she was "dubious that the juvenile court would be inclined" to accept the probate court's invitation for review and that the children at this point needed "a little bit of resolution."

The probate court stated: "The easy case in a guardianship is where there is parental neglect and the issues have not been addressed or remedied by the time the

guardianship petition is heard. [¶] This is a tougher case, really, because I see progress being made by both mother and father. It's like a light bulb came on at some point after the children were removed from their care and the depths of their love and commitment to parenting really came to the forefront and it's very gratifying to see that." The court then individually commended each parent regarding his and her progress. The court noted that this was an ICWA case, "which heightens standards for granting custody to a non-parent over parental objection."

The probate court summarized the testimony and evidence in the case. The court found that detriment had been established by clear and convincing evidence based on the short duration of mother's sobriety and her risk of relapse if the children were returned to her so early in her recovery. The court also found clear and convincing evidence showed that active efforts had been made to provide services to the parents, but they failed to avail themselves of that support prior to the removal of the children. The court further found that continuing the temporary guardianship was not in the best interest of the children.

The probate court denied the request by aunt and uncle for guardianship and found it detrimental to remove the children from their stable placement with great-grandmother. The court ordered supervised visitation for mother with Sam and T.R. for a minimum of two hours per week in the home of aunt and uncle. It ordered a minimum of four additional hours of supervised visits with the two younger children in the home of aunt and uncle. The court named great-grandmother as the children's guardian of the person, but denied her request for de facto parent status. The order of guardianship and the letters were filed on August 8, 2011.

The probate court stated that it had set the minimum visitation times for mother and if the parties could not work out the details of visitation, they could come back to the court for a very short hearing to resolve the details. The court added that the court does not review guardianships but the parents could bring a motion to terminate the guardianship. The court added that it believed "this is a case where there's potential for

these parents in the next 12 months to make potentially successful motion to terminate this guardianship.”

The probate court explained that it should be “relieving all the court appointed attorneys because the guardianship case has been resolved.” Counsel for mother stated that she would remain on the case pro bono to work on any issue regarding visitation. The court proceeded to relieve appointed counsel on the case except counsel for the minors.

Mother filed a timely notice of appeal. Mother filed briefs in this court and counsel for great-grandmother and Sam filed separate respondent briefs.

DISCUSSION

I. The Probate Court’s Duty Under Probate Code Section 1513, Subdivision (c), and Welfare and Institutions Code Section 331

A. The Relevant Law Governing Probate Guardianships²

Mother argues that the probate court’s order granting the letters of guardianship must be reversed because the court delayed referring the case to the agency under Probate Code section 1513, subdivision (c) and, once the agency decided not to file a petition pursuant to Welfare and Institutions Code section 300, the probate court under Welfare and Institutions Code section 331 should have requested the dependency court to review the social worker’s decision.

When a relative files a petition for the appointment of a guardian of a minor, a court investigator must investigate and file a report and recommendation with the court, unless waived by the court. (Prob. Code, § 1513, subd. (a).)³ Here, the court did appoint

² The additional ICWA requirements that are relevant to the present case are set forth in part II.

³ Probate Code section 1513 provides in relevant part: “(a) Unless waived by the court, a court investigator, probation officer, or domestic relations investigator may make an investigation and file with the court a report and recommendation concerning each proposed guardianship of the person or guardianship of the estate. Investigations where the proposed guardian is a relative shall be made by a court investigator. Investigations where the proposed guardian is a nonrelative shall be made by the county agency designated to investigate potential dependency. . . .” “(b) The report shall be read and

Bates as the court investigator and he did file a report indicating that mother and father had substance abuse problems. Bates recommended a permanent guardianship with great-grandmother.

When there are allegations of parental neglect, as in the present case, the probate court has a duty under Probate Code section 1513, subdivision (c) to refer the case to the social services agency for determination of whether a dependency petition pursuant to Welfare and Institutions Code section 300 should be filed. (See *Guardianship of Christian G.* (2011) 195 Cal.App.4th 581, 603-604 (*Christian*) [referral to social services agency for dependency investigation applies to any parent whose child allegedly falls within the jurisdiction of the juvenile court under Welfare and Institutions Code section 300]; but see also, *Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1534-1536 [referral to social services agency for a dependency investigation is not necessary when the probate guardianship is established pursuant to a stipulation after mediation].)

Welfare and Institutions Code section 329 requires the social worker to investigate immediately the referral as the social workers deems necessary to determine whether proceedings in the juvenile court should be commenced. If the social worker does not file a petition in the juvenile court within three weeks after the application, the social worker shall immediately inform the applicant of the decision and reasons not to proceed further. (Welf. & Inst. Code, § 329.)

“When any person has applied to the social worker, pursuant to [Welfare and Institutions Code section] 329, to commence juvenile court proceedings and the social worker fails to file a petition within three weeks after the application, the person may,

considered by the court prior to ruling on the petition for guardianship, and shall be reflected in the minutes of the court. The person preparing the report may be called and examined by any party to the proceeding. [¶] (c) If the investigation finds that any party to the proposed guardianship alleges the minor’s parent is unfit, as defined by Section 300 of the Welfare and Institutions Code, the case shall be referred to the county agency designated to investigate potential dependencies. Guardianship proceedings shall not be completed until the investigation required by Section 328 and 329 of the Welfare and Institutions Code is completed and a report is provided to the court in which the guardianship proceeding is pending.”

within one month after making the application, apply to the juvenile court to review the decision of the social worker, and the court may either affirm the decision of the social worker or order him or her to commence juvenile court proceedings.” (Welf. & Inst. Code, § 331.) “In cases such as this one, where there is not a private party seeking review of the social worker’s decision under [Welfare and Institutions Code] section 329, the probate court is by implication the person who has applied to the social worker to commence juvenile court proceedings.” (*In re Kaylee H.* (2012) 205 Cal.App.4th 92, 104, fn. 9.)

