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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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

SACRAMENTO COUNTY DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

MICHELLE D.,

Defendant and Appellant.

C070216

(Super. Ct.  
No. JD228674)

Michelle D., the mother of four-year-old Alexis D., appeals from an order of the Sacramento County Juvenile Court terminating her parental rights.

On appeal, mother contends (1) no substantial evidence supports the juvenile court's selection of adoption as the permanent plan because the beneficial parental relationship

exception applies, and (2) the juvenile court erred by failing to comply with the inquiry and notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1912). We conclude that mother failed to raise the beneficial parental relationship exception in the juvenile court and has forfeited this argument on appeal. On the merits, we conclude that mother has failed to meet her burden that the trial court erred by not applying this exception. With regard to the ICWA, we conclude that the matter must be remanded to allow the juvenile court to ask father about his Indian heritage and order him to complete the form ICWA-020. Accordingly, we vacate the orders terminating parental rights and must remand the matter for the limited purpose of permitting the trial court to comply with the inquiry and notice provisions of the ICWA.

#### FACTUAL AND PROCEDURAL BACKGROUND

##### *Originating Circumstances*

Mother was born in September 1987 and was raised in foster care from age 11 to age 18. She resided in transitional housing for former foster youth.

Mother has an extensive history with the Sacramento County Department of Health and Human Services (Department) dating back to 2007. The referrals involved allegations of her general neglect of Alexis. For example, in December 2007, almost immediately following Alexis's birth, a referral was received because mother had been unaware of her pregnancy until her eighth month and had not obtained prenatal care. Mother was

reported to be low functioning, and she lacked awareness of the minor's basic needs. Furthermore, mother did not return home one night as required by housing program regulations. The Department substantiated the referral.

In February 2008, the Department received a referral that mother had complained she is "a prisoner" to Alexis. The Department substantiated that Alexis was gaining weight very slowly. Mother had stated she would not feed Alexis for fear she would "get fat." Mother had little interaction with Alexis, whom she left sitting in her carrier for extended periods of time.

In July 2008, the Department received a referral indicating mother was about to lose her transitional housing due to noncompliance with housing rules.

Two weeks later, housing staff informed a Department social worker that mother had been observed pinching Alexis's legs until she cried.

The next day, housing staff reported that mother had thrown Alexis into the air and had failed to catch her. Alexis fell to the floor and sustained a bump on her head. Mother took Alexis to an emergency room only after housing staff had told mother to do so.

In August 2008, as a result of mother's lack of supervision, Alexis fell off her bed. Housing staff advised mother to take Alexis to an emergency room.

Twice in September 2008, mother resisted taking Alexis to a hospital or urgent care provider for treatment of mosquito or bed bug bites. The bites on Alexis's eyes were so large that one eye was almost swollen shut.

In October 2008, mother left her transitional housing for several days without returning telephone calls from housing staff. She later claimed she had been unable to awaken for the several days because she had taken Nyquil.

Later that month, housing staff found an unidentified male hiding under a pile of laundry in a closet of mother's apartment. Mother claimed not to know the male, but she did not file a police report regarding the incident. Mother later claimed she knew the man only by a nickname.

In November 2008, Alexis was found crying after mother had left her unattended in the apartment with the door open. Mother had asked an approved resident to care for Alexis while she went to a store. However, mother did not return until the following morning. Mother had not equipped the caretaker to care for Alexis overnight.

On November 13, 2008, Alexis was placed into protective custody.

*Petition*

The Department filed a petition alleging that Alexis was within Welfare and Institutions Code<sup>1</sup> section 300, subdivision (b), in that she was at substantial risk of physical harm or illness because mother refused to participate in family maintenance services, continuously left Alexis unattended and/or with inappropriate/unapproved caretakers, and must be prompted to attend to Alexis's medical needs.

*Detention*

At the initial hearing in November 2008, Alexis was detained.

*Jurisdiction and Disposition*

The report for the jurisdiction and disposition hearing indicated that the whereabouts of Elijah C., the father, were unknown, and a due diligence search had not located father.<sup>2</sup> However, at the March 20, 2009, pre-trial jurisdictional/disposition hearing, father appeared for the first time in these proceedings.

At the jurisdiction hearing, the juvenile court sustained the petition's allegations and continued the disposition hearing.

