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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re J.P., et al., Persons Coming Under the
Juvenile Court Law.

LAKE COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

J.P., et al.,

Appellants.

A135427, A136437

(Lake County
Super. Ct. Nos. JV320322A,
JV320322B)

J.P. and J.C. (minors) were declared dependents of the juvenile court following the death of their mother (mother). At the time, their fathers had long since ceased to be involved in their lives, and minors were living with their grandmother (grandmother) and grandmother's husband (collectively grandparents). The Lake County Department of Social Services (Agency) detained minors on the basis of police reports of a messy, unsanitary home and grandmother's conviction, several years earlier, for elder abuse resulting in death. Minors later expressed a preference to stay with grandmother, but they were given no opportunity to present their views at the jurisdictional hearing.

Minors contend the juvenile court erred in failing to assure they had an opportunity to participate in the jurisdictional hearing. In addition, they contend the court erred in declining to permit a retained attorney to represent them in proceeding with the dispositional hearing prior to proper notice having been given under the Indian Child

Welfare Act (25 U.S.C. § 1901, et seq.; ICWA), and in failing to find good cause to deviate from the placement preferences of ICWA. We affirm the court's jurisdictional order, but we issue a limited reversal of the court's dispositional order and remand for a determination of proper compliance with the notice provisions of ICWA.

I. BACKGROUND

J.P. and J.C., half-brothers who were then 14 and 10 years old, respectively, were the subjects of a dependency petition under Welfare and Institutions Code¹ section 300, subdivisions (b) and (g), filed March 1, 2012. The petition alleged mother had suffered a heart attack and was being kept alive by means of a ventilator. For a year prior to mother's illness, minors had been living with her at the home of grandparents. After mother's heart attack, minors were placed with the presumed father of J.P. (J.P.'s father), who had shown little interest in them previously, had a history of alcohol abuse, and lacked a permanent home. J.P.'s father allowed them to return to grandparents' home. The petition alleged grandmother was "not an appropriate caregiver" because she had a history of drug abuse, maintained a "physically unsafe" home, and had been convicted of elder abuse resulting in death. J.C.'s father had not been located.

A. Jurisdictional Proceedings

By the time of the jurisdictional report, mother had died. As the report explained, the Agency's intervention arose after two visits to grandparents' home in Clearlake by police. On the first visit, the police found the home to be "dirty," with "clothes and trash lying on the ground." The minors assured the police they were well-fed and well cared for, and all parties claimed the disorder occurred because mother had prevented them from cleaning. Nonetheless, grandmother decided to place the minors with J.P.'s father, who had little recent contact with them, but two days later he returned the minors to grandmother.² When a subsequent police check at grandmother's home found no change,

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² J.P.'s father acknowledged being an alcoholic, but he claimed to have been sober for the preceding two months.

the officers decided to remove the minors. The juvenile court detained minors, and they were placed in foster care.

The report attached documents demonstrating that grandmother and her husband had been charged in 1996 with causing the death of an elderly woman in their care by failing to seek medical treatment for her. The victim was said by the Agency to be grandmother's mother. Grandmother ultimately pleaded no contest to two counts of elder abuse, but the resolution of the charges against her husband was unclear. In addition, grandmother had been arrested in 2010 on suspicion of embezzling over \$30,000 from a local church, where she had been hired as a part-time secretary. It was unclear from the report whether any formal charges were filed in connection with the arrest.

At a detention hearing held the day after filing of the petition, grandmother explained to the court that the disordered state of their home was caused by mother, who was a hoarder. Grandmother said the house had been straightened up since her daughter's hospitalization and that it was "completely sanitized and cleaned." She denied any history of drug abuse, although she acknowledged taking prescription medication. She did not address her criminal conviction.

The March 26 jurisdictional hearing was conducted by a different judge. The minors were not present, although they were represented by appointed counsel. J.P.'s father did not contest jurisdiction, his counsel telling the court he was "prepared to submit it on the petition." After some discussion of other issues, the court "adopt[ed] the findings and orders set forth in the jurisdiction report" and scheduled a dispositional hearing. Sometime thereafter, the court addressed counsel for the minors, noting that one of them was a "young teenager" and saying, "I take it that you'll . . . talk to them and see if they want to appear and what their positions are." Counsel responded, "Right. I want[ed] to wait before the dispo and jurisdiction just for talking to them."