When a juvenile court does not take jurisdiction over the matter, a probate court may appoint a guardian for a minor “if it appears necessary or convenient.” (Prob. Code, § 1514, subd. (a).) Under Probate Code section 1510, subdivision (a), a court may grant custody to a nonparent over a parent’s objection only if it finds “ ‘that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child.’ (Fam. Code, § 3041.)” (*Adoption of Daniele G.* (2001) 87 Cal.App.4th 1392, 1401.) While the child’s health, safety, and welfare, and any history of abuse or substance abuse by a parent are relevant (Fam. Code, § 3011), “the critical finding of detriment to the child does not necessarily turn on parental unfitness. It may be based on the prospect that a successful, established custodial arrangement would be disrupted.” (*Guardianship of Ann. S.* (2009) 45 Cal.4th 1110, 1123.)

If it is not in the child’s best interest to remain in a parent’s custody, the preference is for custody with “the person or persons in whose home the child has been living in a wholesome and stable environment.” (Fam. Code, § 3040, subd. (a)(2).) The parent’s rights over the child are suspended for the duration of the probate guardianship. (Fam. Code, § 7505, subd. (a); *Guardianship of Ann S., supra*, 45 Cal.4th at p. 1124.) However, the court retains discretion to grant visitation, and may terminate the guardianship on a petition by the guardian, a parent, or the child, based on the child’s best interest. (*Guardianship of Ann S.*, at pp. 1123-1124.)

B. Standard of Review

Welfare and Institutions Code section 331 provides that application by a person (here, the probate court judge) to the social worker to initiate juvenile court proceedings “may” seek juvenile court review of an agency’s decision not to do so. The auxiliary verb “may” in the statutory language vests the trial court with discretion. Thus, we review this decision under the abuse of discretion standard.

“The test for abuse of discretion is whether the trial court exceeded the bounds of reason.” (*Ziesmer v. Superior Court* (2003) 107 Cal.App.4th 360, 363.) “This description of the standard is complete, however, only if ‘beyond the bounds of reason’ is understood as something in addition to simply ‘irrational’ or ‘illogical.’ While an irrational decision would usually constitute an abuse of discretion, the legal standard of review encompasses more than that: ‘The scope of discretion always resides in the particular law being applied, i.e., in the “legal principles governing the subject of [the] action” Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an “abuse” of discretion.’ [Citation.] For example, a court could be mistaken about the scope of its discretion and the mistake could be entirely ‘reasonable’—that is, it adopts a position about which reasonable judges could differ. But a reasoned decision based on the reasonable view of the scope of discretion is still an abuse of judicial discretion when it starts from a mistaken premise, even though nothing about the exercise of discretion is, in ordinary-language use of the phrase, ‘beyond the bounds of reason.’ [Citation.] In other words, judicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion. [Citations.]” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393-394.)

C. No Abuse of Discretion

Mother complains that the probate court exceeded its authority and abused its discretion when it ordered a guardianship. (See *In re Andres G.* (1998) 64 Cal.App.4th 476, 483 [no waiver when juvenile court acted in excess of jurisdiction because the code

did not authorize the order and the order contravened the state’s comprehensive statutory scheme]; *In re Jack C.* (2011) 192 Cal.App.4th 967, 987 [court acted in excess of its jurisdiction when it terminated parental rights without holding an evidentiary hearing to establish good cause not to transfer jurisdiction to the Indian tribe].) She maintains that the probate court “circumvented the dependency scheme” by not asking the dependency court to review the agency social worker’s decision not to file a petition pursuant to Welfare and Institutions Code section 300. She claims that the court’s failure to refer the matter to the dependency court violated her constitutional due process rights. As we discuss below, mother is attempting to create a duty that is not prescribed by statute or case law.

Mother contends that this is a case of first impression; we disagree. The law is clear that the probate court has a duty under Probate Code section 1513, subdivision (c) to refer this matter when there are allegations of parental neglect or abuse to the social welfare agency to determine whether a petition pursuant to Welfare and Institutions Code section 300 needs to be filed. Here, the probate court followed the mandates of the law and referred the matter to the agency social worker. The social worker determined that a petition pursuant to Welfare and Institutions Code section 300 did not need to be filed in the juvenile dependency court.

Under Welfare and Institutions Code section 331, the probate court has the discretion to ask the juvenile court to review the social worker’s decision. When any person applies to the social worker “to commence juvenile court proceedings and the social worker fails to file a petition within three weeks after the application, the person *may*, within one month after making the application, apply to the juvenile court to review the decision of the social worker” (Welf. & Inst. Code, § 331, italics added.)

Mother asserts that the use of the word “may” in Welfare and Institutions Code, section 331, does not give the probate court discretion to decide whether to seek review by the juvenile court. She asserts that this word merely indicates that “the need for engaging in” dependency proceedings may not arise in all cases. She maintains that under *Christian, supra*, 195 Cal.App.4th 581, the probate court was required to exercise

its discretion under section 331 of the Welfare and Institutions Code because she contested the guardianship and there were allegations of parental abuse and neglect. Thus, she urges us to construct the statute to require the probate court to ask the juvenile court to review the decision by the social service agency not to file a dependency petition whenever a parent contests the guardianship and the pleadings or investigator's report contain allegations of parental neglect or abuse.⁴

Mother's argument lacks merit. In *Christian, supra*, 195 Cal.App.4th 581, we reversed the guardianship order when the lower court had failed to refer the matter to a child welfare agency despite allegations of parental unfitness. (*Id.* at p. 596.) We held that once the probate court "received information constituting an allegation of [parental] unfitness, whether from the investigator's report or from the pleadings themselves," the court was "obligated to order the case referred to" the county agency designated to investigate potential dependencies. (*Id.* at p. 604.)