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<sup>1</sup> Undesignated statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Father is not a party to this appeal.

At the disposition hearing, the juvenile court adjudged Alexis a dependent, placed her with mother, ordered family maintenance services for mother, and ordered reunification services for father.

*Six-Month Review*

The report for the review hearing stated that mother had left Alexis with an unapproved caretaker while she held a birthday party for herself in a rented motel room. Mother invited minors to the party and provided alcohol to them. Because mother had left Alexis with an unapproved caretaker and had furnished alcohol to minors, she became ineligible to move from her current transitional housing to a more permanent supportive housing facility.

The report noted that housing staff had "multiple concerns" with the supervision mother provided to Alexis. Mother had to be counseled repeatedly regarding "the cleanliness of her apartment or supervision of the child." The apartment often was dirty, messy, and in disarray. Food was left on the tables and floor, and garbage and papers were strewn everywhere. Alexis had been observed eating food off the floor.

Furthermore, mother was unwilling or unable to arrange daycare for Alexis. Consequently, in November 2009, mother had to delay re-entering her vocational program.

The report noted that a therapist with the University of California at Davis CAARE center<sup>3</sup> had expressed concerns regarding Alexis's language development, but mother appeared to be unconcerned about the issue.

The therapist also was concerned about mother's ability to integrate material from her parent-child interaction therapy into her daily life. The therapy's purpose was to improve the quality of the parent-child relationship and to change parent-child interaction patterns. The therapist noted that mother had a flat affect, no enthusiasm, and did not appear to retain information from week to week. She recommended a medication evaluation to treat her depression and attention deficit hyperactivity disorder. Due to lack of progress, mother was unable to move to a second phase of treatment.

In October 2009, psychologist Sidney Nelson, Ph.D., conducted a psychological evaluation of mother. Dr. Nelson asked mother to describe the behaviors on her part that the Department had considered to be neglectful. Mother said she did not know which behaviors had been considered neglectful and did not know why Alexis had been placed in protective custody; mother did not believe she had been neglectful; and her individual counseling had not been helpful. Mother reported

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<sup>3</sup> Child and Adolescent Abuse, Resource, Evaluation Center  
<http://www.ucdmc.ucdavis.edu/publish/news/newsroom/6470>  
(retrieved Aug. 20, 2012).

that her transitional housing provided a great deal of assistance and she did not know whether she could care for Alexis without assistance.

Dr. Nelson determined that mother has "borderline intellectual functioning," her abstract reasoning and common sense reasoning are "very impaired," and her insight and judgment are "fair to poor." Dr. Nelson opined that mother's prognosis is "poor," and that her tendency "to act on impulse without considering the consequences of her actions . . . could place a young child in a dangerous situation." He concluded further individual counseling would be "of limited benefit."

As of December 2009, father had yet to visit Alexis.

In late March and early April 2010, mother left her housing facility and allowed Alexis to stay with an unapproved adult. Mother admitted that she had left Alexis with unapproved adults on at least two occasions.

Mother failed to complete a psychiatric medication assessment and failed to follow through on Alexis's speech and developmental therapy. Mother was terminated from her therapy program due to her cognitive delays, lack of motivation, and mental health issues, and was referred to a more intensive in-home parenting program.

During the intake appointment for in-home parenting, Alexis was observed grabbing steak knives off the kitchen counter and turning on the gas stove without mother's knowledge. In April 2010, mother missed a scheduled appointment with the in-home

parenting therapist. The next week, the social worker visited mother's home and noted there was no fresh food or milk in the home.

Mother was terminated from her transitional housing due to her poor compliance. Her residence had failed inspection due to dirt and clutter; and, after leaving Alexis in the custody of unauthorized adults, she had departed from the facility without signing out.

*First Supplemental Petition*

In April 2010, the Department filed a section 387 supplemental petition alleging that Alexis could not be maintained safely in the home because mother had failed to benefit from court-ordered services. According to the detention report for the supplemental petition, mother had been provided services since December 2008, but she had not benefited from them.

In April 2010, the juvenile court ordered Alexis detained on the supplemental petition.

In July 2010, at a combined jurisdiction/disposition hearing on the supplemental petition and six-month review hearing, the juvenile court sustained the petition, ordered reunification services for mother, denied reunification services for father because he had not requested custody (*Robert L. v. Superior Court* (1996) 45 Cal.App.4th 619), and ordered that mother undergo another psychological evaluation.

