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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re COLLIN E., a Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JAMES E. et al.,

Defendants and Appellants.

D069017

(Super. Ct. No. EJ3941)

Appeals from a judgment of the Superior Court of San Diego County, Gary M. Bubis, Judge. Affirmed in part and conditionally reversed in part with directions.

Cristina Gabrielidis, under appointment by the Court of Appeal for Defendant and Appellant H.S.

Lelah S. Fisher, under appointment by the Court of Appeal for Defendant and

Appellant James E.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Dana C. Shoffner, Deputy County Counsel, for Plaintiff and Respondent.

James E. (Father) and H.S. (Mother) appeal from the juvenile court's judgment declaring their minor son, Collin E., a dependent, contending there is no substantial evidence to support the court's jurisdictional findings and removal order as to Father. The San Diego County Health and Human Services Agency (the Agency) maintains these rulings were appropriate and supported by the record. We agree and affirm the judgment. In addition, Mother contends the Agency failed to comply with the Indian Child Welfare Act (ICWA) and the Agency concedes error. We order a conditional reversal and limited remand for that purpose.<sup>1</sup>

## I

### FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

Collin was born in June 2014. The Agency opened his dependency case in July 2015, following an incident during which Mother was observed stumbling in a convenience store and slurring her speech. She had left Collin in the car. The police were called; when they arrived, they observed Mother was "sweating profusely," had bloodshot eyes, and had trouble maintaining her balance. She admitted to taking

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<sup>1</sup> Mother also joins Father's arguments, but she does not challenge the court's jurisdictional or dispositional findings as to herself.

<sup>2</sup> We describe the factual background relevant to ICWA in the discussion section of this opinion.

prescribed morphine earlier in the day. Mother was arrested for being under the influence of controlled substances and willful cruelty to a child, transported to a detention facility, and released to a hospital due to medical issues. Collin was taken to Polinsky Children's Center (Polinsky).

The Agency filed a petition on Collin's behalf under Welfare and Institutions Code section 300, subdivision (b).<sup>3</sup> The petition alleged Collin's "parent left [him] inadequately attended and inadequately supervised" and summarized the convenience store incident. The petition further alleged "[M]other and [F]ather have a history of drug use and the mother had a prior voluntary case due to drug use, and there is a substantial risk the child will suffer serious physical harm or illness. . . ."

The Agency's detention report addressed prior referrals regarding Collin, which were determined to be unfounded or were evaluated out. The first referral, shortly after his birth, reflected he was born positive for opiates. Another referral occurred in August 2014, after Collin came out of surgery. When the parents arrived, Mother appeared under the influence. Father was unconcerned, said she was "just tired," and was willing to let her watch Collin that night; however, the parents agreed to leave him overnight at the hospital. Later that month, the parents participated in a team decision meeting (TDM), a safety plan was created, and the parents received a referral to community resources. In May 2015, the Agency received a report that, among other things, Mother was carrying Collin while under the influence and both parents abuse prescription medications. The

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<sup>3</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

parents denied current substance abuse, but refused to drug test or sign consents for medical information. They again were provided with community referrals.

The report also reflected social worker Lisa Birdine's initial interview with the parents. Mother indicated she was sober the night Collin was detained and was acting oddly because of low blood pressure. Father said the only medications he was taking were prescribed. Birdine also communicated with the paternal grandfather (Jim E.), his fiancée (Stephanie P.), the paternal grandmother (Katherine B.), and Father's probation officer. Jim described Father as a "functioning addict" and discussed several incidents. He told Father he wanted to attend his next doctor's visit, but Father canceled the visit and went by himself when Jim was unavailable. For Collin's first birthday party, Father was two hours late. Jim had plans to meet the parents at Polinsky on July 20 to visit Collin, but when he arrived at their home, they had been sleeping and "blew off the visit."<sup>4</sup> Stephanie recounted an incident during which Mother sought to borrow money for medication and Father was angry at Mother for doing so, out of concern Stephanie would tell Jim. Katherine said Father's substance abuse began when he was a teenager. She felt he had "gone backwards in the last couple of months," citing recent weight loss, late attendance to family gatherings, and Father's acknowledgment he was using prescription drugs. As for the probation officer, he indicated Father was on "high risk

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<sup>4</sup> It is unclear how many visits the parents missed. Jim later told Birdine the parents missed a visit on July 19 and he found them asleep at home. She does not say whether he was reiterating his initial account or alleging a different missed visit. Another report indicated the parents were no-shows on July 19 and July 22. At the very least, the record reflects they missed one visit.

supervision," but had been compliant and they were looking into a lower level of supervision.

