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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re D.C., a Person Coming Under the  
Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN  
& FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

D.C.,

Defendant and Appellant.

A141365

(Contra Costa County  
Super. Ct. No. J12-01245)

D.T.C. (father), the father of two-year-old D.C., challenges the juvenile court’s termination of his parental rights on the grounds that (1) the requirements of the Indian Child Welfare Act (ICWA) and related state laws were not satisfied; (2) the “statutory framework” of Welfare and Institutions Code section 300 et sequitur was not followed;<sup>1</sup> and (3) he should have been appointed a guardian ad litem. He also claims his trial counsel rendered ineffective assistance of counsel. We reject father’s claims, except we conditionally reverse the order terminating his parental rights and remand to ensure compliance with ICWA-related requirements.

<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

I.  
FACTUAL AND PROCEDURAL  
BACKGROUND

In August 2012, six-month-old D.C. was removed from father and R.C. (mother) after it was reported that D.C. and two-year-old Z.H., D.C.'s half sister on mother's side, were not being cared for appropriately.<sup>2</sup> The family's "home was 'very marginal, dirty, with little furniture and food.'" A neighbor reported that the parents were "'constantly fighting and yelling at each other,'" during which "the children [would] 'cry for like an hour,'" and there was a sheet over a window because "father 'broke the blinds in one of his rages.'" The neighbor could "'smell drugs from the house every night.'" The children had been observed "'run[ning] around in the [apartment] complex unsupervised and poorly dressed,'" and the parents reportedly "use[d] the children to 'go to each neighbor's house and beg for food, money, or matches.'" "

Father had a history of domestic violence, including a pending criminal charge involving two other women. He told the social worker he had a "life[-]threatening illness" that sometimes prevented him from getting out of bed, had stopped taking his medication because he was unable to apply for MediCal, and smoked marijuana "'several times'" a day to be able to eat. His probation officer reported that both father and mother neglected their medical issues and had "'serious mental health concerns.'" The officer opined that father "'should not have any children in his care due to his history and mental health instability.'" <sup>3</sup>

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<sup>2</sup> Mother is not a party to this appeal, and the order at issue does not involve Z.H. We do not discuss facts relating to either except as relevant.

<sup>3</sup> When D.C. and Z.H. were removed, father was in violation of an order for no contact between him and Z.H., which was entered after Z.H. was removed from mother's care in October 2011 and her father was granted custody. In addition, two of father's young children by a different mother were detained in June 2012 after he "violently [took them] from a motel . . . at 1 a.m., where he was observed to be under the influence of drugs" and when it appeared he had no means to care for them. Father's appeal involving these children's dependency cases is currently pending in this court. (*In re L.C.* (A142376).)

In late August 2012, the Contra Costa County Children & Family Services Bureau (Bureau) filed a juvenile dependency petition for D.C., alleging jurisdiction under section 300, subdivision (b) (failure to protect) based on father's domestic violence and drug use and under subdivision (j) (abuse of sibling) based on the two other half-siblings' dependency cases. At the jurisdictional hearing in October, mother pleaded no contest to the allegation that she "placed the child at risk of harm by engaging in heightened altercations [with] the child's father . . . , who has a history of serious domestic violence," and father pleaded no contest to the allegation that he "has a history of engaging in domestic violence, including with the child's mother, placing the child at risk of harm."<sup>4</sup> The juvenile court found D.C. to be a child described by section 300, subdivision (b). It also entered a judgment of father's paternity.

Father visited weekly with D.C. until November 2012, when he was arrested for violating parole and jailed. He was transferred to San Quentin State Prison in late January 2013. Meanwhile, D.C. and Z.H. were first placed in a foster home together, but Z.H. was then placed with her paternal uncle in Sacramento, and D.C. was soon moved to a different foster home.<sup>5</sup>

After several continuances, the dispositional hearing was held in March 2013. The juvenile court ordered reunification services for the parents, and the case plan required father to complete a domestic violence program, attend substance abuse counseling, and be tested for drugs. The court suspended father's visits with D.C. until his release from

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<sup>4</sup> The allegations involving father's drug use were dismissed with the agreement that the case plan would address his substance abuse. Also dismissed were allegations under section 300, subdivision (j) based on the dependency cases involving the two half-siblings.