It is indisputable that there are significant differences between probate proceedings and dependency proceedings. The dependency process focuses on the maintenance or reunification of the family "to the fullest extent possible without jeopardizing the child's physical or emotional safety." (*Christian, supra*, 195 Cal.App.4th at p. 598, fn. omitted.) "This preference for family continuity and reunification is absent in the context of a guardianship proceeding." (*Id.* at p. 599) Thus, a referral to the child welfare agency is always required when a parent is accused of unfitness as defined by Welfare and Institutions Code section 300. (*Christian, supra*, at p. 602.)

Christian, supra, 195 Cal.App.4th 581 mandates a referral to "the county's dependency agency for investigation," and does not suggest, as mother argues, that the

⁴ The probate court can ask the juvenile court to review the decision only if it made the initial request under Probate Code section 1513, subdivision (c). Mother does not address the probate court's "duty" when another party, rather than the probate court, requests the social worker to do an investigation under Welfare and Institutions Code section 329 to determine whether to file a petition pursuant to Welfare and Institutions Code section 300. In such a situation, the probate court does not have standing under Welfare and Institutions Code section 331 to ask for review of the decision not to file a dependency petition.

court has the additional duty of requesting review of the agency's decision by the juvenile court when the agency decides not to file a dependency petition. (*Id.* at p. 605.) Once that referral is made, the probate court has satisfied its duty. Here, in contrast, to the situation in *Christian*, the probate court made the proper referral.

The fact that there are significant differences between a dependency court and a probate guardianship does not mean that the matter can never proceed in the probate court when there are allegations of parental abuse and neglect and the parent opposes the guardianship. Indeed, such a holding would be contrary to the plain language of Welfare and Institutions Code section 331. As already stressed, the plain language of section 331 of the Welfare and Institutions Code section is that the party applying to the social worker to initiate juvenile court proceedings "may" seek juvenile court review of an agency's decision not to do so. The language does not suggest that there are any situations that divest the applicant of that discretion or that there are particular situations where the applicant must seek juvenile court review. Mother is attempting to rewrite the statute to impose a sua sponte duty on the probate court to request review by the juvenile court within the time prescribed by Welfare and Institutions Code section 331. Mother's construction of the statute is contrary to the express language of the statute. We will not rewrite the statute in this manner.

Mother also seems to suggest that the probate court's duty to ask the juvenile court to review the matter was triggered because the investigation by the agency social worker was, according to mother, inadequate. She claims the social worker submitted an untimely "sham report." Mother argues that the record shows that the children were at risk of abuse or neglect under Welfare and Institutions Code section 300, subdivision (b), and the social worker's basis for deciding not to file a petition was clearly improper.

Mother cannot now complain about any alleged defects in the agency social worker's report. The statute does not require the social worker to provide the court with a written report. (See *Guardianship of H.C.* (2011) 198 Cal.App.4th 1235, 1248.) The record must demonstrate that the social worker conducted the required investigation.

(*Ibid.*) Here, the social worker did conduct an investigation, and mother never made a timely challenge to the adequacy of this investigation.

The probate court's sole obligation was to request an investigation and Welfare and Institutions Code section 329 provides that the social worker "shall immediately investigate as he or she deems necessary to determine whether proceedings in the juvenile court should be commenced." The probate court, similarly to the juvenile court that reviews a social worker's decision not to file a dependency petition, "should also give due consideration to the social worker's determination and may properly rely upon the agency's expertise for guidance." (*In re M.C.* (2011) 199 Cal.App.4th 784, 814.)

On June 8, 2011, Bates informed mother's counsel that the social worker "was not going to open a case, [and] that [the agency was] 'certainly not yanking those kids out of great-grandmother's home.'" One week later, on June 15, 2011, mother requested a continuance of the trial date due to her grandfather's pending heart surgery. Mother did not raise any challenge to the decision of the social worker not to file a petition pursuant to Welfare and Institutions Code section 300.

The probate court made the referral to the agency pursuant to Probate Code section 1513, subdivision (c), on May 19, 2011. Under Welfare and Institutions Code section 331, if the social worker does not to file a petition in the dependency court within three weeks after the application, review by the juvenile court must be requested "within one month after making the application[.]" (Welf. & Inst. Code, § 331.) Thus, the time for the probate court to request a review of the social worker's decision expired on June 19, 2011. Yet, mother did not raise the issue in the probate court until July 2011, which was beyond the time to ask the juvenile court to review the social worker's decision. Mother cannot now, belatedly, challenge the grounds for the social worker's decision or the adequacy of the social worker's investigation when she never voiced a timely objection in the probate court.

The probate court stated that Welfare and Institutions Code section 331 provides that the applicant has the right to ask the juvenile court to review the decision of the social worker. Thus, there is nothing in this record that establishes that the court did not

understand that it had the discretion to ask for review by the juvenile court under the relevant statute. The probate court simply exercised its discretion not to ask for review and mother never made a timely challenge to this decision.

Mother also complains about the probate court's delay in referring the matter to the agency. The temporary guardianship was granted on December 21, 2010, but the court did not refer the matter to the agency until May 2011. She contends that she should have received the services mandated under ICWA earlier.

Mother ignores that the probate court's delay in referring the matter to the agency did not result in prejudice to her. The cause of any delay in her receiving services was because she initially declined services. The children were removed in December 2010 and mother signed a safety plan in December 2010 with the ICWA director stating that she would attend two meetings a month at Yuki Trails and that she would do random drug testing. Although she signed this safety plan and the services were offered to her, she chose not to participate in them. Subsequently, in March 2011, she was offered the 90-day Pinoleville Recovery program for substance abuse treatment, drug testing, and parenting classes, which she accepted. Thus, she was offered services immediately as mandated by ICWA and she actually received services prior to the probate court's referral of the matter to the agency.

Finally, mother argues that if the juvenile court had decided this case on its merits, it probably would have ordered the agency's social worker to file a dependency petition. We reject this argument as mother is merely speculating as to what the juvenile court would have done; the juvenile court did not make any ruling on the merits. Furthermore, as already discussed, the juvenile court generally defers to the decision of the social worker (see *In re M.C.*, *supra*, 199 Cal.App.4th at p. 814), and the time for the probate court to ask for review of the juvenile court had already expired by the time mother voiced her objection.