The Agency found there was a need for continued detention, noting family members' observations that Mother was "extremely tired" when caring for Collin and their concerns that she was under the influence, as well as Father's substance abuse history. At the detention hearing, the court detained Collin.

The Agency's jurisdiction and disposition report included the parents' criminal histories (reflecting multiple incidents involving controlled substances), further information about the parents, and additional input from witnesses.

Birdine spoke with the parents several times. Mother said Father "didn't put [Collin] in danger" and indicated he had not used substances since they had been together. She explained she was not currently prescribed pain medication, but had leftover pills from her pregnancy. She said Father did not know she had the leftover medication. However, Father told Birdine he knew Mother took sleep and seizure medication, and "ha[d] pain medication that was prescribed when Collin was born" (although he stated he was not aware she was using the pain medication). Father indicated Mother was prepared to move out if Collin returned, explaining: "My son's safety is the most important to me. I will choose my son over [Mother]."<sup>5</sup> Father also

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<sup>5</sup> Father contends Birdine said she "could release Collin to him once he discussed his awareness of mother's behavior, drug tested for the Agency, and signed medical releases." He mischaracterizes the report. Birdine did identify these steps as necessary, but she also explained that "Collin [could] not be returned home to either parent until the Agency believes Collin can be kept safe and properly cared for."

agreed to take a drug test and tested negative on August 4. Birdine described the parents' visits with Collin and noted that during one of them, the parents "appeared slow in their movements" and slept during the latter part of the visit. Father also ate some of Collin's snacks.

Jim provided Birdine with additional information, including his discovery on July 31 of empty prescription bottles filled on July 17 and 20 and background on Father's prior efforts to achieve sobriety. Birdine spoke with additional witnesses as well. One of Father's sisters said he abused alcohol after recovering from methamphetamine and recalled an incident when he asked her for vodka after taking painkillers. She also corroborated his recent weight loss. One of the parents' neighbors had "on occasion" witnessed Father falling out of his car, after fumbling in it for a long time. He noted Father's head would nod forward and he would almost fall down.

The report then addressed the Agency's reasonable efforts, including meeting with the parents, providing service referrals, and scheduling a TDM (discussed *post*), as well as its assessment of the situation. It observed both parents had substance abuse history and denied current abuse, despite their use of prescription drugs and behaviors indicating abuse. The Agency found Father failed to protect Collin from being in Mother's care, noting it alerted him to its concerns in this regard during the May 2015 referral. The Agency concluded there was "substantial risk of [Collin] suffering physical and emotional harm" while in the parents' care, based on issues including the parents' history of drug use and Father's failure to protect Collin from drug use. It expressed specific concern that Father would continue to "minimize his own drug use" and allow Mother to

care for Collin while under the influence.

The Agency's addendum reports provided additional information. During the TDM, Father maintained he was unaware Mother was using medication while caring for Collin and stated he kept the medication locked in his safe. At a subsequent meeting with Birdine, Father acknowledged he was aware Mother took morphine while pregnant. He also discussed his choice to use pain medication, despite his history, explaining the drug abuse caused his body to break down and the medication was prescribed by his doctor. The reports also addressed services. The substance abuse specialist indicated Father was scheduled for intake on August 13, rescheduled for August 17, and did not attend the rescheduled appointment. Father did finish his therapy assessment. Birdine felt the parents had not had time to gain needed education to address their substance abuse and keeping Collin safe. Finally, the Agency reiterated its concerns, noting Father's awareness of Mother's substance abuse (including her use of morphine while pregnant) and his own choice to use morphine, even after completing prior substance abuse treatment.

At the settlement conference in September 2015, Father's counsel told the juvenile court that he was willing to live separately from Mother, asked the Agency to look into placing Collin with him, and indicated he was "willing to do anything possible to have his child with him."

In October 2015, the juvenile court held the contested adjudication and disposition hearing and accepted the Agency's reports into evidence. Birdine and Father testified. Birdine opined Collin would be at substantial risk of danger if placed with his parents.

