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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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

SONOMA COUNTY HUMAN
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

MARK D. et al.,

Defendants and Respondents.

A143496

(Sonoma County
Super. Ct. No. 3858-DEP)

Mark D. and Stacie D. are the parents of the minor K.D., who was detained from Stacie's care after the Sonoma County Human Services Department (the Department) filed a Welfare and Institutions Code section 300¹ petition. The petition alleged that Mark was incarcerated and Stacie had failed to protect K.D.'s half-brother, sharing initials K.D. (Brother), from her boyfriend, Kevin, who was suspected of physically abusing Brother. Stacie subsequently separated from Kevin, and K.D. returned to her home under a family maintenance plan.

In December 2012, after Stacie became homeless and placed K.D. in the care of Brother's father without informing the Department, the Department filed a supplemental

¹ Further statutory citations are to the Welfare and Institutions Code, unless indicated otherwise.

petition. The Department placed K.D. in the home of his maternal grandparents and the juvenile court ordered reunification services for Stacie. After 12 months, the court terminated reunification services and set a section 366.26 hearing to establish a permanent plan for K.D.

A few days before the section 366.26 hearing, Stacie filed a JV-180 form petitioning the court to continue the hearing for three months, propose to K.D. that a return to her home was an option, and allow in-home, unsupervised visits between her and K.D. The court denied Stacie's petition without a hearing. At the section 366.26 hearing, the court found that K.D. was likely to be adopted and terminated Mark's and Stacie's parental rights.

Stacie and Mark have filed separate briefs in this appeal. Stacie argues that the juvenile court abused its discretion when it denied her JV-180 petition without holding an evidentiary hearing. Mark argues that the proceedings below did not comply with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We find no merit in Stacie's argument, but we agree with Mark that the proceedings below did not comply with ICWA. Accordingly, we conditionally reverse so that ICWA requirements may be met.

BACKGROUND

On February 10, 2012, the Department filed a section 300 petition alleging that K.D., who was almost eight years old, came within the provisions of subdivisions (g) and (j). The subdivision (g) allegation was that Mark was in state prison and unable to provide care and support for K.D. Under subdivision (j), the petition alleged that Stacie "has failed to provide adequate care, supervision, and safe living environment for the child, [K.D.], to wit, on or about January 31, 2012, while in the care of the mother's boyfriend, Kevin . . . , the child's maternal half-sibling, [Brother], sustained numerous injuries, to include, but not limited to visible linear bruising and swelling to the right side of his face, buttocks and right arm. The mother . . . has failed to protect the child by minimizing the injuries, expressing contradictory explanations as to how and where the

injuries occurred, not reporting the injuries, and allowing the boyfriend to continue to reside in the home, placing the child at substantial risk of physical harm in her care.”

On February 14, 2012, the court held a detention hearing concerning both K.D. and Brother, who was about three and a half years old and for whom a separate petition was filed. Stacie informed the court that she was Cherokee, her maternal aunt was a member of the tribe, and Mark also had Native American ancestry, though she was not sure “how much.” Stacie’s counsel informed the court that Stacie had separated from Kevin and he no longer resided in the home. The court ordered that Stacie allow no contact between Kevin and her children and that Brother reside with his father, Michael.² K.D. was returned to Stacie’s care.

On March 12, 2012, the Department filed an ICWA-030 notice form regarding K.D. that listed Michael as K.D.’s biological father instead of Mark. The form identified three Cherokee tribes for which K.D. might be eligible for membership through his mother and maternal relatives. Proof that the notice had been sent to the Bureau of Indian Affairs (BIA) and the Cherokee tribes accompanied the filing.

On March 20, 2012, the Department filed a jurisdiction/disposition report recommending that both K.D. and Brother be declared dependents of the court, that K.D. be placed with Stacie, that Brother be placed with Michael, and that family maintenance services be provided to Stacie and Michael. No responses from the BIA or the Cherokee tribes had been received following the notice provided by the ICWA-030 form. The Department recommended a finding that ICWA did not apply, based on available information.

K.D.’s school reported that he was prone to unpredictable bouts of violent anger. K.D. had been diagnosed with anxiety and mood disorder and oppositional defiant

² Stacie and Michael shared custody of Brother, who resided with Michael on weekends.

disorder. He was a client of Sonoma County Mental health for case management and medication monitoring³ only and the social worker was seeking a therapist for him.

The report stated that Mark played no role in raising K.D. and was incarcerated almost all of K.D.'s life. The Department recommended a finding that Mark be declared merely a biological father. It also recommended that reunification services for him be bypassed pursuant to sections 361.5, subdivisions (b)(12) and (e).