Accordingly, we conclude that mother's due process rights were not violated and the probate court did not abuse its discretion when it did not ask the juvenile court to review the agency social worker's decision not to file a dependency petition. The probate

court complied with its duty under the law to refer the matter to the agency and it acted within its discretion when it did not sua sponte ask the juvenile court to review the social worker's decision not to file a dependency petition. Mother received all the rights to which she was entitled under the statutes and case law.

II. *The Probate Court Complied with ICWA*

A. *The Application of ICWA and the Standard of Review*

In the present case, the record establishes that ICWA applies to the children and mother, father, and great-grandmother are members of the Tribe. Probate Code section 1459.5 specifies that ICWA applies to guardianship proceedings.

In 1978, Congress enacted ICWA in an effort to protect and preserve Indian tribes and their resources. (25 U.S.C. §§ 1901, 1902.) ICWA was specifically designed to help Indian children retain their familial, tribal, and cultural ties. (*In re Robert A.* (2007) 147 Cal.App.4th 982, 988.) ICWA sets forth minimum federal standards for removing Indian children from their families and placing these children in foster or adoptive homes that reflect the unique values of Indian culture. (25 U.S.C. § 1902; *Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 37.) “Consistent with Congress’s goals, ‘[p]roceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in any individual case contrary to those preferences.’ ” (*In re G.L.* 177 Cal.App.4th 683, 690.)

ICWA requires the court to make certain findings affecting an Indian child before ordering foster care or terminating parental rights. ICWA requires that active efforts be made prior to removing Indian children from their parents. (25 U.S.C. § 1912(d); Welf. & Inst. Code, § 361.7, subds. (a) & (b).) Before the court can order foster care it must make a finding, “supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” (25 U.S.C. § 1912(e); see also Welf. & Inst. Code, § 361.7, subd. (c) [a guardianship may not be ordered “in the absence of a determination, supported by clear and convincing evidence, . . . , that the continued custody of the child by the parent or Indian custodian is

likely to result in serious emotional or physical damage to the child”].)

To the extent that mother is challenging the probate court’s findings, we apply the substantial standard of evidence review. (See, e.g., *In re Barbara R.* (2006) 137 Cal.App.4th 941, 950.) “Under this standard, we do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or reweigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court’s order and affirm the order even if there is other evidence to the contrary. [Citation.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court’s finding. [Citation.]” (*In re M.B.* (2010) 182 Cal.App.4th 1496, 1506.)

We review de novo issues of statutory interpretation and the question whether the factual findings comply with ICWA or section 361.7 of the Welfare and Institutions Code. (See e.g., *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254; *In re K.B.* (2009) 173 Cal.App.4th 1275, 1286.) If we conclude that the court did not comply with ICWA or a state statute, we apply the harmless error standard and reverse only if the error is prejudicial. (See, e.g., *In re E.W.* (2009) 170 Cal.App.4th 396, 402-403.)

B. ICWA Does Not Require the Filing of a Dependency Petition

Mother claims that the probate court violated ICWA by proceeding with a probate guardianship in a situation where she objected to the guardianship. Mother argues that the dependency scheme provides more protection for parental rights than the probate guardianship proceedings and, therefore, the matter had to proceed in the juvenile court. To support this argument, mother cites the following language in ICWA: “In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.” (25 U.S.C. § 1921.)

The abovementioned federal statute cited by mother simply authorizes states to provide “a higher standard of protection to the rights of the parent . . . of an Indian child than the rights provided” under ICWA. (25 U.S.C. § 1921.) Thus, California may adopt

stricter ICWA standards than federal law requires. This federal statute expressly provides that the higher standard as between state or federal law shall be provided. The federal statute does not require, as mother argues, that a particular state law be applied in preference to another state law.⁵

Additionally, mother's argument implies that the probate court could compel the juvenile court to accept jurisdiction over the matter. The probate court does not have any authority to compel dependency proceedings. In contrast to dependency proceedings, the state is not a party to a probate guardianship. (*Guardianship of H.C.*, *supra*, 198 Cal.App.4th at p. 1248.) A probate court " 'is a private custody arrangement approved but not supervised by the court. The state initiates no proceedings and carries no burden to prove anything. It performs only a judicial role.' " (*Id.* at pp. 1248-1249.) Dependency proceedings are commenced when the social worker files a dependency petition. The social worker "has the sole discretion to determine whether to file a petition" under Welfare and Institutions Code section 300. (Cal. Rules of Court, rule 5.520(a).) If the social worker has been asked to investigate filing a dependency petition pursuant to Welfare and Institutions Code section 329, and the social worker "fails to file a petition within three weeks after the application, the person may, within one month after making the application, apply to the juvenile court to review the decision of the social worker, and the court may either affirm the decision of the social worker or order him or her to commence juvenile court proceedings." (Welf. & Inst. Code, § 331.) Thus,

⁵ We note that, although dependency proceedings provide the parents with services and other advantages not required in a probate guardianship proceeding, in this particular case mother received legal counsel as required by ICWA and received services. Furthermore, as we pointed out in *Adoption of Myah M.*, *supra*, 201 Cal.App.4th 1518, parents may enjoy certain advantages by not having the case be part of the dependency system. (*Id.* at p. 1536.) A probate guardianship avoids the involvement of the county child welfare agency and the supervision of the court and social services agency. (*Ibid.*) Furthermore, a probate court, unlike a juvenile court, is not required to terminate parental rights after any period of time. (*Ibid.*)

the juvenile court has sole jurisdiction over the filing of a dependency petition and the probate court has absolutely no authority to order the social worker to file a dependency petition.

Accordingly, we reject mother's argument that ICWA compelled dependency proceedings and required the probate court to refer the matter to the juvenile court.

C. Active Efforts

As already noted, ICWA requires that active efforts be made prior to removing Indian children from their parent. (25 U.S.C. § 1912(d).) Mother contends that the record does not support a finding that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family before her children were removed from her.