She felt Father was "aware of what was going on" with Mother's substance abuse, but failed to take steps to mitigate the danger to Collin. With respect to Father locking up medication for Mother, Birdine believed this practice reflected a "lack of insight" into both Mother's drug use and his own (as he was on similar drugs), as well as impaired judgment as to the effect of such drug use on Collin. She observed Father was "very, very enmeshed" with Mother and was concerned "he would allow Mother to have interaction with Collin." With respect to Father's own substance abuse issues, she noted his history included drug-related arrests. She also discussed evidence suggesting he continued to abuse substances, including witness observations of his behavior and his weight loss, among other things. Finally, Birdine noted that previous efforts at safety planning had failed to keep Collin safe.

Father testified that Mother was "a great mother" and "the only problem that [he] would identify is . . . her not knowing her own body." He did not think she had abused prescription medication since he had been with her. He said he would "do whatever it takes to get [his] child back," and if Mother "ha[d] to move, she moves." As for his own drug use, Father said he last used methamphetamine three years prior and completed a drug program in 2014. He was taking hydromorphone and morphine for back pain, which resulted from an accident, and noted his work as an electrician was "tough on [his] back." He was planning to get an epidural "to try to take less medication." He also had a clonazepam prescription for anxiety that he was not taking. Father addressed the empty pill bottles. For the hydromorphone and morphine, he indicated he put the pills in other bottles (like a "travel case") due to his dad "basically evicting" them and because they

had to "leave right away."<sup>6</sup> As for the clonazepam, he said there were "only a few" pills to begin with. Father was willing to participate in therapy (and had met with his therapist), was planning to contact a drug treatment program after court (and had told the substance abuse specialist about his plan that day), and was enrolled in and willing to complete a parenting course.

The juvenile court found by clear and convincing evidence that the petition allegations were true and Collin was a child described by section 300, subdivision (b). The juvenile court also found by clear and convincing evidence that Collin should be removed from his parents' custody pursuant to section 361, subdivision (c)(1), because there was substantial danger to Collin and no reasonable means to protect him without removal.

The court stated it "want[ed] to address this from the factual basis." It explained both parents had a history of substance abuse and noted the "worse thing" for addicts are prescription drugs. It found "overwhelming evidence" Mother was abusing prescription drugs. The court described Father's testimony that she was a great mom as having "his head in the sand" and reflecting he was "totally in denial" and "just does not put his child's safety above the love he has for the mother of the child." The court also found Father had to understand his codependency issues with Mother. As for Father's own drug use, the court explained Father had a history of drug use, was on medications that could "cause him problems if . . . abused," and there was an indication from witnesses this

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<sup>6</sup> Jim had been renting the parents' home for them.

might be happening (although it still had to be evaluated).

The court concluded reasonable efforts had been made to prevent or eliminate the need for removal. The court also ordered reunification services for both parents. The parents timely appealed.

## II

### DISCUSSION

#### A. *There is Substantial Evidence to Support the Jurisdictional Findings as to Father*

Father argues there was no substantial evidence to support the juvenile court's jurisdictional finding under section 300, subdivision (b), as to him.

##### 1. *We Will Exercise our Discretion to Reach Father's Jurisdiction Argument*

Mother has not appealed the jurisdictional findings as to herself. We therefore will affirm jurisdiction even if the allegations as to Father were unsupported. (See *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 (*Alexis E.*) ["When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence."].)

Father requests we reach the jurisdictional findings, contending they could prejudice him in this and future dependency proceedings. We may "exercise our discretion and reach the merits of a challenge to any jurisdictional finding when the finding (1) serves as the basis for dispositional orders that are also challenged on appeal

[citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) 'could have other consequences for [the appellant], beyond jurisdiction' [citation]." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763 (*Drake M.*); *id.* at p. 763 [addressing jurisdiction as to father, although there was no challenge to findings under separate counts as to mother].) As discussed *post*, the juvenile court's removal findings treat Father as an offending parent. Father therefore has a colorable argument that the court's findings as to jurisdiction impacted its removal decision. In addition, the references to prior referrals, throughout the record here, lend credence to Father's concerns about the possible impact of leaving the jurisdictional findings unreviewed. (*Id.* at pp. 762-763; cf. *In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 (*I.A.*) [declining to address issues that raised " 'abstract or academic questions of law' "].) Therefore, we will exercise our discretion to reach Father's challenge to the jurisdictional findings. (See *Drake M.*, *supra*, 211 Cal.App.4th at p. 763; see also *In re Anthony G.* (2011) 194 Cal.App.4th 1060, 1064-1065 (*Anthony G.*) [electing to consider father's appeal as to jurisdiction under § 300, subd. (g), even though there was no challenge to jurisdiction under § 300, subd. (b)].)