B. The Attempt to Substitute Counsel

Within a week of the jurisdictional hearing, attorney Anna Gregorian filed a substitution of counsel form executed by minors' appointed counsel, pursuant to which Gregorian purported to replace the appointed counsel. Immediately thereafter, Gregorian

began filing pleadings on minors' behalf, including a "Children's Attorney's Report" accompanied by handwritten declarations from minors expressing their desire to hire Gregorian as their attorney.

Gregorian attended the dispositional hearing on April 9 as minors' attorney. After she refused to inform the court how she learned of the proceedings or who was paying her to represent the minors, the juvenile court appointed a law firm to investigate the withdrawal of minors' appointed counsel and "whether or not [Gregorian was] truly an independent counsel within a dependency matter." The court also appointed that law firm to represent minors pending completion of the investigation. In a subsequent written order, the court declared void the purported substitution of counsel because it had not been approved by the court (§ 317, subd. (d)) and held that any further request for substitution by Gregorian would be denied until she clarified her relationship with the grandparents to permit an evaluation of potential conflicts of interest.

Gregorian sought reconsideration, arguing the minors were entitled to their choice of counsel and claiming she had "explained matters regarding conflict of interest to the minors" and "explained matter relevant to whether or not third parties pay their bill and how that effects them and the case [*sic*]." At the final dispositional hearing on April 30, Gregorian sought to argue her motion, claiming the minors "[have] hired me to represent them before this Court. . . . And they'd like to be heard on the issue." When she prompted J.P. to speak, however, he declined to say anything. Examined as a witness, Gregorian acknowledged receiving payment of \$1,500 from grandmother to represent the minors. She agreed that "the grandmother basically wanted to get a lawyer for the grandchildren."

At a subsequent hearing, the court declined to revisit its earlier ruling rejecting Gregorian's substitution. As the court explained: "Judicial notice is taken of Counsel Gregorian's testimony at the prior hearing, as well as the older child's response to her question in open court. A simple 'no' when she leaned into him and tried to get him to say something to the Court, 'Do you want to say something to the Court,' he said 'No.' [¶] . . . Her testimony . . . [¶] . . . on its face shows a conflict that essentially cannot be

knowingly waived by at the bare minimum a ten-year-old, if not a 15-year-old. . . . [¶] To the extent that the Court would have jurisdiction to grant reconsideration or the extent that [Gregorian] has any standing, which is doubtful, the motions would all be denied.”

C. The Dispositional Decision

The initial disposition report recommended that reunification services be provided to J.P.’s father and J.C.’s alleged father, who had been located. At the time, however, the minors were “unwilling to visit” J.P.’s father, and J.C.’s alleged father was uninterested in reunification. He disclaimed biological parentage and said he had not had contact with J.C. for five years. Although grandparents were reported to be “interest[ed] in placement,” the Agency believed grandmother’s elder abuse conviction made the prospect doubtful. Because J.P.’s father had Native American ancestry, the Agency submitted a declaration by an expert witness, Percy Tejada, who urged placement consistent with that heritage.

The dispositional hearing on April 16 was attended by a representative of the Scotts Valley Band of Pomo Indians (Pomo Indians), the Native American tribe with which J.P.’s father was affiliated. The representative presented the court with a resolution from the tribe stating its preference for placement of minors with two of J.P.’s father’s sisters in Santa Rosa. The tribe anticipated minors would remain together, although J.C. was not related to J.P.’s father or the tribe. Minors then met with the court privately. J.P. told the court he would “love to live with my grandparents . . . because there’s lots of thing I cannot leave here, like my friends I can’t just leave my mother’s pets because she kept them as close as me and [J.C.]” J.C. agreed. The juvenile court continued the dispositional hearing without ruling.

At the continued hearing on April 30, prior to handling the Gregorian matter discussed above, the court sought guidance from the parties, including the tribal representative. The minors’ attorney told the court they “are adamant that they want to be placed with their grandparents. But if they could not be placed with their grandparents, they would like to remain with their foster parents at this time.” Although the court “noted” the minors’ views, it elected “to follow the tribal preference” to place

both minors with members of J.P.'s father's family. The court's dispositional order directed "tribal placement . . . no later than 6/29/12."

Following entry of the dispositional order, the minors filed motions pursuant to section 388 to modify the juvenile court's order directing tribal placement preference on the grounds J.P. was a multiethnic child who had little prior contact with his paternal relatives and J.C. was not a member of that family or tribe at all. The court denied the motions in an order of July 24, noting the placement "has not been given sufficient time to succeed." Virtually identical section 388 motions filed promptly thereafter were also denied.