In August 2010, psychologist Jayson Wilkenfield, Ph.D., conducted an evaluation of mother. He noted that she had arrived for the evaluation 30 minutes late. Mother's "scores on the substantive scales of [a psychological] test suggested a pervasive pattern of personality pathology as well as a number of symptoms of severe affective disturbance and delusional ideation." Dr. Wilkenfield opined that mother was incapable of parenting a child on her own and that services were not likely to improve her parenting ability.

Also in August 2010, Dr. Nelson re-evaluated mother to determine whether she would benefit from further reunification services. This time mother arrived one hour 25 minutes late. Dr. Nelson observed that mother's "overall hygiene was poor" in that she emitted "a strong body odor." Mother believed she did not require additional services and believed the Department did not need to remove Alexis from her care.

Dr. Nelson reported that mother's "current psychological assessment" indicated "significant cognitive and intellectual impairment"; her "reasoning skills are poor, and she also has poor common sense reasoning skills"; and her "mood and behavior are likely to be variable and unpredictable and her overall behavior will likely continue to be rather erratic." Dr. Nelson opined that mother "would not be able to meaningfully benefit from further Family Reunification Services" due to her "significant impairment in terms of her cognitive and intellectual skills," her "poor insight into the reasons for the

current dependency action," her poor motivation for participating in any further services, and her prior pattern of not benefiting from services and failing services that previously had been provided.

At the continued disposition hearing in September 2010, based on its review of the two psychological evaluations and the most recent report addendum from the social worker, the juvenile court denied mother reunification services pursuant to section 361.5, subdivision (b) (2).

#### *Progress Report*

In a December 2010 progress report, the Department recommended placement, and eventual guardianship, of Alexis with the maternal aunt in Nevada. The aunt had known Alexis since birth and had spent a considerable amount of time with her prior to the dependency. The aunt was not eligible to adopt Alexis because she had a child welfare history with the Department 10 years previously. Moreover, the aunt was opposed to adoption because she was unwilling to disrupt familial relationships.

The social worker requested evaluation of the maternal aunt through the Interstate Compact for Placement of Children (ICPC), with a goal of legal guardianship. In the event the aunt did not pass the evaluation, the social worker recommended referral to a local organization that provides hard-to-place children an intensive home-finding search, as well as supportive services, with the ultimate goal of finding a home that will provide permanence through adoption.

*First Selection and Implementation Hearing*

In March 2011, the juvenile court approved guardianship as the permanent plan and placement of Alexis with the maternal aunt. Alexis was placed in the aunt's home in April 2011.

On a cold night in May 2011, Alexis and her younger cousin (the aunt's two-year-old child) were observed playing in a nearby drainage ditch. The children were unsupervised and had no shoes or warm clothing. Law enforcement arrived and found the maternal aunt's home to be filthy and unsuitable for a child of Alexis's age. The aunt was arrested for child endangerment but no criminal charges ensued. Alexis was placed in a confidential foster home.

*Second Supplemental Petition*

In July 2011, the Department filed a second section 387 supplemental petition alleging the previous disposition had not been effective in that the maternal aunt had been arrested for child endangerment and the Department revoked its prior waiver of the aunt's disqualifying child welfare history.

In July 2011, the juvenile court again detained Alexis. In August 2011, the court sustained the supplemental petition and denied further services.

*Second Selection and Implementation Hearing*

In a December 2011 report, the social worker stated that Alexis was making good progress in speech therapy and her social skills had improved. The social worker opined that: Alexis is generally adoptable; although mother has been relatively

consistent with visitation, she remains homeless and unable to meet Alexis's needs; the "nature of the mother's contacts appears to be that of friendly visitation"; and "the benefit of a permanent, stable and nurturing home outweighs any detriment that may result from the termination of parental rights." Accordingly, the social worker recommended a permanent plan of adoption.

By December 21, 2011, Alexis was making a good transition into the home of her prospective adoptive family.

At the hearing in January 2012, mother read a prepared statement. Mother informed the court that she looked forward to her weekly visits with Alexis. Mother's counsel entered general objections to the Department's recommendations. Counsel did not ask the court to apply any exception to adoption.

Father's counsel entered general objections as well as specific objections to the finding that Alexis is adoptable and the order placing her for adoption.