Stacie did not believe that Kevin had abused Brother, even though she was aware that Kevin had hit K.D. with a belt. She believed that Kevin "knows better now." Kevin has a lengthy criminal history, "including substance abuse-related crimes, gang enhancements, Burglary (conviction), Vandalism (felony conviction), Participate in Criminal Street Gang, Obstruct/Etc. Public Officer, Manufacture/Possession Dangerous Weapon, ADW Not Firearm: PO/Firefighter: GBI (felony conviction), Threaten crime with Intent to Terrorize, numerous Probation violations including Commit Felony While On Bail." K.D. reported that he had seen Kevin spank Brother on his bare buttocks and put hot sauce in Brother's mouth. K.D. also said that Kevin smokes "a lot," including from a pipe. When asked to draw a picture of the pipe, K.D. drew a "pretty good facsimile" of a bong.

The court held a hearing on March 21, 2014, and acknowledged that the parties intended to have a settlement conference. All of the parties submitted on the issue of jurisdiction, so settlement would concern disposition. After finding that the court had jurisdiction and the petition was true, the court found that ICWA "does not apply to this matter." Counsel for the Department pointed out that 60 days had not passed since notice was provided to the tribes, so it would later ask the court "to reaffirm that finding." The court then clarified: "The ICWA non-applicability to this case is not based on the expiration of time. The Court will reconsider once that time period has expired."

On April 12, 2012, following a settlement conference, the Department filed a memo with the court correcting its jurisdiction/disposition report. The memo stated that

³ K.D. took drugs to treat anxiety and depression.

Mark and K.D. had maintained regular contact through letters and telephone calls. K.D. had supervised visits with Mark while Mark was temporarily in custody in Sonoma County for the dependency proceedings and it was “evident” that Mark and K.D. had “a definite and positive bond, and that this is very important to K.D.” The Department changed its recommendation regarding Mark’s status and now joined with Mark’s counsel in requesting that Mark be declared K.D.’s presumed father.

At an April 12, 2012 disposition hearing, the court declared Mark to be K.D.’s presumed father. The court declared K.D. a dependent of the court under the supervision of the Department’s Family Maintenance Program with placement in Stacie’s home. ICWA applicability was not discussed at the hearing, but the court’s order included a finding that ICWA did not apply to the case.

On October 5, 2012, the Department filed a six-month status review report recommending that family maintenance be continued for three additional months. The report noted that Brother was placed in Michael’s care and Brother’s case was dismissed on June 27, 2012. Brother visited with K.D. and Stacie on weekends. Stacie’s case plan included a provision that her children have no contact with Kevin. Although Stacie had not allowed contact between Kevin and her sons, she was “honest about her desire to reconnect with Kevin.” K.D. said he liked Kevin and was not afraid of him. Stacie continued to deny that Kevin had been responsible for Brother’s injuries. K.D. was now in therapy with Michael Montgomery, who reported that K.D. was doing well.

On October 11, 2012, the court held a status review hearing and adopted the Department’s recommendations.

On December 6, 2012, the Department filed a supplemental petition alleging that Stacie had left K.D. in Michael’s care without informing the Department and that she was residing with Kevin, in violation of her plan. The Department corrected this information on December 7, 2012, stating that Stacie was homeless and unable to provide a safe and stable living arrangement for K.D.

On December 10, 2012, Stacie’s counsel informed the court that Stacie had placed K.D. with Michael because she was homeless and was attempting to find housing. She

was to start a new job the next day. Stacie had “been attempting to reach the Department with no success.” Counsel for the Department requested detention, stating that it was not clear that Michael was prepared to undertake long term care of K.D., and Michael was “concerned and having difficulty with [K.D.]” The court found that a prima facie case for detention had been established. Temporary placement and custody was vested with the Department. K.D. was to be detained at a children’s shelter, but the Department had the authority to place K.D. with Stacie or anyone else it determined to be in K.D.’s best interest.

On January 7, 2013, the Department filed a disposition report. K.D. had been placed in the home of his maternal grandparents on January 2. The report stated that ICWA “does not apply as found by the Court on April 12, 2012.” The Department recommended that K.D. remain with his grandparents and that Stacie receive reunification services.

Stacie had been offered liberal visitation with K.D., including unsupervised offsite visits of up to six hours every other day, unsupervised on-site visitation every day, unmonitored phone calls, and longer weekend passes. Michael was authorized to have frequent visitation with K.D., including weekend passes. However, Stacie visited K.D. only twice in the children’s shelter, and Michael had not visited at all. Since being placed with his grandparents, K.D. had attempted to speak with Stacie on the phone and arrange visits with Michael, but the phone conversations were short and Stacie had not visited with K.D. for over two weeks.

At the jurisdiction/disposition hearing on January 17, 2013, Stacie and Mark submitted on the Department’s report and recommendation. The court adopted the agency’s proposed findings and orders, including the finding that ICWA did not apply.