D. ICWA Compliance

In a disposition report filed April 5, 2012, the Agency informed the court that on March 29, 2012, grandmother informed an Agency social worker in a voicemail that "her father is a Navajo out of New Mexico." The report noted the Agency "is in the process of gathering more information from [grandmother] to notice the appropriate Tribes."³ The Agency did not request a delay in the dispositional hearing, which was scheduled for April 9. As noted above, the hearing was ultimately held on April 16 and 30. Although a representative of the Pomo Indians participated, there is no indication in the record that notice had been sent to the Navajo tribe at the time of the dispositional hearing.

At the time, the Federal Register, which maintains a list of "Designated tribal agents for service of notice" pursuant to regulations promulgated under ICWA (see 25 C.F.R. § 23.12 (2013); 76 Fed. Reg. 30438 (May 25, 2011); 77 Fed. Reg. 45816 (Aug. 1, 2012)), listed three possible agents for service of notice on the Navajo tribe: Omar Bradley, regional director of the Navajo Regional Office in Gallup, New Mexico; Regina Yazzie, director of the Navajo Children and Family Services of the Navajo Nation in Window Rock, Arizona; and Marlene Martinez, administrative services director of the Ramah Navajo School Board, Inc., in Pine Hill, New Mexico. (76 Fed. Reg. 30451,

³ As noted above, J.P.'s father claimed descent from the Pomo Indians, which participated in the dispositional hearing. There is no claim of error in the Agency's ICWA compliance with respect to J.P.'s father's tribe.

30468–30469 (May 25, 2011).) Following the dispositional hearing, on May 16, 2012, the Agency sent notice of the proceeding to Yazzie in Arizona.⁴ An ICWA compliance report, filed September 20, 2012, attached a letter cosigned by Regina Yazzie and Jacqueline Yazzie, stating they had been unable to verify either minor’s eligibility for enrollment with the “Navajo Indian Tribe.” There is no explanation in the record for the Agency’s decision to provide notice only to the tribal representative residing in Arizona.

II. DISCUSSION

The minors appeal the court’s jurisdictional and dispositional orders and its refusal to permit Gregorian to serve as their attorney.

A. *The Jurisdictional Hearing*

Minors contend they were denied due process when the court failed to determine whether they had received notice of the jurisdictional hearing and did not receive effective assistance of counsel because their attorney failed to ensure they were present to state their views at the jurisdictional hearing. Under section 349, minors unquestionably had the right to be present. (*Id.*, subd. (a).) Moreover, because both minors were 10 years or older, the juvenile court had an affirmative statutory duty to determine whether they were properly notified and were given the opportunity to attend. (*Id.*, subd. (d); see also Cal. Rules of Court, rule 5.534(p)(2).) The juvenile court not only failed to make these determinations, but it was also informed by minors’ counsel that she had not spoken to minors, suggesting no notice had been given. Under these circumstances, section 349, subdivision (d) required the juvenile court to continue the hearing unless it made an affirmative finding a continuance would not have been in the minors’ best interests.

We decline to decide whether this statutory violation constituted a violation of due process and a failure to render effective assistance of counsel because we find no prejudice, even under the stringent due process prejudice test of *Chapman v. California* (1967) 386 U.S. 18. The premise for minors’ argument is their contention the only

⁴ By order of January 15, 2013, we granted the Agency’s request for judicial notice of the documents discussed in this paragraph.

evidence before the juvenile court of risk to their well-being was grandmother's dirty home. They argue if a continuance were granted they could have appeared and told the juvenile court they were well cared for by grandparents and preferred to stay with them. We conclude such testimony would not have prevented the juvenile court from exercising dependency jurisdiction beyond a reasonable doubt.

Minors' argument badly mischaracterizes the evidence presented in the jurisdictional report. In fact, the juvenile court was presented with these circumstances. Mother had died recently and, apparently, unexpectedly. The father of one of the minors was nowhere to be found, and the father of the other boy, a longtime alcoholic, had little relationship with them and was not in a position to care for them. J.P.'s father had returned them to the home of grandparents, despite his own qualms about grandparents' competence as caregivers. In addition to maintaining a filthy and disordered home, grandmother had been convicted of abusing an elder in her care by failing to secure medical treatment and permitting the elder to die. She also had, fairly recently, been arrested on suspicion of embezzlement.