We briefly address the Agency's arguments against addressing these findings. The Agency relies on *I.A.*, *supra*, 201 Cal.App.4th at p. 1493 and *Briana V.* (2015) 236 Cal.App.4th 297, 308-310. However, *I.A.* provides "there is no doubt the court retains the discretion to consider alternative jurisdictional findings"; it simply found the father there "ha[d] not suggested a single specific legal or practical consequence" from the finding at issue. (*I.A.*, *supra*, 201 Cal.App.4th at p. 1492.) Here, Father has identified

potential consequences. *Briana V.* likewise is distinguishable. (*Briana V.*, at p. 310 [finding, under the circumstances, that father failed to establish *Drake M.* exception].) The Agency also attempts to distinguish *Drake M.* and *Anthony G.* on the grounds they involved multiple counts, whereas the petition here has a single count. However, the Agency does not explain why the form of the petition would limit the significance of factors that otherwise support review.<sup>7</sup>

## 2. *Applicable Law*

Section 300 provides, in relevant part, as follows: "A child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: [¶] . . . [¶] (b)(1) The child has suffered, or there is a substantial risk the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child . . . ." The " 'basic question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.' " (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.)

"On appeal, the jurisdictional findings are reviewed under the substantial evidence test." (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.)

## 3. *Analysis*

The court found the petition allegations were true by clear and convincing

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<sup>7</sup> We do agree Father's concerns regarding the Child Abuse Central Index (CACI) are misplaced. CACI reporting is based on agency, not court, action and listings are challenged first by administrative grievance. (See *Saraswati v. County of San Diego* (2011) 202 Cal.App.4th 917, 921; *In re C.F.* (2011) 198 Cal.App.4th 454, 464-465.)

evidence. The record contains substantial evidence to support these findings as they pertain to Father.

At Collin's tender age, "the absence of adequate supervision and care poses an inherent risk to . . . physical health and safety." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824 (*Rocco M.*)) Mother's substance abuse prevented her from properly supervising Collin. Father, by failing to grasp the extent of Mother's substance abuse problems and permitting her to watch Collin, contributed to this risk. (*In re T.V.* (2013) 217 Cal.App.4th 126, 135 (*T.V.*) [addressing evidence supporting substantial risk of harm to a minor; observing father "was aware of [the mother's] substance abuse but nevertheless allowed her in the home"].) Father denies he knew Mother was taking medication on the day Collin was detained and indicates he was locking the medicine in a safe. However, the record reflects Father knew about Mother's drug use, at least generally. With respect to his practice of securing medicine from Mother, this does not establish he was protective of Collin. In fact, as the social worker testified, it suggests a lack of insight and judgment as to Mother's drug use and its impact on Collin. One should recognize that a person from whom medication needs to be secured may not be capable of caring for a one-year-old child—and may find another way to obtain and take such medication, as Mother did on the day Collin was detained.

Father's history of drug abuse also contributed to the risk to Collin. Even if Father were not presently abusing drugs, a parent's prior drug use is relevant to establishing a current risk of harm where, as here, evidence suggests the parent's behavior may recur. (*Rocco M.*, *supra*, 1 Cal.App.4th at p. 824 ["While evidence of past conduct may be

probative of current conditions, the question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm. (Citations.) . . . '[T]here must be some reason to believe the acts may continue in the future.' ") The Agency established that despite Father's past challenges with drug addiction and completion of drug treatment, he was voluntarily taking addictive pain medication, potentially abusing it, and evidencing behaviors typical of drug use, all while living with and caring for Collin.

Taken as a whole, Father's "comments and conduct offered no indication" that his approach toward Mother's care of Collin or his own drug use were "unique situation[s]" or that "[he] was unlikely to engage in similar behavior in the future." (*In re John M.* (2012) 212 Cal.App.4th 1117, 1124-1125 (*John M.*)) We conclude there was substantial evidence to support the juvenile court's jurisdictional findings as to Father. His arguments, discussed below, are unavailing.

First, Father contends past abuse of drugs does not support jurisdiction and current risk of harm is necessary, citing *Rocco M.*, *supra*, 1 Cal.App.4th at p. 824. He concedes, however, that "evidence of past parental conduct may have some probative value in considering current conditions." As discussed *ante*, Father's drug history contributes to a showing of current risk to Collin. In the same vein, Father argues there is no evidence Collin suffered physical harm or injury due to his past drug use. However, there is evidence he is putting Collin at risk, and " 'section 300 does not require that [Collin] actually be abused or neglected before the juvenile court can assume jurisdiction.' " (*T.V.*, *supra*, 217 Cal.App.4th at p. 134, citation omitted.)