On July 1, 2013, the Department filed a status review report recommending that reunification services be continued and that a trial home visit be authorized “to begin when appropriate.” Stacie was living in a two-bedroom apartment and was employed fulltime. K.D. was now nine years old and “seem[ed] to enjoy his close relationships with his grandparents.” K.D.’s medications for anxiety and depression were being

reduced. He had an overnight visit with Stacie each week. The grandparents reported that after his visits, “[K.D.] does not talk much, especially not about his visit. He can be rude and agitated for multiple days following visits.”

Stacie’s participation in therapy had been inconsistent. A psychological evaluation indicated that Stacie suffers severe depression and anxiety and is prone to thoughts of suicide. The evaluator recommended that Stacie re-engage in therapy, including family therapy with her father. In March, the parenting educator reported that she had not been able to meet with Stacie for months, even though Stacie reported ongoing work with the educator. Stacie and the educator were now meeting every two weeks.

K.D.’s grandparents had expressed a desire to remain K.D.’s caretakers if reunification was unsuccessful. The social worker believed they were providing “excellent care,” and K.D. was “thriving in their home.”

Following a hearing on July 11, 2013, the court adopted the Department’s recommended findings and orders.

On December 23, 2013, the Department filed a status review report recommending that reunification services be terminated and that a section 366.26 hearing be set. The report stated that ICWA “does not apply as determined in Court on March 21, 2012.”

Stacie had been let go from her job in July 2013 and was currently on temporary disability. She was pregnant and unsure about paternity, but believed the father to be Kevin. Kevin had been incarcerated for a violation of probation, but he and Stacie reunited after he was released from jail in April 2013. Stacie reported in August that they spent time together only when her children were not present. Kevin’s address of record at the probation department was the same as Stacie’s, multiple probation checks had occurred at Stacie’s home, and Kevin was present each time. When confronted with these facts, Stacie admitted that Kevin resided with her during the week but would leave on the weekend when her children came to visit. Stacie told the social worker that she and Kevin had ceased their relationship and he had moved out of her home.

K.D.'s therapist reported that "[K.D.] has shown huge gains in part due to living with his grandparents. They are far more able to set consistent limits with him, to be able to talk with him when his behavior is inappropriate, and to communicate their concerns in a way that really facilitates his learning and emotional growth." K.D.'s dose of one drug had been successfully halved and he had been successfully titrated off the other.

Stacie had completed a parenting course and was consistently participating in therapy, but in October the therapist believed that Stacy needed "many more sessions to begin to see her denial and to accept responsibility" for the relationship with Kevin that led to dependency proceedings. In December, the therapist wrote: "Stacie still cannot trust [the Department] and her social worker. She feels anytime she reveals the truth or admits her mistakes, it is used against her. She has huge issues with trust. Stacie has severed all ties to her support system. She is pregnant and alone and feels the therapeutic alliance with her therapist is the only resource she has. She would like to attend sessions two times per week." Details concerning Stacie's compliance with prescribed psychotropic medication were unclear due to her unwillingness to authorize contact between the Department and her prescribing doctors.

In July, visitation between Stacie and K.D. had been increased from one overnight visit per week to unsupervised visits for the entire weekend. After this change, the grandparents reported that K.D. often had a "bad attitude" after returning from a visit—talking back, cursing, and "displaying negative self-talk." K.D.'s therapist described K.D. as appearing "very conflicted" after his visits with Stacie. On August 21, 2013, the social worker suspended unsupervised visits because of Stacie's renewed relationship with Kevin and other inappropriate behavior, such as borrowing money from K.D. to buy cigarettes; telling K.D. about her pregnancy, despite a plan to work with K.D.'s therapist to develop an effective way to impart the information; and allowing in her home a friend of Kevin who discussed with K.D. his and Kevin's involvement with drugs. At the end of August, Stacie was authorized to have four hours of supervised visitation outside the home. In November, the social worker determined that Kevin no longer resided in

Stacie's home and his vehicle had been removed. Thereafter, the social worker authorized supervised visitation at Stacie's home.

The report concluded that although Stacie had worked hard to participate in her case plan services, "she has been unable to make the behavioral changes necessary to diminish the concerns consistently identified throughout the history of this case." The social worker believed it unlikely that an additional six months of reunification services would allow Stacie "to fully resolve the identified concerns needed in order to achieve successful reunification" with K.D.

On February 19, 2014, Mark and Stacie submitted on the Department's recommendation without contest. The court terminated reunification services and set a section 366.26 hearing.

On June 9, 2014, the Department filed a section 366.26 report recommending that the court find K.D. likely to be adopted and order termination of parental rights. K.D.'s grandparents, with whom he continued to reside, were the potential adoptive parents. K.D., now 10 years old, told the adoptions social worker "that he loves living with his grandparents and that he wants to stay with them forever."