<sup>5</sup> The case plan stated D.C. and Z.H. would have weekly visits, but the record does not indicate whether any visits ever occurred.

prison, however, finding that visits at San Quentin would be detrimental to D.C. (who had recently turned one year old).<sup>6</sup>

Father was released from prison in June 2013. By August, the parents were reportedly living together in a shelter in San Francisco, having left two previous shelters after having problems with other residents, “ ‘smoking pot in [their] room, arguing a lot, . . . having people in the rooms [who] were not supposed to be there,’ ” being “ ‘unpleasant and uncooperative with staff,’ ” and possibly engaging in domestic violence. Later that month, mother gave birth to another child by father. The newborn boy was also removed from the parents’ care and was placed with D.C.<sup>7</sup>

According to information provided by the social worker in the infant’s case, father recognized he “had ‘not been able to do much of [the] services’ ” ordered in D.C.’s case while incarcerated. An October 2013 report filed before the combined six- and twelve-month status-review hearing stated that father “ha[d] not remained in contact with the Bureau and provided no verification of any service participation . . . before, during, or after his incarceration.” Nor had he asked to resume visits with D.C. after his release from prison, and he did not appear for scheduled visits in September and October. The Bureau concluded that neither parent had “addressed any of the issues that place their child at risk” and recommended termination of services.

Before the combined six- and twelve-month status-review hearing in November 2013, father had one visit with D.C., at which mother was also present. The social worker reported, “[F]ather tried to hold [D.C.,] who was crying and did not want to be held. [She] did not appear to know or feel comfortable with either parent, but was more upset when . . . father tried to hold her.” At the review hearing, father did not appear, and the juvenile court found that further visitation with the parents would be detrimental to

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<sup>6</sup> Citing the transcript of this hearing, father claims the juvenile court never made a finding of detriment, but the minute order contains the handwritten note that “visitation at San Quentin would be detrimental to minor.”

<sup>7</sup> Father’s appeal from an order terminating his parental rights to this child is also currently pending in this court. (*In re D.C.* (A141989).)

D.C. The court also found that reasonable services had been provided, terminated the parents' services, and scheduled a selection-and-implementation hearing under section 366.26 (section 366.26 hearing).

Father also did not appear at the section 366.26 hearing in March 2014, despite being personally served with notice of it. His trial counsel requested a continuance, which the juvenile court denied because there was "absolutely no reason for [his] failure to be here that the Court's aware of." The court then terminated father's and mother's parental rights.

## II. DISCUSSION

### A. *The Order Terminating Father's Parental Rights Must Be Conditionally Reversed Because the Juvenile Court Did Not Determine Whether ICWA Applies.*

Father argues that the order terminating his parental rights must be reversed because the juvenile court and the Bureau failed to comply with ICWA-related notice and inquiry requirements. We conclude that a conditional reversal is necessary because the court made no express or implied finding whether ICWA applies despite father's conflicting representations about D.C.'s possible Indian heritage.

The petition filed in August 2012 included an ICWA-010(A) form, "Indian Child Inquiry Attachment," stating that an ICWA inquiry had been made of both parents and that D.C. had no known Indian ancestry. The detention/jurisdiction report similarly noted that on August 27, the parents had "advised the [social worker] that to their knowledge [D.C. and Z.H.] have no known/affiliated Native American Heritage" and that the ICWA-010(A) form had been completed based on this conversation.

On August 29, however, father completed and filed an ICWA-020 form, "Parental Notification of Indian Status," containing conflicting information. On the form, he checked the following three boxes: (1) "I am or may be a member of, or eligible for membership in, a federally recognized Indian tribe"; (2) "I may have Indian ancestry";

and (3) “The child is or may be a member of, or eligible for membership in, a federally recognized Indian tribe.” He did not identify any specific tribes in the spaces provided.<sup>8</sup>

The November 2012 disposition report states that father signed an ICWA-020 form on August 10, 2012, in which he “stated he does not have Indian Ancestry,” but no such form appears in the record before us.<sup>9</sup> This report also states that when the parents were themselves dependent children, “no Native American Heritage” was found in their cases. Elsewhere, however, the report stated that father said he “believe[d] that he has American Indian Ancestry on his father’s side,” although father also reported that “[h]e never knew his father and only met him once.”

Both the six- and twelve-month status-review report and the section 366.26 report inaccurately state that at the detention hearing on August 29, 2012, “the Court found that notice ha[d] been given pursuant to ICWA and the Court determined that the child is not an Indian child.” But the record reflects that the court at that hearing only ordered the parents to submit ICWA-020 forms. The court never determined whether ICWA applied, made any other ICWA-related findings, or mentioned ICWA issues again throughout the proceedings below. And there is no evidence of any efforts by the Bureau to follow up on the information father provided.

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<sup>8</sup> Mother also completed and filed an ICWA-020 form the same day, on which she checked the box indicating that she “[is] or may be a member of, or eligible for membership in, a federally recognized Indian tribe.” She also did not identify any specific tribes. Father does not rely on mother’s potential Indian heritage in making his ICWA claim, and we therefore do not consider the effect of any information involving mother’s heritage.