The juvenile court found that Alexis was generally adoptable and added: "And I do not find there is evidence indicating an exception to adoption." The court terminated the parental rights of both parents.

## DISCUSSION

### I

#### *Substantial Evidence*

Mother's opening brief begins with the assertion "no substantial evidence supported the juvenile court's selection of

adoption as permanent plan.” But the remainder of her argument fails to support this assertion with argument or analysis. Instead, the brief makes the very different claim that *evidence would have supported* an exception to adoption had the court chosen to apply one. Thus, mother claims there was evidence (1) she had maintained regular visitation and contact with Alexis, and (2) they shared a beneficial relationship such that termination would be detrimental to Alexis. We conclude that mother failed to raise the beneficial parental relationship exception in the juvenile court and has forfeited this argument on appeal. On the merits, we conclude that mother has failed to meet her burden that the trial court erred by not applying this exception.

**A.**

*Beneficial Parental Relationship Exception*

“‘At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption.* [Citation.]’ [Citations.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child.” (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.)

There are only limited circumstances permitting the court to find a “compelling reason for determining that termination [of parental rights] would be detrimental to the child.”

(§ 366.26, subd. (c)(1)(B).) One of these is where the parent has maintained regular visitation and contact with the child and the *child would benefit* from continuing the relationship, often referred to as the beneficial parental relationship exception. (§ 366.26, subd. (c)(1)(B)(i).) The “benefit” to the child must promote “the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*); *In re C.F.* (2011) 193 Cal.App.4th 549, 555 (*C.F.*).) Even frequent and loving contact is not sufficient to establish this benefit absent a *significant, positive, emotional attachment* between parent and child. (*C.F., supra*, 193 Cal.App.4th at p. 555; *Autumn H., supra*, 27 Cal.App.4th at p. 575.)

No matter how “‘frequent and loving [the] contact’ [citation],” and notwithstanding “an emotional bond with the child, . . . the parents must show that they occupy ‘a parental role’ in the child’s life. [Citation.]” (*In re Andrea R.*

(1999) 75 Cal.App.4th 1093, 1108-1109 (*Andrea R.*); see *In re Jason J.* (2009) 175 Cal.App.4th 922, 938.)

"Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*)).

## **B.**

### *Burden and Standard of Review*

The party claiming the exception in the juvenile court has the burden of establishing the existence of any circumstances that constitute an exception to termination of parental rights. (*C.F., supra*, 193 Cal.App.4th at p. 553.)

As the party must establish the existence of the factual predicate of the exception -- that is, evidence of the claimed beneficial parental relationship -- and the juvenile court must then *weigh* the evidence and determine whether it constitutes a compelling reason for determining detriment, substantial evidence must support the factual predicate of the exception, but the juvenile court exercises its discretion in weighing that evidence and determining detriment. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

"On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing

party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*Autumn H., supra*, 27 Cal.App.4th at p. 576.) "[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge.'" (*Jasmine D., supra*, 78 Cal.App.4th at p. 1351.)

### C.

#### *Analysis*

The juvenile court has no sua sponte duty to determine whether an exception to adoption applies. (E.g., *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.) Rather, the parent has the burden of proving that an exception applies. (*Ibid; C.F., supra*, 193 Cal.App.4th at p. 553.) Mother's counsel entered a general objection to termination. There was no mention of the applicability of the beneficial parental relationship exception. This meager record cannot be said to constitute an effort to place the beneficial parental relationship exception at issue. Mother has forfeited this argument by failing to assert it in the juvenile court. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558; *In re Dakota S.* (2000) 85 Cal.App.4th 494, 501-501; *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

In any event, mother has not met her burden. There was substantial evidence that mother was not capable of occupying a parental role in Alexis's life. (*In re Andrea R., supra*, 75

Cal.App.4th at pp. 1108-1109.) In 2009, mother's therapist was concerned about her ability to integrate material from her parent-child interaction therapy into her daily life. The therapy's purpose was to improve the quality of the parent-child relationship and to change parent-child interaction patterns. The therapist noted that mother had a flat affect, no enthusiasm, and did not appear to retain information from week to week. Due to lack of progress, mother was unable to move to a second phase of treatment.

Also in 2009, Dr. Nelson opined that mother's prognosis was poor with respect to her ability to parent Alexis without significant assistance from another responsible adult.