“Any party seeking to effect . . . 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.” (25 U.S.C. § 1912(d); Welf. & Inst. Code, § 361.7, subd. (a).) The finding of active efforts must be supported by clear and convincing evidence. “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.” (Welf. & Inst. Code, § 361.7, subd. (b); see also Cal. Rules of Court, rule 5.484(c).)

When ruling on March 28, 2011, that great-grandmother had met her burden of showing that she made active efforts, the probate court noted that great-grandmother did not have the same resources as the child welfare agency and could not force mother to avail herself of the services offered her. The court added, to the extent that great-grandmother had to make a showing that she tried to keep the children home, great-grandmother satisfied that requirement. Great-grandmother encouraged father to comply

with his probation and she helped care for the children when the parents needed a break. The court emphasized that great-grandmother could not personally offer mother any drug treatment programs.

On July 27, 2011, at the end of the probate hearing regarding great-grandmother's petition for a permanent guardianship, the probate court expressly found that active efforts had been made prior to the removal of the children from mother's home, and mother and father had not availed themselves of any of the services offered to them. Mother signed a stipulation on March 28, 2011, admitting, among other items, that she had not participated in the substance abuse treatment or parenting class offered by Yuki Trails, that she had refused to participate in any other drug treatment programs until March 24, 2011, and that she had refused drug screening. In February 2009, CPS offered voluntary services to the parents, but they declined these services. Yolanda Hoaglen, the ICWA advocate for the Tribe, testified that she had offered mother and father services previously, and these services included tribal transportation to Sam's medical appointments. The parents did not avail themselves of this offered assistance.

We agree with the probate court that the record satisfies the ICWA standard that clear and convincing evidence showed that mother was offered services to prevent the children from being removed from her home. Mother chose not to avail herself of any of these services until the children were actually removed from her home.

Mother argues that great-grandmother sought the breakup of the family and mother would have been offered services immediately if this had been a dependency case. She argues that great-grandmother could have contacted the agency to commence dependency proceedings rather than immediately seeking a temporary guardianship. Furthermore, she alleges that great-grandmother prevented her from visiting with the children for a month. She also points to great-grandmother's opposition to placing the children with aunt and uncle as evidence of her attempts to break up the family.

Mother's argument is not persuasive. Great-grandmother sought a temporary guardianship after the Tribe and ICWA advocate contacted her following the removal of the children from mother's home because the children had been left with an inappropriate

caretaker and had insufficient heat and food. Thus, great-grandmother took action at the behest of the Tribe. This was after the children were left in a dangerous situation and without proper care and after mother had not availed herself of any of the services offered by the agency and the Tribe.

Mother complains that great-grandmother did not support placement of the children in mother's care in the home of aunt and uncle, as a way to preserve the Indian family. However, great-grandmother and father are Indians under ICWA. Thus, placing the children with great-grandmother, where father also resided, preserved the Indian family. Great-grandmother, rather than aunt and uncle, was the person who acted to protect the children when mother had left them on December 9, 2010.

Accordingly, we conclude that clear and convincing evidence in the record satisfied the active efforts requirement under ICWA.

D. *The Detriment Standard Under ICWA*

As explained above, before the court can order foster care it must make a finding, “supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” (25 U.S.C. § 1912(e); see Welf. & Inst. Code, § 361.7, subd. (c) [a guardianship may not be ordered “in the absence of a determination, supported by clear and convincing evidence, . . . , that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child”].) This finding is commonly referred to as the ICWA detriment finding. (*In re Barbara R.*, *supra*, 137 Cal.App.4th at p. 950.)

“The legislative history of ICWA reveals that Congress attributed many unwarranted removals of Indian children to cultural bias on the parts of state courts and social workers making decisions. (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584, 67593, § D.3, Commentary (Nov. 26, 1979) (Guidelines).) Thus, ICWA and the Guidelines require the use of one or more Indian experts to educate the trial court on the tribal culture and childrearing practices. ‘Determining the likelihood of future harm frequently involves predicting future

behavior—which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.’ (Guidelines, *supra*, 44 Fed.Reg. at p. 67593, § D.4, Commentary.)” (*In re M.B.*, *supra*, 182 Cal.App.4th at p. 1503.) “The purpose of the Indian expert’s testimony is to offer a cultural perspective on a parent’s conduct with his or her child to prevent the unwarranted interference with the parent-child relationship due to cultural bias.” (*In re M.B.*, at p. 1505.)

ICWA does not necessitate evidence of social and cultural standards of an Indian child’s tribe. (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1413.) “The Indian expert’s testimony is directed to the question of whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and not because the family did not conform to a decision-maker’s stereotype of what a proper family should be.” (*In re M.B.*, *supra*, 182 Cal.App.4th at p. 1505.)

Welfare and Institutions Code section 224.6 sets forth the qualifications of an expert witness. “[A] ‘qualified expert witness’ may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, tribal historian, or tribal elder, provided the individual is not an employee of the person or agency recommending foster care placement or termination of parental rights.” (Welf. & Inst. Code, § 224.6, subd. (a).) “Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings: [¶] (1) A member of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices. [¶] (2) Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child’s tribe. [¶] (3) A professional person having substantial education and experience in the area of his or her specialty.” (Welf. & Inst. Code, § 224.6, subd. (c).)

Here, the probate court found by clear and convincing evidence, including the testimony of the expert witness, Bates, that the continued custody of the four children by mother was likely to result in serious emotional or physical damage to the children. Mother first challenges the probate court's decision to qualify Bates as an expert under ICWA. She also challenges the detriment finding.

The record established that Bates worked for CPS for four years while working to satisfy the hour requirements for his marriage and family therapist license. Bates stated that his focus when he worked for CPS was working with Native American families and 70 percent of his caseload involved Native American families. As a court evaluator, he had done about 15 to 20 custody or visitation evaluations involving the Tribe. We conclude that this evidence supported the probate court's finding that Bates was an expert under ICWA, as he was "[a] professional person having substantial education and experience in the area of his or her specialty." (Welf. & Inst. Code, § 224.6, subd. (c)(3).)