Remarkably, in the 96 pages of minors' opening brief on appeal, there is no mention of, let alone an honest attempt to address, the importance of grandmother's criminal history for the juvenile court's jurisdictional decision. While minors do acknowledge the issue in their reply brief, they merely dismiss her conduct, arguing: "While it is likely that the Department could not have placed the children in [grandmother's] care after the court acquired jurisdiction in light of her criminal history, this did not provide any evidence that the children were subject to a substantial risk of physical harm." On the contrary, by pleading no contest to these charges grandmother effectively admitted that she had, at a minimum, allowed a helpless person entrusted to her care to die for want of proper medical care. Given the immense gravity of that failure, the conviction has a direct bearing on the likely quality of care grandmother could be expected to give to minors, who similarly would be persons entrusted to her care. As minors point out, the conviction would disqualify grandmother for custody of minors under the dependency laws. (§ 361.4, subd. (d)(2); Health & Saf. Code, § 1522,

subd. (g)(1)(A)(i) [person convicted under Pen. Code, § 368 ineligible for exemption].) Although this disqualification was not directly relevant at the jurisdictional stage, it clearly indicates the Legislature's view of the seriousness of the crime and its implications for the character of a caregiver. Grandmother's much more recent arrest, and the accusations and evidence surrounding it, which are detailed at length in the jurisdiction report, confirmed that she continued to be a person who would abuse a trust. The juvenile court could not be expected to take that risk with minors' well-being.

The mere fact that minors were comfortable in grandparents' home would not have been sufficient to overcome these alarming circumstances, particularly because minors were at that time in regular contact with and potentially under the influence of grandmother. In fact, the juvenile court was already aware, through the police report, that minors were well-fed and claimed not to have been abused, notwithstanding the unsanitary state of their home. Given the unavailability of a competent parent and caretakers whose background and conduct cast doubt on their ability to care properly for minors, it would have been irresponsible for the juvenile court to decline to exercise jurisdiction merely on the basis of minors' assurances they were content with grandparents' care. We conclude beyond a reasonable doubt the juvenile court would not have acted irresponsibly in this manner.⁵

B. Gregorian's Representation

Minors contend the trial court erred in refusing to permit Gregorian to represent them.

A minor who is party to a dependency hearing "has the right to be represented at the hearing by counsel of his or her own choice." (§ 349, subd. (b).) Once an attorney for a minor has been appointed, however, that attorney "shall continue to represent the parent, guardian, child, or nonminor dependent unless relieved by the court upon the substitution of other counsel or for cause." (§ 317, subd. (d).) These provisions were

⁵ For the same reasons, we deny minors' petition for habeas corpus, A138507, filed April 29, 2013, by separately filed order.

reconciled in *Akkiko v. Superior Court* (1985) 163 Cal.App.3d 525, which held that when a minor seeks to substitute counsel of his or her own choosing for appointed counsel in a dependency proceeding, the court must rule on the request, taking into consideration “the minor’s capacity to select counsel as well as the competence of counsel.” (*Id.* at p. 530.) The *Akkiko* court “categorically reject[ed the] argument that a child of any age may choose his or her own counsel.” (*Ibid.*) Rather, the court held, the juvenile court is “obligated to honor the minor’s choice of counsel [citation] [only] if [the minor] was competent to choose and chose competent counsel.” (*Id.* at p. 531.)

Under rule 3-310 of the Rules of Professional Conduct, an attorney “shall not accept compensation for representing a client from one other than the client” unless “[t]here is no interference with the member’s independence of professional judgment or with the client-lawyer relationship” and the attorney obtains the client’s “informed written consent.” (Rules of Prof. Conduct, rule 3-310(F)(1), (3).) “ ‘[W]hen a third party pays for a lawyer’s service to a client . . . there is [a] danger that the lawyer will tailor his [or her] representation to please the payor rather than the client.’ ” (*Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 428–429.) “In order for there to be valid consent, clients must indicate that they ‘know of, understand and acknowledge the presence of a conflict of interest’ ” (*Id.* at p. 429.) “ ‘[The concept of informed consent] signifies that a person making an important decision does so on the basis of adequate knowledge of the facts and an awareness of the consequences of decision.’ ” (*Id.* at p. 430.) An attorney who fails to obtain written informed consent in a context covered by rule 3-310(F) must be disqualified. (*City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 502.)