In 2010, Dr. Nelson noted his prior opinion and concluded that mother would not benefit from further services, i.e., services would not enable mother to occupy a parental role in Alexis's life.

Also in 2010, Dr. Wilkenfield opined that mother was incapable of parenting a child on her own, and services were not likely to improve her parenting ability.

Thus, the therapist and psychologists reached the conclusion that mother was unable to establish and maintain a quality parent-child relationship. This evidence amply supports the juvenile court's findings that Alexis is generally adoptable, adoption is the preferred plan, and there is no evidence indicating any exception to adoption.

Mother counters that, at the first selection and implementation hearing in March 2011, the juvenile court had found that termination of parental rights would be detrimental to Alexis, and since "nothing changed in terms of the relationship between this mother and her child," the same finding should have been made at the second hearing in January 2012. We disagree.

The evidence suggests the juvenile court rendered the March 2011 finding at the behest of the Department, in order to accommodate guardianship with the maternal aunt who could not qualify as an adoptive parent due to her own adverse child welfare history and who did not want to disrupt existing familial relationships. The Department did not provide any evidence that, notwithstanding the therapist's opinion and the psychological evaluations, mother had occupied the requisite parental role in Alexis's life. Instead, the Department made plain that, if the placement with the aunt were to fail, the appropriate permanent plan would be adoption. Based on these facts, mother's reliance on the March 2011 finding is misplaced.

In sum, mother failed to raise the beneficial parental relationship exception in the juvenile court and, therefore, has forfeited the argument on appeal. And based on the ample evidence in the record, mother has failed to meet her burden that the trial court erred by not applying this exception.

## II

### *ICWA Compliance*

Mother contends the juvenile court erred by failing to comply with the notice provisions of the ICWA. Specifically, mother claims the court never required father to complete form ICWA-020. The duty of inquiry is separate from the duty of notice. Mother's contention concerns the duty of inquiry.

At the outset of the juvenile proceedings, the juvenile court has a duty to inquire whether the child who is the subject of the proceedings is, or may be, an Indian child. We conclude that the juvenile court did not meet its duty of inquiry because father was not asked about his Indian heritage and was not required to complete form ICWA-020.

#### A.

##### *Background*

In November 2008, mother told the social worker she had last seen father in August 2007. Father did not live with her, had not been present at Alexis's birth, and had not seen the child. His whereabouts were unknown.

In November 2008, mother completed form ICWA-020, indicating she had no Indian heritage. At the original detention hearing, the juvenile court found there was no evidence that Alexis is an Indian child. At the detention hearing on the first supplemental petition, the court found that, as to mother, there was no evidence Alexis is an Indian child.

Father failed to appear at hearings from November 18, 2008, through February 18, 2009. He appeared for the first time on March 20, 2009. Thereafter, he appeared on April 15, 2009; July 1, 2009; January 13, 2010; November 13, 2010; and January 19, 2011. Father did not appear, but was represented by counsel, at hearings on April 20, 2010; December 15, 2010; February 2, 2011; March 2, 2011; March 23, 2011; August 10, 2011; August 17, 2011; August 24, 2011; October 5, 2011; December 21, 2011; and January 4, 2012.

The juvenile court did not inquire as to father's Indian heritage and did not require father to complete a form ICWA-020.

**B.**

*Analysis*

"The ICWA, enacted by Congress in 1978, is intended to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." [Citation.] "The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." [Citation.] [¶] . . . [¶]

"In *In re H.B.* (2008) 161 Cal.App.4th 115, 120 (*In re H.B.*), the court explained that neither the ICWA nor controlling federal regulations 'expressly impose any duty to inquire as to American Indian ancestry.' [Citation.] 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."" [Citations.]

"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. [Citation.] Reversal is not warranted, however, when the court's noncompliance with the inquiry requirement constitutes harmless error. [Citations.]" (*In re A.B.* (2008) 164 Cal.App.4th 832, 838-839.)

Here, the juvenile court and the Department had an affirmative and continuing duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (§ 224.3, subd. (a); Cal. Rules of Court, rule 5.481(a).) As part of its duty, the court must "order the parent" to complete form ICWA-020 at the first appearance by the parent in the juvenile proceedings in which the child is at risk of entering foster care. (Cal. Rules of Court, rule 5.481(a)(2).) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the Bureau of Indian

Affairs if the tribal affiliation is not known. (25 U.S.C. § 1912; see § 224.2; Cal. Rules of Court, rule 5.481(b).)