<sup>9</sup> The Bureau asks us to take judicial notice of an ICWA-020 form, filed by father on August 10, 2012 in the two half-siblings’ cases, stating “that he has no Indian ancestry.” It also recently informed us of its intent to request judicial notice of an ICWA-020 form to the same effect filed in another dependency case involving father. We deny the pending request because the form from the half-siblings’ cases was not introduced into evidence below and cannot be considered in determining whether error occurred. (*In re I.G.* (2005) 133 Cal.App.4th 1246, 1253; cf. *In re Z.N.* (2009) 181 Cal.App.4th 282, 298-299 [taking judicial notice of ICWA documents not before the juvenile court to assess prejudice].) Neither form would affect our decision in any event, since father made similar statements to the social worker in this case.

The purpose of ICWA is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes.” (25 U.S.C. § 1902.) “ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource.” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) To further these goals, tribes are entitled to take exclusive jurisdiction over or intervene in state dependency proceedings involving Indian children. (25 U.S.C. § 1911(a) & (c).) “Because [a] tribe’s right to assert jurisdiction over . . . or to intervene in such proceedings would be meaningless if the tribe has no notice that the action is pending,” ICWA requires notice “where the [juvenile] court knows or has reason to know that an Indian child is involved.” (25 U.S.C. § 1912(a); *In re B.R.* (2009) 176 Cal.App.4th 773, 780; see § 224.2; Cal. Rules of Court, rule 5.481(b).<sup>10</sup>)

State law also imposes on both the juvenile court and the county welfare agency “an affirmative duty to inquire whether a dependent child is or may be an Indian child.” (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; § 224.3, subd. (a); rule 5.481(a).) If the agency or the court “knows or has reason to know that an Indian child is involved, the social worker . . . is required to make further inquiry regarding the possible Indian status of the child” to facilitate the provision of notice. (§ 224.3, subd. (c); see also *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200.) An “Indian child” is any unmarried minor who “is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” (25 U.S.C. § 1903(4).) Among the circumstances that “may provide reason to know that the child is an Indian child” is when a relative “provides information suggesting that the child is a member of a tribe or eligible for membership in a tribe or one or more of the child’s biological parents, grandparents, or great-grandparents are or were a member of a tribe.” (§ 224.3, subd. (b)(1); see also rule 5.481(a)(5).)

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<sup>10</sup> All further rule references are to the California Rules of Court.

The Bureau initially argues that father forfeited his ICWA claim by not objecting below or appealing from the dispositional order. It relies on *In re Isaiah W.* (2014) 228 Cal.App.4th 981, but soon after the Bureau filed its brief, that case was accepted for review by our state Supreme Court and depublished. (*Id.*, review granted Oct. 29, 2014.) *Isaiah W.* followed *In re Pedro N.* (1995) 35 Cal.App.4th 183, which held that a mother had waived her challenge to the sufficiency of notice provided to a particular tribe by failing to raise the issue in a timely appeal from an earlier order. (*Pedro N.*, at pp. 188-190.)

We agree with the courts declining to follow *In re Pedro N.*, *supra*, 35 Cal.App.4th 183 that “it would be contrary to [ICWA’s] terms . . . to conclude . . . that parental inaction could excuse the failure of the juvenile court to ensure” the giving of proper notice, which “is intended to protect the interests of Indian children and tribes despite [any such] inaction.” (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 251, 259-261; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 736-739 [parents did not waive claim where they reported heritage in particular tribe but no notice sent]; see, e.g., *In re B.R.*, *supra*, 176 Cal.App.4th at p. 779.) Similarly, we conclude that parental inaction does not waive a claim involving the duty of inquiry because that duty also protects tribes’ interests in receiving notice. (See *In re S.B.* (2005) 130 Cal.App.4th 1148, 1160.)

We ultimately need not determine whether the juvenile court and the Bureau complied with ICWA-related notice and inquiry requirements, however, because we conclude that the court erred by not determining in the first instance whether ICWA applies to this case.<sup>11</sup> Although a juvenile court is not “required to make an *express* finding that ICWA [does] not apply[,] . . . the record must reflect that the court considered the issue” and has at least *implicitly* so found. (*In re Asia L.* (2003) 107 Cal.App.4th 498, 506, italics added; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413.) The court here made no express finding about ICWA’s applicability, and

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<sup>11</sup> At our request, the parties submitted supplemental briefing on this issue.

we are unable to conclude that it made an implied finding. There is no indication the court ever considered father's ICWA-020 form or father's expressed belief that he had Indian ancestry on his father's side. And we disagree with the Bureau that the court's "adopt[ion] of recommendations" in subsequent reports, which incorrectly stated that notice had been sent and that the court had previously found ICWA to be inapplicable, constituted an implied finding that ICWA did not apply. The court's error is understandable given the reports' misinformation, but the failure to determine whether ICWA applies constitutes error nonetheless. (*Antoinette S.*, at p. 1413.)