Next, Father argues his current prescription drug use does not support dependency jurisdiction. However, his prescription use is relevant. Father has a history of abusing drugs and his choice to use addictive prescription medications amplifies the risk that his abuse of drugs will reoccur. Indeed, the evidence before the juvenile court suggested he may already be abusing drugs again.

Finally, Father contends the Agency did not allege he failed to protect Collin from Mother and there was no evidence to support such a claim in any event. The evidence does establish Father failed to protect Collin from Mother, as discussed *ante*. To the extent Father is challenging the sufficiency of the petition, neither party addresses whether he made this argument below. If he failed to do so, he forfeited the issue. (*In re S.O.*, *supra*, 103 Cal.App.4th at pp. 459-460.) Even if there was no forfeiture, the existence of substantial evidence to support the allegations and the absence of any notice issue renders this challenge moot. (*In re Athena P.* (2002) 103 Cal.App.4th 617, 626–628 [holding that in the absence of prejudicially inadequate notice, "if the jurisdictional findings are supported by substantial evidence, the adequacy of the petition is irrelevant."].)

B. *There is Substantial Evidence to Support Removal*

Father next argues there was no substantial evidence to support Collin's removal.

1. *Applicable Law*

Section 361, subdivision (c), provides in pertinent part: "A dependent child shall not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and

convincing evidence of any of the following circumstances . . . : [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor 's parent 's . . . physical custody." (§ 361, subd. (c); Cal. Rules of Court, rule 5.695(d)(1) [accord].)

The juvenile court "shall consider, as a reasonable means to protect the minor," options including: "(A) . . . [R]emoving an offending parent . . . from the home" and "(B) Allowing a nonoffending parent . . . to retain physical custody as long as that parent . . . presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm." (§ 361, subd. (c)(1).)

The court also "shall make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home" and "state the facts on which the decision to remove the minor is based." (§ 361, subd. (d).)

We review the court's removal order for substantial evidence. (*T.V., supra*, 217 Cal.App.4th at p. 136.)<sup>8</sup>

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<sup>8</sup> The Agency contends the underlying clear and convincing test "disappears" at this stage, relying on *In re Mark L.* (2001) 94 Cal.App.4th 573. (*Id.* at p. 580; see *id.* at p. 581, fn. 5 ["Whether the test at the trial court is preponderance of the evidence or clear and convincing evidence, a substantial evidence standard of review applies on appeal."].) Father contends our substantial evidence review requires consideration of the test below. (See *In re Patrick S. III* (2013) 218 Cal.App.4th 1254, 1262 ["We review the record . . . to determine whether there is substantial evidence from which a reasonable

## 2. *Analysis*

Substantial evidence supports the juvenile court's removal decision. As an initial matter, the juvenile court made its jurisdictional findings by clear and convincing evidence and those findings likewise support the court's removal determination. (See *Rocco M.*, *supra*, 1 Cal.App.4th at p. 826 ["Since the evidence warranted a finding of substantial risk of serious physical injury, it also appears to have supported a finding . . . of a substantial danger to the minor's physical health."]; *In re Cole C.* (2009) 174 Cal.App.4th 900, 917 (*Cole C.*) ["The jurisdictional findings are prima facie evidence that the child cannot safely remain in the home."].)

Specifically, the record contains substantial evidence that removing Collin from Father's custody was necessary to protect him from substantial danger. The focus is on "averting harm to the child." (*John M.*, *supra*, 212 Cal.App.4th at p. 1126.) Father permitted Mother to care for Collin, despite her substance abuse issues, and although he maintains he would choose Collin over her, the social worker and the juvenile court expressed doubts about his ability to do so. In addition, the evidence reflected Father had a history of drug abuse and could abuse drugs again (and possibly already was doing so), which also put Collin in danger. (See *id.* at p. 1126 [observing, in connection with removal, that "[t]he court may consider a parent's past conduct as well as present circumstances"].) The juvenile court "could infer these were recurring problems, and

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trier of fact could find clear and convincing evidence. . . .") We need not address how these applications of substantial evidence review differ, because even assuming the latter applies, there was sufficient evidence to support removal.

nothing in [the parents'] situation had changed to suggest that they would not continue in the future." (*Ibid.*) In turn, the court reasonably could conclude Collin would not be safe in Father's custody. The record also supports the juvenile court's finding that reasonable efforts had been made to avoid removal. The Agency's reports and social worker's testimony addressed previous efforts at safety planning, as well current efforts to work with the parents, provide service referrals, and engage in team decisionmaking.