On June 12, 2014, the court held a section 366.26 hearing. Both parents announced they wished to contest and wished to participate in a settlement conference, which the court then set for July 9, 2014.

At a hearing on July 16, 2014, the parties informed the court that they were continuing to confer about a possible resolution. On July 23, 2014, the parties informed the court that the matter would have to be set for contest, which the court set for September 2, 2014.

On August 29, 2014, Stacie filed a JV-180 form petitioning that the section 366.26 hearing be continued for three months, that it be proposed to K.D. that return to Stacie's home was an option, and that K.D. have unsupervised, overnight visits with Stacie.

At the September 2, 2014 hearing, the Department requested a judicial settlement conference, commenting: "[A]lthough the JV-180 is not officially before the Court today, certainly that would be a part of the conversation." A settlement conference was

held off the record, after which the court noted that the parties had not reached a resolution. After opening statements, in which counsel for Mark and Stacie requested that the matter of the JV-180 petition be decided first, the court stated that it was not timely filed for a ruling that day and the 366.26 hearing would not be continued.

Mark testified on his own behalf concerning the care he provided to K.D. from the time K.D. was about one year old up to Mark's incarceration, when K.D. was just over three years old. After his incarceration, Mark had regular phone calls with K.D. and they exchanged letters. He had visits with K.D. while he was incarcerated temporarily in Sonoma County for participation in this case. Mark believed that K.D. had "an attachment or a bond" with him, and it would be detrimental for K.D. to end their relationship.

The section 366.26 hearing continued on September 4, 2014. Counsel for the Department asked for a ruling on the JV-180 petition so that any orders issued as a result of the hearing could not be called into doubt for failing to address the petition. The court stated: "I did review it, and I denied the request."⁴

Stacie testified that she and K.D. had a very close bond and loved each other "to death." She believed it would be in K.D.'s best interest to maintain a relationship with her so that he would not be separated from his half-siblings, Brother and seven-month-old M.D. She thought the best option for Brother would be "not do an adoption, to do a guardianship, and still leave that open to visit."

The court found that K.D. was likely to be adopted and ordered adoption as the permanent plan. The court also found that termination of parental rights would not be detrimental to K.D. and ordered that Mark and Stacie's parental rights be terminated.

On September 8, 2014, the court received Mark's notice of appeal. On October 16, 2014, the court received Stacie's notice of appeal. The court clerk filed the two notices of appeal on November 4, 2014. A declaration from a legal clerk for the

⁴ On September 3, 2014, the court filed an order denying the JV-180 request on two grounds: (1) the request did not state new evidence or a change of circumstances and (2) the proposed change of order did not promote the best interest of the child.

court explains the gap between receipt and filing of the notice of appeals as due to a backlog. Because “[a] document is deemed filed on the date the clerk receives it” (Cal. Rules of Court, rule 8.25(b)(1)), the notices of appeal were timely filed.

DISCUSSION

I.

The Juvenile Court Did Not Abuse Its Discretion in Denying Stacie’s JV-180 Petition Without a Hearing.

The JV-180 form that Stacie filed petitioned for a change in the juvenile court’s prior orders and is permitted by section 388, subdivision (a)(1): “Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of the court previously made or to terminate the jurisdiction of the court.” Subdivision (d) provides that the court shall hold a hearing on such a petition “[i]f it appears that the best interests of the child . . . may be promoted by the proposed change of order.”

“Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability. A hearing pursuant to section 366.26 to select and implement a permanent plan for the children is to be heard within 120 days from the time it was set. [Citations.] The court need not continue to consider the issue of reunification at the section 366.26 hearing. The burden thereafter is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue. Section 388 provides the ‘escape mechanism’ that [is] built into the process to allow the court to consider new information.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) “*Marilyn H.* makes clear that reunification pursuant to section 388 must remain a viable possibility even after the formal termination of reunification services . . . if there is, as the court put it, a ‘legitimate change of circumstances.’ ” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.)

Petitions pursuant to section 388 “are to be liberally construed in favor of granting a hearing to consider the parent’s request. [Citations.] The parent need only make a

prima facie showing to trigger the right to proceed by way of a full hearing.” (*In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 309–310.) “A ‘prima facie’ showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.” (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) “There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citations.] If the liberally construed allegations of the petition do not show changed circumstances such that the child’s best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. [Citation.] We review the juvenile court’s summary denial of a section 388 petition for abuse of discretion.” (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

A juvenile court does not abuse its discretion by summarily denying a section 388, subdivision (a), petition when the petition fails to state a change of circumstance or new evidence that may require a change of order. Summary denials in such circumstances are explicitly permitted by California Rules of Court, rule 5.570(d)(1).