We are also unable to conclude that the failure was harmless. (See *In re Antoinette S.*, *supra*, 104 Cal.App.4th at pp. 1413-1414 [finding such failure harmless where Bureau of Indian Affairs responded to notice by saying child had no known Indian heritage].) The ICWA-010(A) form and detention/jurisdiction report's indications that father had no known Indian ancestry directly conflicted with father's ICWA-020 form and father's statement about his father's possible Indian heritage, and this conflict triggered the duty of both the Bureau and the juvenile court to inquire further. (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167-1168.) Even assuming the Bureau thoroughly interviewed father, there is no indication it ever sought information about his possible Indian background from any other source.<sup>12</sup> (See *id.* at pp. 1165, 1167-1168; § 224.3, subd. (c); rule 5.481(a)(4).) And although father appeared in court more than once after his ICWA-020 form was filed, the court did not question him about potential Indian heritage. (See *Gabriel G.*, at p. 1168.) It may well be that father's representations of Indian heritage would not have held up in the face of his conflicting representations on the subject, or in the face of information properly presented to the court from other cases,

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<sup>12</sup> In its supplemental brief, the Bureau also asks us to take judicial notice of a report in D.C.'s brother's case containing father's statement that he " '[b]elieves he has American Indian Ancestry on his father's side but he and no one in his family [have] any information about which relative or which tribe it might have been.' " We deny the request because it is procedurally improper. (See rule 8.252(a)(1).) Moreover, the report would not affect our decision because it does not establish that the possibility of following up with father's family was ever considered.

but we cannot make any determinations about his credibility in the first instance. (See *In re Ana C.* (2012) 204 Cal.App.4th 1317, 1329.) As a result, we must conditionally reverse the order terminating father’s parental rights and remand for the limited purpose of compliance with ICWA-related requirements. (*Gabriel G.*, at p. 1168.)

*B. Father’s “Statutory Framework” Claims Are Foreclosed Because Father Lacks Standing and Failed to Seek Timely Appellate Review of Prior Final Orders.*

Father contends the order terminating his parental rights must be reversed because the juvenile court “failed throughout the dependency matter to adhere to the statutory framework provided in section 300 et seq.” (Capitalization omitted.) Specifically, he claims that the court erred by (1) failing to monitor D.C.’s relationship with Z.H. and ensure sibling visitation; (2) not considering potential placement with relatives; (3) suspending his visits with D.C. while he was incarcerated; (4) finding that he received reasonable reunification services; and (5) not cautioning him that reunification services could be terminated after six months. The Bureau responds that father forfeited these claims by failing to seek appellate review of any previous final orders. We conclude that these claims are unsuccessful for various reasons. He does not have standing to raise the sibling-relationship claim. And his remaining “statutory framework” allegations are foreclosed because he cannot challenge the November 2013 order setting a section 366.26 hearing or any other earlier orders because he failed to seek timely appellate review of them.

1. Father lacks standing to raise issues involving D.C. and Z.H.’s relationship.

Father first argues that the juvenile court and the Bureau did not comply with numerous statutes involving sibling placement and visitation. (See §§ 358.1, subd. (d), 361.2, subd. (j), 362.1, subd. (a)(1), 366, subd. (a)(1), 16002, subd. (b).) He lacks standing to raise this claim.<sup>13</sup>

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<sup>13</sup> As a result, we need not consider father’s claim that his trial counsel rendered ineffective assistance of counsel by failing to raise sibling-relationship issues.

In general, parents lack standing to assert claims related to “[t]he interest of siblings or other relatives in their relationship with the minor[, which] is separate from that of the parent.” (*In re Frank L.* (2000) 81 Cal.App.4th 700, 703.) A parent does have standing to assert the exception to termination of parental rights applicable when termination would cause “substantial interference with a child’s sibling relationship.” (§ 366.26, subd. (c)(1)(B) & (v); *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 949-951.) And some decisions have held more broadly that a parent “has standing to raise issues of sibling visitation affecting the applicability of” the sibling-relationship exception (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 999-1000), reasoning that sibling “ ‘relationships directly impact the parent’s interest in reunification, an interest that can be kept alive merely by avoiding adoption.’ ” (*In re Asia L., supra*, 107 Cal.App.4th at p. 514.) But father does not contend that his interests were harmed based on the sibling-relationship exception. Indeed, he does not identify any interest of his that was affected by the alleged errors but instead simply asserts that “[t]he requirements related to the sibling relationship and placement are statutory and are required by law.” The mere existence of a legal requirement is insufficient, however, to confer standing on anyone who might contend the requirement was not met. We conclude father lacks standing to raise the sibling-relationship claim.