Moreover, this is not a case in which removal of Indian children was attributable to cultural biases, or "the family's nonconformance with 'the decision-maker's stereotype of what a proper family should be.'" (*In re Brandon T.*, *supra*, 164 Cal.App.4th at p. 1414.) Mother had a substance abuse problem, had failed to obtain needed medical care for Sam, and had neglected her children. These problems are also viewed as problems in the tribal cultural context. Indeed, the ICWA advocate was the person who had determined the children were not safe in mother's home and that the children needed to be removed. Wright, the tribal president and council member, agreed that the use of methamphetamine was not socially or culturally appropriate among members of the Tribe and that the tribal community did not view drug abuse any differently than the rest of society.

Mother also argues that Bates's report and testimony were inadequate because he did not consult with the Tribe. Probate Code section 1513, subdivision (h) provides: "In an Indian child custody proceeding, any person making an investigation and report shall consult with the Indian child's tribe and include in the report information provided by the

tribe.” Bates admitted that he did not consult with the Tribe. Thus, Bates complied with the statutory requirements by filing a report, but the report was deficient and we will reverse on this basis “ ‘only if we conclude “. . . it is reasonably probable that a result more favorable to the appealing part would have been reached in the absence of the error.” [Citations]’ [Citations.]” (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1381.)

Although we agree that Bates should have consulted with the Tribe, this error was harmless. The probate court considered the testimony of tribal council president, Wright, and tribal council member Becerra, an ICWA expert. The court therefore considered the Tribe’s opinion; nothing in this record indicates that Bates’s report would have contained any information not considered by the court had he directly consulted with Wright or Becerra. Furthermore, in the present case, as already discussed, mother’s substance abuse and neglect of her children were not issues that needed to be placed in a cultural context in order to find risk of harm.

The record in the present case amply supported the probate court’s finding that clear and convincing evidence showed that it would be detrimental to the children for them to remain in mother’s home. The record is replete with evidence of mother’s history of drug abuse and her failure to attend to Sam’s medical needs. Mother admitted that she abused drugs while her children were in her custody and that the abuse included the intravenous use of methamphetamine, and the use of alcohol and marijuana. Bates spoke to Whipple, the resident manager for the tribal housing program, and she explained that mother was evicted because of gunshots in the home and “wild” parties in the home.

The evidence also revealed that mother was in the early stage of recovery after many years of drug and alcohol abuse and that her treatment thus far was insufficient. Although mother acknowledged to the court that she had taken drugs, the court found her testimony about her limited drug use and time of sobriety incredible. Shepard, the program manager and substance abuse counselor for Pinoleville Recovery, stated that mother told him that she did not have a drug problem but was requesting treatment just to get her children back or to prove to the court that she was clean. McFadden, an expert on substance abuse treatment stated that mother had done a lot of good work in the past four

months but the drug testing was not conclusive because none of her tests had been conducted randomly or lab tested. Bates also testified that mother's treatment of two sessions per week for a three- and one-half-month period was insufficient and that most programs were for 90 days, followed by aftercare for about four to eight months.

Additionally, Ulvila, T.R.'s therapist, testified that T.R. became more aggressive and closed down after visiting with mother. She testified that the environment of great-grandmother's home was good for T.R. She opined that it would be detrimental to T.R. if she were removed from her great-grandmother's home. T.R. told Ulvila and Bates that she wanted to live with her great-grandmother.

The record also contained evidence that mother had medically neglected the children. The CPS records indicated that mother had medically neglected her children for five years. This was a particularly significant issue because Sam has serious medical needs and mother missed his medical appointments in the past.

Mother argues that the probate court improperly deferred to Bates's recommendation that placing the children with aunt and uncle was "no different" than leaving the children with great-grandmother while father was living with her. She maintains that this was incorrect as she was living with aunt and uncle and preference should have been given to keeping the children with her. She points out that L.R. had anxiety because she was separated from mother and even Bates admitted that she provided appropriate care when with the children.

The question before us is not whether there was some evidence supporting the guardianship request by aunt and uncle but whether the record supported the finding of permanent guardianship with great-grandmother. The record contained substantial credible evidence that the children should be placed with great-grandmother rather than with aunt and uncle. Bates expressed concern about aunt's failure to intervene earlier on the children's behalf when she knew about the problems with drugs and violence in the household. Bates worried that aunt and uncle would not adequately set limits and boundaries with mother. Furthermore, both Bates and Ulvila believed that it would be disruptive to the children to remove them from great-grandmother's home, since they

were doing well there.

Mother also objects to the probate court's ruling on the basis that it did not follow the Tribe's recommendation. She maintains that the court had to give full faith and credit to the tribal council resolution for reunification with mother. (25 U.S.C. § 1911(d).)

“The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.” (25 U.S.C. § 1911(d).)

Mother does not provide a credible explanation as to how the Tribe's resolution was a judgment or other enforceable order. (See *In re Laura F.* (2000) 83 Cal.App.4th 583, 594.) This resolution was neither a judgment nor other order and was not entitled to res judicata or collateral estoppel effect in the probate court under ICWA's full faith and credit provision. (*In re Laura F.*, at p. 594.) “The full faith and credit provision of the ICWA did not empower the Tribe to control the outcome of the proceedings here.” (*In re Laura F.*, at p. 595; see also *In re A.A.* (2008) 167 Cal.App.4th 1292, 1325 [rejected argument that termination of parental rights was precluded by the preference of the Indian Tribe for guardianship because “although guardianship may have served the Tribe's interests, the court, in assessing the children's best interests, was not compelled to agree with the Tribe”]; *In re T.S.* (2009) 175 Cal.App.4th 1031, 1040 [juvenile court not obligated to adopt permanent plan designated by a child's tribe without conducting an assessment of detriment].)