Stacie’s statement of new facts and/or changed circumstances in the JV-180 form is as follows:

“Mother has a new baby who is residing in Mother’s care ([M.D.]); The baby’s father (the alleged perpetrator of the abuse on [Brother]) is participating in services and is allowed to have contact with his child in the home of the mother; [Brother], the alleged victim of the abuse by mother’s partner Kevin, is now enjoying weekend visits in the home of the mother (per a Family Court order); there is no risk to the minor [K.D.] in being returned to the home of the mother.

“By way of history, this case began with allegations of physical abuse perpetrated on [Brother] ([K.D.’s] 1/2 sibling.) At the time of the incidents, the two boys were residing primarily with their mother. [Brother] was placed with his father and his dependency case was dismissed.

“Mother and [Brother’s] father have gone to Family Court and currently [Brother] has weekend overnight visits with his mother and 1/2 sister ([M.D.]) [M.D.’s] father Kevin is allowed, per CPS, to be in the home with his child. At present Kevin does not have contact with [Brother]; however, Mother is certain that, as Kevin continues in services, that [Brother’s] father will support contact between Kevin and [Brother].

“Should [K.D.] be allowed to visit Mother in her home, Kevin would be more than happy to be elsewhere (until CPS approved contact between [K.D.] and Kevin.)

“One might think Mother chose a man (Kevin) over her boys; that is not the case. Kevin has been willing to participate in services (anger management, counseling, parenting) so he and Mother can be a couple and raise their daughter and her 1/2 siblings as a family.

“The current careprovider (maternal grandfather) is very outspoken in his view that Mother should not contest the adoption of [K.D.] (see attached letter.)^[5] Imparting this kind of sentiment to [K.D.] will not be good for him. Nor will seeing his siblings residing with their mother and he is the odd man out.

“Mother has worked very hard to gain the trust of [Brother’s] father by participating in monitored visits with her son [Brother] and his brother [K.D.]. See attached letter.^[6]

“Mother feels that if it is safe for an infant to be in her care and the alleged victim of the abuse in the within [*sic*] case, why is it not safe for [K.D.]? Why has no one given him the option of returning to her care? The filing of a JV-180 is just a piece of paper; return to Mother could have been discussed without this formality. Mother believes

⁵ Stacie attached a letter, dated June 13, 2014, from her father to her. Stacie’s father forcefully, but without inappropriate language, argued that the proceedings were about what was best for K.D. “and not about you!” Stacie’s father also wrote that, whatever his own wishes, he would respect a decision by K.D. to remain in contact with Stacie after adoption.

⁶ Stacie attached a letter from Sonoma County Legal Services Foundation, dated November 20, 2013, that favorably described joint supervised visits of Stacie with Brother and K.D.

strongly that if [K.D.] knew returning to her care was an option, he would gladly make that choice.

“Mother’s voluntary case plan worker is [name and telephone number], a very experienced social worker.”

Stacie’s statement of new evidence and/or changed circumstances consists primarily of history and argument. On the record before us, most of the material facts alleged by Stacie are not new, and the facts that are new do not assist Stacie’s position.

The Department’s 12-month status review report included the information that Stacie was expecting a child, that she believed Kevin to be the father, and that she and Kevin had resumed a relationship. When the social worker wrote the report, Stacy maintained that the relationship had ended and Kevin had moved out. The information that Stacy was again in a relationship with Kevin and that he was either living in her apartment or a frequent visitor was “new” information, but hardly helpful to her. At the beginning of this case, the court found true the allegation that Brother had suffered injuries while in Kevin’s care. The court had ordered that Stacie allow no contact between Kevin and either of her sons. Those orders were still in effect,⁷ so Stacie’s decision to renew her relationship with Kevin does not favor her request to make additional attempts at reunification. Stacie alleges that Kevin has been participating in anger management, counseling and parenting services but alleges nothing about the length of Kevin’s participation, the extent of his participation, or measures of his progress. That the Department has concluded that Kevin may be in the company of his infant daughter gives little reason to believe that Kevin could, in any close time frame, be

⁷ The order that Stacie allow no contact between Kevin and Brother originated in Brother’s dependency case. When the dependency case was closed and the family court determined Stacie’s and Michael’s respective visitation and custody rights with regard to Brother, the family court reiterated the order that Kevin be allowed no contact with Brother.

safely in the company of older boys who are not his children, one or both of whom he may have physically abused in the past.⁸

The facts that Stacie recites that do not deal with Kevin are not new. The court was aware that Brother was allowed weekend visits in Stacie's home and that Stacie's parents wished to adopt K.D. The Department never raised a doubt that Stacie's supervised visits with K.D. and Brother were other than appropriate. The court was aware of the impact that terminating reunification services could have on K.D.'s contact with his half-siblings. Beyond these facts, Stacie's statement consists of vigorous argument, but vigorous argument does not substitute for new facts and/or a change in circumstance sufficient to state a prima facie case for changing the court's prior orders.