Based on the foregoing, we find two grounds for affirming the juvenile court’s decision not to recognize Gregorian’s substitution. First, because Gregorian was being paid by grandmother, a conflict of interest existed that could not be overcome without the written informed consent of the minors. Such consent required a writing demonstrating minors were aware of the conflict and the risks it presented and chose to proceed. (*Sharp v. Next Entertainment, Inc.*, *supra*, 163 Cal.App.4th at pp. 428–429.) The mere statement

by minors in their declarations that they wanted Gregorian to be their attorney, the only writings by minors in the record, did not suffice. (*Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal.App.4th 1240, 1255.) Without their written informed consents, Gregorian was disqualified from representing minors.

Second, the juvenile court did not abuse its discretion in concluding minors lacked capacity to give informed consent to Gregorian's representation. (*People v. Clark* (1992) 3 Cal.4th 41, 107 [a trial court's finding of lack of capacity is reviewed for abuse of discretion].) The relevant question is whether the minors had the capacity to knowingly waive the conflict "while realizing the probable risks and consequences." (*Ibid.*) At the time of Gregorian's purported substitution, minors were not only minors, 10 and 14 years old, but they were also particularly vulnerable. Their mother had died recently; they had been removed from the home of grandmother with whom they had lived for the past year and whom they loved and trusted; and they were living in the home of a foster parent, necessarily without a clear idea of the forces affecting their lives. As a result, they were in no position to understand and, more importantly, to intelligently evaluate the risks of the conflict presented by their grandmother's retention of an attorney. Given those circumstances, we find no abuse of discretion in the juvenile court's conclusion minors lacked the capacity to give knowing consent to the representation.⁶

We also note that, as the juvenile court appeared to suggest, it is by no means clear Gregorian was minors' choice as their attorney by the time her motion was heard, notwithstanding the handwritten declarations she elicited. The declarations were written at the time of the jurisdictional hearing, when minors' appointed attorney had failed even to contact them. It was not surprising they were willing to agree to an attorney who pledged to fulfill her professional responsibilities. By the time the juvenile court

⁶ Minors contend the juvenile court erred in not holding a separate hearing directed solely at their capacity to consent. There is no requirement of a separate hearing, nor was the juvenile court required to grant Gregorian's request for an ex parte hearing on the issue of her conflict of interest. We are satisfied the court's proceedings gave minors and Gregorian ample opportunity to litigate the relevant issues.

considered Gregorian’s motion for appointment as counsel, at the dispositional hearing, minors had had an opportunity to work with their second appointed counsel, who was actively working on their behalf. When J.P. was asked by Gregorian to confirm her as his choice, he declined to do so, indicating a lack of enthusiasm for her representation.

C. The Dispositional Order

1. ICWA Compliance

Minors argue the juvenile court erred in proceeding with the dispositional hearing before the Agency had provided proper notice to the Navajo tribe, following the Agency’s notification by grandmother that she was descended from a member of the tribe.⁷

“ICWA is a federal law giving Indian tribes concurrent jurisdiction over state court child custody proceedings that involve Indian children living off of a reservation. [Citations.] Congress enacted ICWA to further the federal policy ‘ “that, where possible, an Indian child should remain in the Indian community” ’ ” (*In re W.B.* (2012) 55 Cal.4th 30, 48, fn. omitted.) “When applicable, ICWA imposes three types of requirements: notice, procedural rules, and enforcement. [Citation.] First, if the court knows or has reason to know that an ‘ “Indian child” ’ is involved in a ‘ “child custody proceeding,” ’ . . . the social services agency must send notice to the child’s parent, Indian custodian, and tribe by registered mail, with return receipt requested . [Citation.] . . . No hearing on foster care placement or termination of parental rights may be held until at least 10 days after the tribe or [Bureau of Indian Affairs] has received notice. [Citation.] [¶] Next, after notice has been given, the child’s tribe has ‘ a right to intervene at any point in the proceeding.’ [Citation.] . . . [¶] Finally, an enforcement provision offers recourse if an Indian child has been removed from parental custody in violation of ICWA.” (*Id.* at pp. 48–49.) “Thorough compliance with ICWA is required.” (*In re J.M.* (2012) 206 Cal.App.4th 375, 381.)

⁷ Although minors did not raise this issue below, a challenge to ICWA notice compliance is not forfeited by a failure to object in the juvenile court. (*In re J.T.* (2007) 154 Cal.App.4th 986, 991.)