The probate court was obligated to make its own assessment of detriment. The court gave serious consideration to the testimony of Becerra and Wright and explained its reasons for not following their recommendation. The court noted that Wright admitted that his recommendation was based solely on his discussions with mother; Wright stated that he did not read any of the documents. The court also expressed concern about Wright's inability to give a definite opinion about the safety of returning the children to their parents at this time. With regard to Becerra, the court observed that Becerra

declared that the children were not at risk if returned to mother as long as mother was clean and sober. Becerra, however, assessed mother's sobriety solely on his discussions with mother. The court added: Becerra "was very clear that it is the Tribe's traditional position that when a parent makes an effort to get clean and sober, the Tribe will support reunification regardless of the length, duration or nature of the treatment as long as urinalysis or other chemical testing shows the parent is at that time clean and sober, the Tribe will support returning the children." Becerra did not know the number of sessions mother had attended or the duration of the substance abuse treatment.

In contrast to the position of Becerra and Wright, the probate court cited the extensive evidence indicating that return of the children to the parents at this time would be detrimental. The court acknowledged the evidence of the parents' long history of neglect. The court set forth its reasons for according more weight to the testimony of Bates, McFadden, and Ulvila than to the testimony of Wright and Becerra. The court also stressed "the short duration of [mother's] sobriety, the nature of treatment she's engaged in, [and] the fact that she's previously been able to maintain sobriety during pregnancy, [supported] Dr. Bates's conclusion that mother may indeed be at risk of relapse were the children . . . returned to her now because she's in such early recovery."

The probate court was not obligated to follow the recommendation of Becerra and Wright and the record supported the court's ruling that clear and convincing evidence showed that it would be detrimental to keep the children in mother's care.

We conclude that the probate court's order establishing a guardianship with great-grandmother did not violate ICWA.⁶

III. The Denial of Mother's Request for a Continuance

Mother contends that her procedural and substantive due process rights under the Constitution were violated when the probate court denied her motion to continue the guardianship hearing. Mother argues that she had not received the agency's report prior

⁶ Since we conclude that the probate court's order complied with ICWA, we do not need to address mother's argument that the court's alleged violations of ICWA were prejudicial.

to the guardianship hearing and claims that the report's stated reason for not filing a dependency petition was improper.

A trial court's ruling on a motion for a continuance will not be reversed absent a clear abuse of discretion. (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984; *In re Katrina L.* (1988) 200 Cal.App.3d 1288, 1296.) Continuances of trials are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

On June 15, 2011, mother filed an application requesting the court to continue the trial date of June 16, 2011. The probate court granted this request and set the trial date to July 15, 2011.

On July 8, 2011, mother filed an ex parte application requesting the probate court to continue the trial date of July 15, 2011. Mother argued that the agency had not filed the report required by Probate Code section 1513, subdivision (c). Mother also argued that she wished to have the juvenile court review the investigation done by the agency.

By the afternoon of July 13, 2011, when the probate court considered mother's request for a continuance, the juvenile court had rejected mother's request for review because the time to ask for review had expired and mother lacked standing. Thus, mother's principal reason for requesting a continuance had become moot.

At the hearing in the probate court on July 13, 2011, counsel for the minors, Emily Bartholomew, opposed mother's request for a continuance. Bartholomew observed that the court had already continued the matter once over Bartholomew's objection. She stated that Bates would be unavailable for the next few weeks and that Bartholomew was leaving the law firm on August 23, 2011. Bartholomew advised the court that she had spent a great-grandmother deal of time becoming familiar with the facts of the case. Furthermore, she argued that the children deserved "some resolution on the matter."

After a brief break, the probate court located the social worker's report, which it had not seen in the record, because it had been stapled to a document that related to another case. The court then denied the request for a continuance because the case had been pending for "a very long time" and Bartholomew was relocating out of the area. The court stated that it was in the children's best interest to have Bartholomew represent

them at the hearing. The court added that Bates was scheduled to be on a preplanned vacation outside of the country and Bartholomew would not be available when he returned.

The probate court had granted mother's earlier request for a continuance and we conclude that it had good reasons for denying this second request. The juvenile court had already denied her request to review the agency's decision not to file a dependency petition; thus, her principal basis for requesting a continuance no longer existed. Furthermore, as already discussed, she could not ask the probate court to request the juvenile court to review the decision because the time for review had lapsed under Welfare and Institutions Code section 331. Mother complains that the social worker's report was inadequate, but the time to object to the agency's decision not to file a dependency petition had passed. (See Welf. & Inst. Code, § 331.) Mother's procedural and substantive due process rights were not violated. As already discussed, mother could have made a timely request to have the probate court ask the juvenile court to review the decision not to file a dependency petition. She did not.

Accordingly, we conclude that the probate court did not abuse its discretion in denying mother's request for a continuance because the reason she gave for continuing the hearing—to have the dependency court review the agency's decision not to commence dependency proceedings—was moot. The juvenile court had already denied her request and the time to ask for review by the juvenile court had expired by the time mother raised the issue in the probate court.

IV. Designating Great-grandmother as an Indian Custodian

On February 2, 2011, the probate court found great-grandmother to be the children's Indian custodian "by designation of a parent and also by operation of state law given the temporary guardianship order." Mother claims that she did not agree to this designation and that this designation was contrary to law.

Counsel for Sam responds that mother cannot challenge this designation because, although mother's counsel later objected to great-grandmother's being the Indian custodian, the court never ruled on her request to revoke the designation and mother

never requested a ruling.

“ ‘Indian custodian’ means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.” (25 U.S.C. § 1903(6); Welf. & Inst. Code, § 224.1, subd. (a) [adopting ICWA’s definition of “Indian custodian”].) “In introducing the term ‘Indian custodian,’ the House Report on ICWA explained the need to expand the definition beyond custody of an Indian child ‘with someone other than the parents under formal custom or law of the tribe or under state law. . . . [B]ecause of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family member on an informal basis, often for extended periods of time and at great distances from the parents. While such . . . custodian[s] may not have rights under state law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interests of the parents.’ [Citation.]” (*In re G.L., supra*, 177 Cal.App.4th at p. 691.)