Stacie's reliance on *In re Aljamie D.* (2000) 84 Cal.App.4th 424 (*Aljamie D.*) is unavailing. In *Aljamie D.*, the court terminated reunification services in March 1998, at which point the mother had begun complying with the case plan only recently. (*Id.* at p. 427.) In July 2000, the mother filed a section 388 petition seeking to modify the court's order of long-term foster care. (*Id.* at p. 428.) "Appellant alleged that she had fully complied with the case plan, and attached completion certificates for parenting

⁸ In *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223, the court described appellant's recent sobriety, which he had alleged in a section 388 petition, as "'changing' circumstances, not changed circumstances. [Citation.] Appellant has a history of drug relapses, is in the early stages of recovery, and is still addressing a chronic substance abuse problem." Kevin's recent participation in services can also be described as a changing, and not changed circumstance. Kevin has a lengthy criminal history, including substance abuse-related crimes, gang enhancements, burglary, vandalism, obstruction of a police officer, manufacture/possession of a dangerous weapon, threats with intent to terrorize, and numerous probation violations. In February 2012, he was on probation for assaulting a police officer with a pipe. One of Kevin's convictions, perhaps for the assault of the officer with a pipe, included an allegation of "GBI" (great bodily injury). Kevin was released from jail in April 2013 and was then incarcerated from July 23, 2013, to September 5, 2013, for a probation violation. As of the 12-month status report, Kevin remained on probation. K.D. had seen Kevin smoking from a pipe, and K.D.'s drawing of the pipe appeared to be a bong. (See *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [recent efforts at rehabilitation, although parents were exerting themselves considerably to improve, did not demonstrate changed circumstances].)

classes, a domestic violence program, Via Avanta Residential Program, a job readiness workshop, a perinatal health education program, and a ‘behavior change & skills building prevention’ program. She further alleged that the children wish to return to her, and that she had visited the children consistently. She requested a 60-day trial visit.” (*Ibid.*) The Department in *Aljamie D.* did not “dispute that appellant’s petition alleged changed circumstances. Rather, the Department argue[d] that the petition failed to show how modification of the placement order would be in the children’s best interests.” (*Id.* at p. 432.) The Court of Appeal reversed the juvenile court’s denial of the section 388 petition, stating that it could not “see how the petition failed to show prima facie evidence which might justify modification of the court’s order regarding the permanent placement plan for the children. Appellant’s petition showed that the best interests of the children potentially would be advanced by the proposed 60-day visit and eventual change in the placement order.” (*Ibid.*)

In contrast to *Aljamie D.*, Stacie has not stated material new facts or a change of circumstance sufficient to cause the court to even reach the question of whether Stacie’s proposed changes to prior court orders would be in K.D.’s best interest. Stacie’s allegation that Kevin is participating in some services is very different from the *Aljamie D.* appellant’s showing that she had fully complied with a case plan that she had only started to comply with at the time reunification services were terminated over two years earlier.

Stacie also argues: “At the time of the mother’s submission of her section 388 petition to the juvenile court for consideration, the Department had presented numerous reports contrary to the mother’s position that it would be in [K.D.’s] best interest to grant her request for additional reunification services and ultimately, return to her custody. The mother was entitled to present her own evidence to challenge the Department’s evidence, or, to demonstrate that the evidence in the record itself, including the social worker’s assessments, was based on refutable evidence.” Stacie had an opportunity to contest the Department’s evidence at the 12-month status hearing and did not do so. If

Stacie now has evidence that calls into question whether the court's prior orders are in K.D.'s best interest, she should have alleged that evidence in her section 388 petition.

Moreover, there is ample evidence in the record that K.D. improved in many ways under his grandparents' care. K.D.'s therapist attested to "a noticeable change in [K.D.'s] ability to settle and focus during session" and "growth in [K.D.'s] ability to openly discuss incidents and struggles without feeling ashamed and embarrassed." The therapist attributed K.D.'s "huge gains in part due to living with his grandparents." He believed "consistency in feeling loved and cared for [by the grandparents] has made a huge difference for [K.D.]" K.D. previously took two drugs to address his behavioral issues, but since living with his grandparents, he had successfully stopped taking one drug and the dose of the other had been halved. Nothing alleged in Stacie's section 388 petition tends to show that it would be in K.D.'s best interest to continue reunification efforts, potentially destabilizing the gains he has made, instead of providing him permanency and stability in the home where he expressed a desire to live "forever."

On the record before us, the juvenile court's finding that Stacie's section 388 petition did not state new evidence or a change in circumstances was reasonable, and the court did not abuse its discretion when it summarily denied the petition.

II.

The Dependency Proceedings Failed to Comply with ICWA Requirements.