2. Father cannot challenge the order setting a section 366.26 hearing because he failed to file a petition for extraordinary writ review.

Father argues that he should be excused from not filing a petition for extraordinary writ review of the November 2013 order setting a section 366.26 hearing because the juvenile court did not provide proper notice of the requirement that he do so. Alternatively, he claims that his trial counsel’s failure to file a writ petition on his behalf constituted ineffective assistance of counsel. We conclude he has not established good cause for failing to file a writ petition or ineffective assistance by counsel in not filing one for him. Therefore, he may not challenge the November 2013 order in this appeal.

An order setting a section 366.26 hearing and “any [other] order, regardless of its nature, made at the hearing at which a setting order is entered” must be challenged by filing a petition for extraordinary writ review. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1021, 1023-1024; § 366.26, subd. (I); see rules 8.450, 8.452.) Generally, a party cannot challenge such orders in an appeal unless the party timely filed a petition for writ review and “[t]he petition . . . was summarily denied or otherwise not decided on the merits.” (§ 366.26, subd. (I)(1)(A), (C), (I)(2).)

The failure to file a writ petition may be excused for “good cause,” however, such as where the juvenile court fails to inform the party of the need to file such a petition to challenge the order setting the section 366.26 hearing. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 722-723.) After entering such an order, the court is required to “advise all parties of the requirement of filing a petition for extraordinary writ review . . . in order to preserve any right to appeal these issues.” (§ 366.26, subd. (I)(3)(A).) If a party is not in court when the order is made, notice must be made “by first-class mail by the clerk of the court to the last known address” of that party. (§ 366.26, subd. (I)(3)(A); see also rule 5.590(b).)

At the detention hearing, the juvenile court ordered the parents to “fill out a JV[-]140 [form], which is the notice of mailing address” and stated, “[I]f the court sends out a notice about this case, we’re going to send it out to that address. You have to update your address if it ever changes. Otherwise, if the notice does not get to you, then it’s not on us, it’s on you.” The same day, father filed a JV-140 form, “Notification of Mailing Address,” identifying a permanent mailing address in Pinole. Father never designated a new permanent mailing address.

The October 2013 six- and twelve-month status-review report, which was the first report filed after father was released from prison, listed an address in San Francisco for both parents. It appears that a social worker in D.C.’s infant brother’s case obtained the address in August 2013. Father did not appear at the November 2013 hearing when the juvenile court set the section 366.26 hearing, and a superior court clerk mailed notice of the extraordinary writ requirement to the parents at the San Francisco address.

Father claims the juvenile court did not provide proper notice because the notice was sent to the San Francisco address instead of the Pinole address. Although he concedes he was “temporarily staying” at the San Francisco address, a hotel, at the relevant time, he claims “[t]here was no evidence [he] could even receive mail” there. But he does not claim he actually failed to receive the notice, and there is no indication that it was returned to the sender. Nor does he claim he was unaware of the writ requirement, and he did not attempt to appeal from the November 2013 order.

Under *In re T.W.* (2011) 197 Cal.App.4th 723, these facts permit the inference that father did, in fact, receive the mailed notice. (*Id.* at p. 730.) In *T.W.*, a mother contended she should be excused from not filing a writ petition because the notice was mailed to an address that omitted her ZIP code. (*Id.* at p. 729.) The Court of Appeal disagreed:

Mother’s address to which the written advisement was sent was correct; it simply contained no ZIP code. It was not returned to the sender, indicating that it was indeed received. Mother has offered no declaration stating that she did not receive the writ advisement, nor does her brief claim that she was not aware of the writ requirement. . . . The inference from these facts is that mother in fact received notice as mailed. Further, mother made no attempt to take an appeal from the . . . order [setting a section 366.26 hearing]. . . . Mother’s attorney was present at the hearing, heard the oral advisement[,] and was served with the written advisement. Under these circumstances, we see no good cause to allow mother to contest the . . . order at this late date.

(*Id.* at p. 730.) Almost all these circumstances are present here but, despite the Bureau’s reliance on *T.W.* in its brief, father never addresses the decision.<sup>14</sup> And his failure to assert that he did not receive the mailed notice distinguishes this case from the primary one on which he does rely. (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 448-449 [considering homeless mother’s claims despite her failure to file writ petition where she

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<sup>14</sup> The primary difference between this case and *In re T.W.*, *supra*, 197 Cal.App.4th 723 is that the record here does not establish that father’s trial counsel received oral or written notice of the writ requirement. We find this distinction to be of little significance, however, because only the parent has “[t]he ‘burden . . . to pursue his or her appellate rights[,]’ ” and an attorney need not file a writ petition absent the client’s “specific direction” to do so. (*In re Cathina W.*, *supra*, 68 Cal.App.4th at pp. 723-724.)

was not present when section 366.26 hearing set and no notice was ever mailed because she had no address on record].) We conclude father has failed to establish good cause for his failure to file a writ petition.