In the present case, great-grandmother was an enrolled member of the Tribe and on December 9, 2010, the Tribe removed the children from mother’s home and asked great-grandmother to take them. Great-grandmother immediately applied to the court for guardianship of the children. On December 20, 2010, father, a Tribe member, filed a form designating great-grandmother as the children’s Indian custodian. The court ordered great-grandmother temporary guardianship of the children on December 21, 2010. Thus by February 2, 2011, when the court designated great-grandmother as the Indian custodian, she was the Indian custodian by designation of father and by operation of the state law that had given her temporary guardianship.

Mother had legal representation since January 10, 2011. She, however, did not object to the designation of great-grandmother as the Indian custodian until March 28, 2011.

Even if we presume that this issue was preserved on appeal, we reject mother’s claim on its merits. Great-grandmother is an Indian person and custody of the children

was transferred to her by father and by operation of the law, when the court granted her petition for a temporary guardianship.

Mother argues that the designation of Indian custodian is temporary and is revoked when one parent withdraws consent. She cites *In re G.L.*, *supra*, 177 Cal.App.4th 683 in support of this argument. In *In re G.L.*, the parents both designated “Mary” as the Indian custodian of their child. (*Id.* at p. 687.) Subsequently, the mother filed a revocation of her transfer of care of her child to the Indian custodian. (*Id.* at p. 688.) Later, mother testified that she now wanted Mary to be the child’s Indian custodian. (*Id.* at p. 689.) On appeal, the court held that Mary did not need to receive notice under ICWA because the mother had revoked Mary’s Indian custodian status. (*In re G.L.*, at p. 694.) The court held that mother’s revocation was effective without father’s revocation. (*Id.* at p. 695.) Mother concludes that, under *In re G.L.*, she could revoke great-grandmother’s Indian custodian status without the consent of father.

Mother ignores the factual differences between *In re G.L.* *supra*, 177 Cal.App.4th 683 and the present case. In *G.L.*, both parents had designated a particular person as the Indian custodian and the court had not designated an Indian custodian. The court in *In re G.L.* does not suggest that the parent who never made the designation can then revoke the designation. One parent cannot “usurp the rights of the other parent with respect to an Indian child’s temporary custody.” (*Id.* at p. 695.) Furthermore, nothing in *G.L.* suggests that one parent can revoke temporary custody once the court has made the designation of Indian custodian. By the time mother objected to the Indian custodian designation, she no longer retained legal custody of the children and could not terminate the designation.

Accordingly, we reject mother’s claim that the court’s designation of Indian custodian should be reversed.

V. Visitation

At the end of the guardianship hearing, the court ordered supervised visitation for mother with Sam and T.R. for a minimum of two hours per week and an additional two hours of supervised visitation between mother and the two younger children in the home of aunt and uncle. The orders and letters of guardianship filed on August 8, 2011, did not

mention the court-ordered visitation and mother argues that we should reverse and remand to correct the order. If a court grants visitation, the order must state a minimum level of visitation to ensure that visitation, will in fact, occur. (See *In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1505.)

“Conflicts between the reporter’s and clerk’s transcripts are generally presumed to be clerical in nature and are resolved in favor of the reporter’s transcript unless the particular circumstances dictate otherwise.” (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249.) Both great-grandmother and Sam agree that the written orders should have reflected the court ordered visitation. They assert that the clerical error can be corrected nunc pro tunc. (See, e.g., *In re Marriage of Padgett* (2009) 172 Cal.App.4th 830, 852.)

“A trial court may correct a clerical error, but not a judicial error, at any time. A clerical error is one that is made in recording the judgment; a judicial error is one that is made in rendering the judgment.” (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205.) The error may be corrected with a nunc pro tunc order. (*Estate of Eckstrom* (1960) 54 Cal.2d 540, 544.) “ ‘ ‘ ‘The function of a nunc pro tunc order is merely to correct the record of the judgment and not to alter the judgment actually rendered—not to make an order now for then, but to enter now for then an order previously made.’ ” ’ ” (*In re Marriage of Padgett, supra*, 172 Cal.App.4th at p. 852.)

The orders of guardianship should thus be corrected to include the visitation ordered by the probate court.

VI. Terminating Mother’s Trial Counsel

Mother contends that the probate court erred when it excused her trial counsel after it ordered a permanent guardianship. She maintains that the court has continuing authority to grant visitation. (See, e.g., *Guardianship of Martha M.* (1988) 204 Cal.App.3d 909, 911.) She asserts that she had no opportunity to object to this action since the court relieved her counsel at the end of the hearing.

Mother had ample opportunity to object to the court’s relieving her counsel. Indeed, mother’s counsel expressed no concern about the probate court’s ruling, as her attorney agreed to represent mother pro bono if the parties were unable to reach an

agreement about the details of the visitation ordered. Mother has forfeited raising this issue on appeal.

Furthermore, mother is entitled to court-appointed counsel “in any removal, placement, or termination proceeding.” (25 U.S.C. § 1912(b).) Mother had legal representation, as required, for the foregoing proceedings. Mother has failed to cite any statute or case that supports her argument that she is entitled to appointed counsel for any possible future proceeding regarding visitation, and we will not create any such rule.

Accordingly, we conclude the probate court did not err when it relieved mother’s court-appointed counsel after it had ordered a permanent guardianship.

DISPOSITION

The probate court is directed to correct the orders of guardianship, nunc pro tunc, to add the following: Mother is to have a minimum of two hours per week of supervised visitation with Sam and T.R. and an additional four hours per week of supervised visitation with the two youngest children; all supervised visitation is to occur in the home of the maternal aunt and uncle. In all other respects the orders of guardianship are affirmed.

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.