"The ICWA is designed to protect the interests of Indian children, and to promote the stability and security of Indian tribes and families. It sets forth the manner in which a tribe may obtain jurisdiction over proceedings involving the custody of an Indian child, and the manner in which a tribe may intervene in state court proceedings involving child custody. When the dependency court has reason to believe a child is an Indian child within the meaning of [ICWA], notice on a prescribed form must be given to the proper tribe or to the [BIA], and the notice must be sent by registered mail, return receipt requested." (*In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.) Notice is required in "any involuntary proceeding in a state court" when a party seeks "the foster care

placement of, or termination of parental rights to, an Indian child.” (25 C.F.R. § 23.11(a).)

“Notice under the ICWA must, of course, contain enough information to constitute meaningful notice.” (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) “[T]o establish tribal identity, it is necessary to provide as much information as is known on the Indian child’s direct lineal ancestors” (25 C.F.R. § 23.11(b).) Moreover, an ICWA notice must include, if known, (1) the name, birthplace and birth date of the Indian child; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child’s parents, grandparents, great-grandparents and other identifying information; and (4) a copy of the dependency petition. (25 C.F.R. § 23.11(d); see also § 224.2(a) [specifying these and additional requirements].) Section 224.3, subdivision (a), provides: “The court [and] county welfare department . . . have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings” Similarly, California Rules of Court, rule 5.481(a)(4) imposes an affirmative duty on social service agencies to interview the extended family to ascertain the required information.⁹ If the ICWA notice fails to provide information available to a social service agency that is necessary for the tribe to make a determination that a minor is an Indian child, the notice does not satisfy ICWA requirements. (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630 [“Notice is meaningless if no information or insufficient information is presented to the tribe to make that determination”].)

⁹ In *In re H.B.* (2008) 161 Cal.App.4th 115, 120, the court explained that neither ICWA nor controlling federal regulations “*expressly* impose any duty to inquire as to American Indian ancestry.” (*Id.* at p. 120, italics added.) However, the “ICWA provides that states may provide ‘a higher standard of protection to the rights of the parent . . . of an Indian child than the rights provided under [ICWA]’ [citation], and long-standing federal guidelines provide ‘the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.’ ” (*Id.* at pp. 120–121.)

At the first hearing in this dependency case, Stacie informed the court that she believed she had Cherokee ancestry and that Mark, who was not present at the hearing, was “Native American as well, but I am not sure how much.” Stacie provided an ICWA-020 form to the Department stating what she knew about her Indian ancestry, but there is no indication in the record that the Department ever asked Mark to fill out an ICWA-020 form or otherwise interviewed him concerning possible Indian ancestry, despite having notice that K.D. might have Indian ancestry through Mark. The Department sent an ICWA-030 notice form to the BIA and Cherokee tribes, but the form contained inaccurate information, listing Michael as K.D.’s father and not Mark.

This case presents a facial violation of state and federal law and regulations regarding dependency proceedings in which a child may be an Indian child. The Department failed to make proper inquiry of Mark and his extended family concerning K.D.’s possible Indian heritage. The notice provided to the tribes based on Stacie’s information was facially erroneous regarding K.D.’s paternity. (See *In re Desiree F.* (2000) 83 Cal.App.4th 460, 474–475 [ICWA notice requirement is not satisfied unless there is “strict adherence” to the federal statute].)

The Department argues that “[e]ven if [its] failure to affirmatively inquire about [Mark’s] heritage violated the notice requirements under ICWA, the Department has since remedied any potential defects under the law.” The Department moves to augment the record with documentation concerning more recent attempts to provide proper notice to the tribes or, in the alternative, moves that we take judicial notice of the documentation. Mark opposes the Department’s motion.

In support of its motion, the Department relies on *In re A.B.* (2008) 164 Cal.App.4th 832, in which the father challenged termination of his parental rights because of inadequate inquiry as to the Indian heritage of the mother. (*Id.* at p. 835.) The agency moved to augment the record on appeal with a parental notification of Indian status form that the mother signed and filed in a matter involving A.B.’s sibling or half-sibling. The mother checked the box on the form that states, “ ‘I have no Indian ancestry as far as I know.’ ” (*Id.* at p. 839.) The agency argued that because the mother had

admitted she had no Indian heritage, reversal was not warranted because the breach of the duty of inquiry did not prejudice the father. (*Ibid.*) The *A.B.* court noted that “Code of Civil Procedure section 909 allows appellate courts to ‘accept evidence in dependency cases “to expedite just and final resolution for the benefit of the children involved,” ’ ” though that right should be exercised only with a finding of exceptional circumstances. (*Id.* at p. 843.) The court found exceptional circumstances and affirmed the judgment: “Since both parents have in judicial proceedings denied having any Indian heritage, resolution of this matter now does not thwart the laudatory purposes of the ICWA. Indeed, a limited reversal and remand for compliance with the ICWA inquiry requirement as to [mother] would serve no purpose other than delay. We do not countenance the lack of inquiry, of course, but *A.B.* has been in the dependency system since birth and he is entitled to permanence and stability as soon as possible.” (*Ibid.*)