Father's claim that his trial counsel rendered ineffective assistance by not filing a writ petition on his behalf also fails. Although ineffective-assistance claims are normally raised by a petition for writ of habeas corpus because they depend on evidence outside the record, such a claim "may be reviewed on direct appeal when there is no satisfactory explanation for trial counsel's act or failure to act." (*In re N.M.* (2008) 161 Cal.App.4th 253, 270; *In re Arturo A.* (1992) 8 Cal.App.4th 229, 243.) Here, however, there is an obvious possible explanation for why father's trial counsel did not file a writ petition: he did not have the required authorization from father to do so. (*Arturo A.*, at p. 243; *In re Cathina W.*, *supra*, 68 Cal.App.4th at p. 724; see also rule 8.450(e)(3).) "We cannot assume that the decision [not to file a writ petition] was the result of negligence, when it could well have been based upon some practical or tactical decision governed by client guidance." (*Arturo A.*, at p. 243.)

Since neither ineffective assistance of counsel nor any other good cause justifies father's failure to file a writ petition, our review of the November 2013 order is precluded.

3. Father's challenges to all other orders except the order terminating his parental rights are foreclosed.

In a dependency case, the dispositional order and all subsequent orders—except, as discussed above, an order setting a section 366.26 hearing—are "directly appealable without limitation." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150; see §§ 366.26, subd. (l)(1), 395.) In general, a reviewing court "may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order." (*Meranda P.*, at p. 1151.) This waiver rule protects the "dominant concerns of finality and reasonable expedition" and, where parental rights have been terminated, the "vital policy considerations of promoting, at that late stage, the predominant interest of the child and state, preventing a sabotage of the process and preserving the legislative

scheme of restricting appeals of final-stage termination orders.” (*In re Janee J.* (1999) 74 Cal.App.4th 198, 207.)

The waiver rule must be applied “unless due process forbids it.” (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 208.) “First, there must be some defect that fundamentally undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole. . . . Second, to fall outside the waiver rule, defects must go beyond mere errors that might have been held reversible had they been properly and timely reviewed,” or else the waiver issue would “turn . . . into a review on the merits.” (*Id.* at pp. 208-209.) Other factors may also weigh in the analysis. (See *id.* at p. 208 [declining to “try to catalogue all circumstances that might allow relaxation of the waiver rule”].)

The Bureau argues the waiver rule prevents father from challenging all appealable orders other than the order terminating his parental rights. We agree that father cannot challenge any prior orders in making his “statutory framework” claims.<sup>15</sup> He has not identified any way in which the statutory scheme was so “fundamentally undermined” that his rights were not protected. (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 208.) Indeed, father does not address the waiver rule at all, even in response to the Bureau’s argument that we should apply it.

Instead, father argues that the juvenile court’s “repeated[] failu[re] to follow the statutory scheme” justifies his failure to *object below* to the various errors he alleges and provides us with “good cause to exercise [our] discretion and consider issues raised for the first time on appeal.” (Capitalization omitted.) Unless due process would be offended otherwise, however, we have no discretion to forgive father’s failure to *appeal* so as to “ ‘inquire into the merits of a final appealable order on an appeal from a later appealable order.’ ” (*In re Janee J.*, *supra*, 74 Cal.App.4th at pp. 206, 208.) And although father claims that the various errors he identifies denied him due process, raising

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<sup>15</sup> In contrast, as we discuss below in section II.C., we conclude the waiver rule does *not* prevent us from considering father’s claim that the juvenile court should have appointed a guardian ad litem for him.

“ ‘issues. . . involv[ing] important constitutional and statutory rights’ ” alone does not justify relaxing the waiver rule. (*Ibid.*; *In re A.C.* (2008) 166 Cal.App.4th 146, 156 [whether parent “alleges that the dependency court violated his due process rights” is “not the test under *Meranda P.* [, *supra*, 56 Cal.App.4th 1143]”].) We therefore decline to review any orders other than the order terminating father’s parental rights in evaluating his “statutory framework” claims.

4. The scope of our review forecloses father’s remaining “statutory framework” claims.

In addition to the sibling-relationship claim, father argues several other errors arose from failures to follow the “statutory framework.” He argues he did not receive reasonable reunification services, he was prevented from understanding the limited time he had to reunify with D.C., D.C.’s potential placement with relatives was not considered, and his visitation was improperly suspended during his incarceration. These claims are foreclosed by father’s inability to challenge all orders prior to the order terminating his parental rights.<sup>16</sup> We address each in turn.