Of concern here is the notice requirement. If an Agency “knows or has reason to know that an Indian child is involved” in a dependency proceeding, the Agency must send notice of the proceeding to, among others, a representative of all potentially interested Indian tribes. (§ 224.2, subd. (a).) All that is required to trigger this notice requirement is “ “a suggestion of Indian ancestry.” ’ ’ ” (*In re J.M., supra*, 206 Cal.App.4th at p. 380.)⁸ Once such a suggestion has been received, the juvenile court cannot proceed with further hearings until 10 days after the receipt of notice of the proceeding by all tribes of which the child might be a member. (§ 224.2, subd. (d); Cal. Rules of Court, rule 5.482(a)(1); *Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 267–268 [limited reversal where juvenile court had not received proof of tribes’ receipt of notice at time of hearing].) When a hearing is held in violation of ICWA notice requirements, any order resulting from the hearing is subject to limited reversal and remand to ensure ICWA compliance. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 705–706.)

The dispositional hearing was plainly conducted in violation of ICWA’s notice requirements. At the time of the hearing, the Agency had been informed by grandmother that the great-grandfather of both minors was of Navajo ancestry. This was a sufficient suggestion of Indian ancestry to trigger notice. The juvenile court was therefore precluded from proceeding with the dispositional hearing until 10 days after the Navajo tribe had received notice of the proceedings. (§ 224.2, subd. (d).)⁹

The Agency has sought to demonstrate that the failure to provide notice to the Navajo tribe was harmless by submitting Yazzie’s letter declaring the minors’

⁸ For example, under section 224.3, an agency has “reason to know” a child might be an Indian child if a member of the child’s extended family provides information suggesting the child or one or more of his or her biological parents, grandparents or great-grandparents are or were members of a tribe. (*Id.*, subd. (b)(1).)

⁹ The Agency argues it complied with ICWA because it provided notice to the Pomo Indians, but Indian tribes are not considered fungible under ICWA. The Agency is required to give notice to all tribes of which it has a suggestion of membership. (*In re C.B.* (2010) 190 Cal.App.4th 102, 145–146.)

nonmembership, which resulted from notice sent after the dispositional hearing. (See *In re A.B.* (2008) 164 Cal.App.4th 832, 840–843 [court can take judicial notice of postorder evidence in determining whether ICWA noncompliance was harmless].)

In order to comply with ICWA, the Agency was required to send notice to “ ‘all federally recognized tribes within the general umbrella identified by the child’s parents or relatives.’ ” (*In re C.B.*, *supra*, 190 Cal.App.4th at p. 146.) With respect to the Navajo tribe, the official list of federally recognized tribes at the time of notice specified, “Navajo Nation, Arizona, New Mexico & Utah.” (77 Fed. Reg. 47868, 47870 (Aug. 10, 2012).) As noted above, the official list of Navajo representatives included three different individuals, one in Arizona and two in New Mexico. Although the Agency was informed the minors were descended from a member of the Navajo tribe in New Mexico, it appears to have sent notice only to the Navajo representative in Arizona.

We cannot conclude as a matter of law that the Agency provided proper posthearing ICWA notice, thereby rendering harmless its failure to comply in advance of the dispositional hearing. While it is possible the Arizona representative had the authority to speak for the entire Navajo Nation in deeming the minors ineligible for membership, it is also possible that the “Navajo Nation, Arizona, New Mexico & Utah” encompasses more than one cultural or administrative entity. If this is the case, the Agency did not provide adequate notice merely by contacting the tribal representative in Arizona, since the Agency was told the minor’s Indian ancestor was from New Mexico. Without more information, we cannot conclude that the Agency performed its ICWA duty.

We must enter a limited reversal and remand for ICWA compliance. (See, e.g., *In re Francisco W.*, *supra*, 139 Cal.App.4th at p. 708 [explaining purpose of limited reversal].) In remanding, we do not mean to suggest that the Agency necessarily is required by ICWA to provide additional notice. Rather, the Agency must either provide notice to the New Mexico Navajo representatives or demonstrate to the juvenile court that notice sent solely to the Arizona representative was sufficient to establish the minors’ eligibility for membership in the entirety of the Navajo Nation.

2. *Minors' Placement*

Minors contend the juvenile court erred in not finding “good cause” to deviate from the preferred placement for Indian children listed in section 361.31.