In opposing the Department’s motion, Mark relies on *In re Robert A.* (2007) 147 Cal.App.4th 982, in which father contended that the agency did not comply with ICWA even though it was on notice that he had Cherokee heritage. (*Id.* at p. 988.) The agency moved to augment the record with ICWA notices and documents filed in the separate dependency case of Robert A.’s half-sibling. (*Id.* at p. 989.) The court denied the motion to augment: “Appellate courts rarely accept postjudgment evidence or evidence that is developed after the challenged ruling is made. [Citation.] This is so in part because an appeal court reviews the correctness of a record that was before the trial court at the time it made its ruling. [Citation.] Because the ICWA documents from the half sibling’s case were not before the juvenile court at the time of the proceedings in question nor part of the juvenile court case file, it is inappropriate to augment the record with them. [Citation.] ‘Making the appellate court the trier of fact is not the solution.’ [Citations.] ‘[I]t is up to the juvenile court to review the information concerning the notice given, the timing of the notice, and the response of the tribe, so that it may make a determination as to the applicability of the ICWA, and thereafter comply with all of its provisions, if applicable.’ ” (*Id.* at p. 990.)

Here, the Department seeks to augment the record with (1) documentation allegedly showing that tribes were provided proper ICWA notice in April 2015 and responded that K.D. is not an Indian child and (2) the declaration of Yecenia Almaras, a social worker, concerning attempts to inquire of Mark and his family regarding Indian heritage and the subsequent notice to the tribes. The requested record augmentation raises more questions than it resolves.

Almaras declares: “In April, 2015, social worker Rose Esche, attempted to reach [Mark] and the [*sic*] Liza . . . , the paternal grandmother, to inquire about any paternal Indian heritage, however neither the biological father nor the paternal grandmother returned those calls.” The declaration fails to explain why actions taken by another social worker would be within Almaras’s personal knowledge. Even if the account is credited, it does not tell us how many calls were made or what messages were left. Moreover, Mark is incarcerated, so the Department knows where he is. He was also represented by counsel, who could presumably assist the Department in making contact with Mark. We conclude that Almaras’s declaration fails to demonstrate that the Department made reasonable efforts to inquire of Mark and his extended family regarding possible Indian heritage.

Almaras then goes on to declare that on April 13, 2015, the Department sent new notice to the Cherokee Nation, two Cherokee Bands, the Blackfeet Tribe and the BIA. The notice correctly listed Mark as K.D.’s father and provided a name, address and birth date for Mark’s mother. For both Mark and his mother, the notice specified “Blackfeet Tribe” as the tribe or band. Nothing in the record on appeal or in the requested augmentation of record indicates how the Department came to believe that Mark’s family might have Indian heritage through the Blackfeet Tribe and not some other tribe that should have instead received notice.

We deny the Department’s motion to augment the record or take judicial notice because the documents provided raise questions that can only be resolved at an evidentiary hearing. Thus, this case is more like *In re Robert A.*, in which determinations were required by the juvenile court regarding whether ICWA compliance had been

demonstrated, than *In re A.B.*, in which a single question of fact was unequivocally resolved by the evidence offered in augmentation of the record.

“If the court fails to ask a parent about his or her Indian heritage, a limited reversal of an order or judgment and remand for proper inquiry and any required notice may be necessary.” (*In re A.B.*, *supra*, 164 Cal.App.4th at p. 839.) Accordingly, we reverse so that the juvenile court may ensure that the Department has made reasonable inquiry of Mark and his extended family as to possible Indian heritage and given notice as required by ICWA.

DISPOSITION

The order terminating Mark and Stacie’s parental rights is conditionally reversed. The matter is remanded to the juvenile court to determine that reasonable efforts have been made to inquire of Mark and his extended family regarding their Indian heritage. If the juvenile court determines that no additional ICWA notice is required, then the order terminating parental rights shall be reinstated. Otherwise, the Department must provide ICWA notice containing complete and accurate information, to the extent it may be reasonably ascertained, about paternal relatives as required by ICWA. If the BIA or any tribe responds by confirming that K.D. is a tribal member or may be eligible for membership within 60 days of sending proper notice under ICWA, the court shall proceed pursuant to the terms of the ICWA and is hereby authorized to vacate, in whole or in part, any prior finding or order that is inconsistent with ICWA requirements. If no response provides reason to conclude that K.D. is a tribal member or may be eligible for tribal membership, the order terminating parental rights shall be reinstated.

STEWART, J.

We concur.

KLINE, P. J.

RICHMAN, J.

In re K.D. (A143496)