A parent's failure to raise the issue of ICWA compliance in the juvenile court does not preclude appellate review. (*In re A.B.*, *supra*, 164 Cal.App.4th at p. 839, fn. 4.) The Department concedes that mother may challenge the juvenile court's lack of ICWA compliance with respect to father in this proceeding to terminate mother's parental rights. (*In re A.B.*, *supra*, 164 Cal.App.4th at p. 839, fn. 4.)

Although father appeared in person and by counsel, the juvenile court did not ask about Alexis's Indian status and did not order father to complete form ICWA-020.

The Department claims the juvenile court's omission is harmless under *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 (*Rebecca R.*), in which the "[f]ather complain[ed] that he was not asked below whether the child had any Indian heritage." (*Id.* at p. 1431.) The appellate court responded, "Fair enough. But, there can be no prejudice unless, *if* he had been asked, father *would have* indicated that the child did (or may) have such ancestry." (*Ibid.*)

There are crucial factual differences between *Rebecca R.* and this case. In *Rebecca R.*, *supra*, 143 Cal.App.4th 1426 the father, who claimed error on appeal, *knew* whether or not he had Indian heritage. The court found it incumbent upon him to demonstrate prejudice on appeal by stating what he obviously

knew. But, here, the issue is the ancestry of *the estranged other parent*, which the appealing parent may well *not know*.

*Rebecca R.* was followed in *In re N.E.* (2008) 160 Cal.App.4th 766, in which the father complained that the agency did not question him about Indian heritage and the court did not order him to complete a Parental Notification of Indian Status form. (*Id.* at pp. 769-770.) However, the father's counsel had stipulated in juvenile court that the ICWA did not apply; moreover, the father did not assert on appeal that he in fact had any Indian heritage. (*Ibid.*) *In re N.E.* cannot be relied upon to suggest that a parent has a duty to allege, as part of his or her ICWA claim, the Indian heritage of the other parent.

The Department also cites *In re Noreen G.* (2010) 181 Cal.App.4th 1359, in which *both* parents claimed the juvenile court failed to comply with the notice and inquiry requirements under the ICWA. (*Id.* at p. 1385.) After noting that the appellate record contained no evidence of Indian heritage, *Noreen G.* concluded a limited remand for ICWA compliance was justified by the mother's offer of proof that her father's grandmother had Seminole heritage. (*Id.* at p. 1388.) Here, there is no evidence that mother knows of father's heritage, and the evidence suggests that father's heritage is most probably unknown to her.

The Department relies on *In re H.B., supra*, 161 Cal.App.4th 115, in which the mother claimed the juvenile court violated the ICWA by failing to inquire about Native American ancestry. (*Id.*

at p. 117.) The court held any error was harmless, not only because the mother had never made an affirmative representation of Indian ancestry in the juvenile court or on appeal, but also because she had *told* the social worker she had *no* such ancestry. (*Id.* at p. 122.) Based on the factual differences in this case, *In re H.B.* does not prevent mother from raising her ICWA challenge regarding father's ancestry.

In sum, the Department has not cited a case like this one where mother is claiming father never was asked about Indian heritage and there is no evidence in the record suggesting that mother would have known of father's Indian heritage. Under these facts, we must remand the matter to the juvenile court with directions to inquire of father whether the minor Alexis is or might be an Indian child. (*In re J.N.* (2006) 138 Cal.App.4th 450, 461-462.)

#### DISPOSITION

The orders terminating parental rights are vacated and the matter is remanded for the limited purpose of permitting the juvenile court to comply with its duty of inquiry and notice provisions of the Indian Child Welfare Act (25 U.S.C. § 1912) and for the court to determine whether the Indian Child Welfare Act applies in this case. If the court determines that the Indian Child Welfare Act does not apply, the orders shall be reinstated. However, if a tribe determines the minor is an Indian child or if information is presented to the juvenile court that affirmatively indicates the minor is an Indian child

as defined by the Indian Child Welfare Act and the court determines that the Indian Child Welfare Act applies to this case, the juvenile court is ordered to conduct a new review hearing in conformance with all provisions of the Indian Child Welfare Act.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.