“ICWA provides placement preferences and standards to be followed in foster care placements of Indian children. [Citation.] Preference must be given, ‘in the absence of good cause to the contrary, to a placement with—[¶] (i) a member of the . . . child’s extended [Indian] family’ [Citation.] . . . The placement preference standards reflect the legislative goal of keeping Indian children with their extended families and preserving the connection between the child and his or her tribe when removal is necessary.

[Citations.] [¶] In deciding whether good cause exists to deviate from the statutory placement preferences, the court should consider various factors set forth in ICWA’s Guidelines, including: (1) the request of the biological parents; (2) the request of the child; (3) the extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness; and (4) the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria. [Citations.] The burden is on the proponent of the good cause finding . . . to show there is an exception to the placement preferences.” (*In re G.L.* (2009)

177 Cal.App.4th 683, 697.)

We find no abuse of discretion in the juvenile court’s decision not to deviate from ICWA’s placement preferences.¹⁰ The relatives of J.P.’s father selected by the tribe and the court appear to be qualified extended family members who would maintain J.P.’s tribal connection, the objective of ICWA’s placement preferences. The placement urged

¹⁰ The minors urge application of the substantial evidence standard of review applied to review of a juvenile court’s finding of “good cause” to deviate from the preferences. (E.g., *Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 644.) While it may be appropriate to evaluate an affirmative finding of good cause for substantial evidence, it makes no logical sense to test the failure to find good cause in the same manner. Rather, a juvenile court’s decision to follow the statutory preferences is a typical exercise of judicial discretion, to be evaluated for abuse of discretion.

by minors, a stranger foster home nearer to grandmother's home in Clearlake, would serve none of the objectives of ICWA.¹¹ While minors' preference was entitled to consideration (see Cal. Rules of Court, rule 5.484(b)(2)(B) [good cause "may" take into consideration request of Indian child]), it was not conclusive. It was within the discretion of the juvenile court to disregard minors' request in favor of the preferred placement specified by Congress and our Legislature.

Minors cite *In re Anthony T.* (2012) 208 Cal.App.4th 1019, which found "good cause" in the failure of the tribal placement to satisfy the requirement of section 361.31 that "[t]he child . . . be placed within reasonable proximity to the child's home." (§ 361.31, subd. (b).) As *Anthony T.* recognized, "reasonable proximity" must be determined "on a case-by-case basis considering the child's needs and his or her family's circumstances. It is not simply a matter of determining distance, mileage or travel time." (*Id.* at p. 1030.) In *Anthony T.*, the children needed to be close to their parents' home to permit visitation and facilitate reunification. (*Id.* at p. 1028.) That consideration was absent here, since mother has died, J.C.'s father has expressed no interest in reunification, and reunification services were denied to J.P.'s father. We find no abuse of discretion in the juvenile court's conclusion that the distance between Santa Rosa and Clearlake, which lie in contiguous California counties, constitutes "reasonable proximity" under these circumstances.¹²

III. DISPOSITION

The juvenile court's jurisdictional order is affirmed. The dispositional order is reversed, and the case is remanded to the juvenile court with directions to determine

¹¹ Although minors also expressed a strong desire to stay with grandmother, that was not legally practicable as a result of grandmother's prior conviction. (§ 361.4, subd. (d)(2); Health & Saf. Code, § 1522, subd. (g)(1)(A)(i).) So far as the record reflects, the only realistic alternative in Lake County was a stranger placement.

¹² Minors contend they were denied due process because the juvenile court did not hold a hearing on their second motion for reconsideration. Given the substantial similarity between the first and second motions, the failure to hold a hearing was not prejudicial.

whether the Agency’s provision of notice to Regina Yazzie of the Navajo Nation in Window Rock, Arizona, constituted adequate notice under ICWA to the Navajo Nation in New Mexico. If the court concludes notice was adequate, the dispositional order shall be reinstated.

If the court concludes such notice was not adequate, it shall order the Agency to comply with the notice provisions of ICWA. If, after proper notice, the Navajo Nation in New Mexico claims minors are eligible for membership and seeks to intervene, the juvenile court shall proceed in conformity with all provisions of ICWA. If, on the other hand, the Navajo Nation in New Mexico makes no such claim, the dispositional order shall be reinstated.

Margulies, Acting P.J.

We concur:

Dondero, J.

Sepulveda, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.