First, father claims he did not receive reasonable reunification services throughout the case, including during his incarceration. The juvenile court found that reasonable services had been provided in the November 2013 order. As father did not seek timely appellate review of that order, he cannot seek to overturn the court’s finding now.

Second, father contends the juvenile court’s failure to advise him that his services could be terminated within six months of D.C.’s removal (see § 361.5, subd. (a)(3)), combined with the number of continuances granted throughout the case, prevented him from understanding he had a limited time in which to reunify. Again, this claim fails because father can no longer undo the November 2013 order terminating his reunification services.

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<sup>16</sup> Father also argues that his trial counsel rendered ineffective assistance by failing to object to these errors. We need not consider this issue because we determine that his claims are foreclosed by his failure to seek appellate review of earlier orders, not by his failure to object below.

Third, father claims the juvenile court and the Bureau failed to comply with section 309, subdivision (e), which requires identification and notification of any potential relative caregivers, and section 361.3, which establishes a preference for placement with a relative. “Once a parent’s reunification services have been terminated,” however, “the parent has no standing to appeal relative placement preference issues.” (*In re Jayden M.* (2014) 228 Cal.App.4th 1452, 1460; *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1035.) We therefore must reject this claim.

Finally, father claims the juvenile court erred by not allowing him to visit with D.C. while he was incarcerated. The court ordered that visitation be suspended until father’s release from prison in the March 2013 dispositional order, which father did not timely appeal. As a result, this claim also fails.

*C. The Juvenile Court Had No Sua Sponte Duty to Appoint a Guardian Ad Litem for Father.*

Father claims the juvenile court erred by not sua sponte appointing a guardian ad litem for him due to his mental incompetency. But the record fails to demonstrate that father was unable to understand or participate in the proceedings or to assist his trial counsel, and we therefore conclude the court had no sua sponte duty to appoint a guardian ad litem for him.<sup>17</sup>

The detention/jurisdiction report stated that while father was a dependent child, he “was placed in high level residential treatment programs” and was diagnosed with “PTSD, Depressive Disorder, and Oppositional Defiant Disorder.” The six- and twelve-month status-review report provided further details: father “had a mental health conservator” from the time he was 14 years old until the time he emancipated in 2003, when he was almost 19 years old. “The recommendation was that [father] continue[] to be under the care of a conservator even after he emancipated,” but “the continued

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<sup>17</sup> Father also argues that his trial counsel rendered ineffective assistance by failing to raise the issue of his incompetence. We reject this claim because, again, there is an obvious “satisfactory explanation for trial counsel’s . . . failure to act”: as we discuss below, the record contains no clear sign that father was actually incompetent. (*In re N.M.*, *supra*, 161 Cal.App.4th at p. 270.)

conservatorship was not pursued” because father was living on the East Coast when he emancipated. And, as noted above, father has a “life[-]threatening illness” and had reported being so sick that he was “sometimes ‘not . . . able to get out of bed’ ” and could not apply for MediCal to get the medication he needed.

“Code of Civil Procedure section 372 provides that in any proceeding in which an incompetent person is a party, that person shall appear by a guardian ad litem appointed by the court in which the action is pending.” (*In re Sara D.* (2001) 87 Cal.App.4th 661, 665; Code of Civil Procedure, § 372, subd. (a).) A person may be found incompetent under either Penal Code section 1367, which applies to criminal defendants, or Probate Code section 1801, which applies to conservatees. In the dependence context, the key question in determining whether an adult parent requires a guardian ad litem is “whether the parent has the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case.” (*In re James F.* (2008) 42 Cal.4th 901, 910; *Sara D.*, at p. 667.)

“When a dependency court has knowledge of a party’s . . . incompetence under [Code of Civil Procedure] section 372, the dependency court has an obligation to appoint a [guardian ad litem] sua sponte.” (*In re A.C.*, *supra*, 166 Cal.App.4th at p. 155.) We review the failure to appoint a guardian ad litem for an abuse of discretion. (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1366-1367; see also *In re Christopher I.* (2003) 106 Cal.App.4th 533, 568.)

Contrary to the Bureau’s position, father’s failure to seek timely appellate review of prior final orders does not foreclose this claim. At least two published decisions have refused to apply the waiver rule to claims of error in the failure to appoint a guardian ad litem for a parent. (*In re A.C.*, *supra*, 166 Cal.App.4th at pp. 156-157; *In re M.F.* (2008) 161 Cal.App.4th 673, 681-682.) We agree with the Court of Appeal in *A.C.* that “a person entitled to a [guardian ad litem] under [Code of Civil Procedure] section 372 is hardly in a position to recognize the error and to protest . . . [the] failure to appoint one” (*A.C.*, at p. 156), and we therefore conclude the waiver rule should not be applied to this claim.

The Bureau also argues that father forfeited this claim by failing to raise it below. Again, we disagree. “When a dependency court has knowledge of a party’s . . . incompetence under [Code of Civil Procedure] section 372, the dependency court has an obligation to appoint a [guardian ad litem] sua sponte.” (*In re A.C.*, *supra*, 166 Cal.App.4th at p. 155.) Father argues that information in the social worker’s reports about his health issues and his demeanor at hearings triggered this duty. As a result, he was not required to raise the issue of appointing a guardian ad litem before the juvenile court to preserve the claim that the court violated its duty to appoint one sua sponte. (*Ibid.*)

We conclude, however, that the juvenile court’s sua sponte duty was not triggered in this case. Father does not argue that appointment of a guardian ad litem was required as a matter of law, as it would have been, for example, had he had a conservator during the proceedings. (See *In re A.C.*, *supra*, 166 Cal.App.4th at pp. 155-156.) Instead, he claims the juvenile “court was presented with proof beyond a preponderance of the evidence that [he] was mentally incompetent” because (1) he “had lived with multiple mental health diagnoses since he was a teenager” and had a mental health conservator at one time; (2) he could not get out of bed every day and could not apply for MediCal due to his poor mental and physical health; and (3) “there was no evidence that he understood the court process or how to assist his counsel in his own representation.”

But, even if a parent has mental health issues, a juvenile court is not required to appoint a guardian ad litem unless there is affirmative evidence the parent is unable to understand the proceedings or to assist counsel. (*In re Ronell A.*, *supra*, 44 Cal.App.4th at pp. 1367-1368; *In re R.S.* (1985) 167 Cal.App.3d 946, 979.) In *Ronell A.*, the Court of Appeal affirmed the juvenile court’s failure to sua sponte appoint a guardian ad litem, despite “repeated testimony and reference in the file [to the] father’s ‘chronic mental illness and substance abuse,’ ” based on the juvenile court’s statement that it had “ ‘heard [the father] testify over the course of this trial in the proceedings, and he does not appear to be an incompetent to me.’ ” (*Ronell A.*, at pp. 1367-1368, italics omitted.) In *R.S.*, the Court of Appeal held that the juvenile court did not abuse its discretion by failing to sua

sponte appoint a guardian ad litem for a mother with “documented mild mental retardation and [a] dependent personality disorder” because “the record . . . establishe[d] that [she] did understand the nature of the proceedings against her and was able to meaningfully participate in those proceedings and to cooperate with her trial counsel in representing her interest.” (*R.S.*, at pp. 979-980.) Similarly, the information here that father had mental health issues and had a conservator almost a decade earlier, as well as father’s self-reported difficulty getting out of bed and applying for MediCal, did not require appointment of a guardian ad litem absent an indication that father was unable to understand the proceedings or assist his trial counsel.

No such indication exists in this record. Father claims he “had difficulty following the court’s voir dire of his right to trial” before he pleaded no contest to the allegation in the amended petition, based on the following discussion:

THE COURT: [¶] . . . [¶] Do you understand the rights that you would have if we were to have a trial in this case?

THE MOTHER: Yes.

THE COURT: Sir?

THE FATHER: Yes.

THE COURT: I keep insisting [on a verbal response], not to hassle you, but because if you just nod your head, it doesn’t get taken down by the court reporter.

THE FATHER: I’m trying not to raise my voice up too loud.

THE COURT: Your normal conversational voice is fine.

At best, this unremarkable exchange merely establishes that father had difficulty remembering to respond verbally instead of nodding or shaking his head. It hardly suggests he did not understand the proceedings or could not provide meaningful input to his trial counsel. In fact, father responded appropriately to the questions the juvenile court asked throughout the voir dire, and he specifically agreed that he understood the petition’s allegations, the waiver-of-rights form, and “what’s happening in court.” And

we see no other indication in the record that father lacked the capacity to understand the case or assist his trial counsel. In particular, we note that father was represented by counsel throughout the proceedings below, and counsel—who would have had unique insight about such issues—never voiced any concerns about father’s competency. Given the lack of evidence that father was incompetent, we conclude the juvenile court did not abuse its discretion by not sua sponte appointing a guardian ad litem for him.

III.  
DISPOSITION

The order terminating father’s parental rights is conditionally reversed. The matter is remanded to the juvenile court with directions to ensure a further inquiry into father’s Indian heritage and, if necessary, compliance with ICWA notice requirements. The court shall then determine whether ICWA applies. If the court determines that ICWA does not apply, it shall reinstate the order terminating father’s parental rights. If the court determines that ICWA does apply, it shall proceed in compliance with ICWA and related state requirements. In all other respects, the order terminating father’s parental rights is affirmed.

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Humes, P.J.

We concur:

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Margulies, J.

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Banke, J.