Father's arguments again are unpersuasive. First, he contends the evidence of risk to Collin in his custody "did not rise to the level of being clear and convincing," noting his willingness to drug test, obtain an epidural so he could take less prescription medication, have Mother move out, and enroll in services. Father's readiness to drug test and reduce his prescription medication use are commendable, but at the time of disposition, he was still using those prescriptions and witness reports suggested he might be abusing them. As for Mother, Father questions the social worker's concern that he would allow contact with her, stating it is "extremely unlikely [he] would ever leave Collin alone with [M]other again." However, the court was "entitled to find the social worker's opinion credible and give great weight to her assessment." (*Cole C.*, *supra*, 174 Cal.App.4th at p. 918.) Finally, it appears Father had not started current substance abuse treatment as of the disposition hearing. In any event, he fails to explain how his enrollment in services mitigates the juvenile court's present concerns regarding his relationship with Mother and his own substance abuse issues.

Father directs us to *In re Kristin H.* (1996) 46 Cal.App.4th 1635 (*Kristen H.*). There, the reviewing court affirmed the removal of a minor from a mother with mental

illness and substance abuse issues, observing among other things that the mother was "in denial" about her problems, notwithstanding her bonding with the minor. (*Id.* at p. 1657.) Father contends *Kristen H.* is distinguishable because the mother there had mental health issues, which drug use compounded, but his "only issue was the need to protect Collin from mother's physical limitations, whether those were due to illness or substance abuse or both." He explained his plan to exclude Mother from the home until she "determined the appropriate dosage of medications and which medications she can take while caring for Collin" was "certain to keep Collin safe and protected."

We disagree for a number of reasons. First, the record reflects at least some concern as to Mother's mental health, but regardless, the absence of such issues would not render the situation safe for Collin. Further, Father's failure to protect Collin from Mother was neither the "only issue," nor obviously remediable. Indeed, his stated plan for protecting Collin contemplated that Mother would care for Collin while taking prescription drugs, which is the exact situation that led to this dependency proceeding. If anything, *Kristin H.* supports the juvenile court's ruling here, given Father's continuing lack of insight into Mother's issues with substance abuse and his own.

Second, Father contends the juvenile court failed to consider reasonable alternatives to removal, including removing Mother from the home or allowing him to retain physical custody and present a plan for protecting Collin. (§ 361, subd. (c)(1)(A)-(B).) Father's argument relies on the assumption that he is a nonoffending parent (indeed, he acknowledges as much with respect to the plan presentation option).

However, the risk posed by Father did not arise solely from his failure to protect Collin,

but also from his own drug use and inability to limit contact between Collin and Mother. As a result, neither removing Mother, nor permitting him to present a plan for keeping Collin safe, were viable options. In any event, we may imply findings where the evidence is clear. (See *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1825; *In re Corienna G.* (1989) 213 Cal.App.3d 73, 83-84 [substantial evidence "amply" supported implied finding].) The court impliedly rejected alternatives to removal and there is substantial evidence to support this determination. Indeed, with respect to the prospect of removing Mother from the home, the court specifically found Father was codependent on Mother, suggesting it doubted Father would be capable of limiting contact with her.<sup>9</sup>

Third, Father contends the juvenile court "compound[ed] its error" by failing to state the facts upon which its findings regarding alternatives and reasonable efforts were based. However, the court did state the basis for its removal determination and Father cites no authority establishing that the court is required explicitly to address each alternative or effort. Regardless, any error here is harmless. Substantial evidence supports the court's findings and there is nothing to suggest that any additional findings, if made, would have been in favor of having Collin remain in Father's custody. (See *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1218 (*Jason L.*) ["[C]ases involving a court's obligation to make findings regarding a minor's change of custody or commitment have held the failure to do so will be deemed harmless where 'it is not reasonably probable

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<sup>9</sup> Father contends that by discussing services that might assist him, the juvenile court "essentially listed the 'reasonable means' " by which removal could be avoided. We disagree. The court never stated Collin would be kept safe by Father's mere participation in services and, as Father himself contends, the court must focus on current risk to Collin.

such finding, if made, would have been in favor of continued parental custody.' "].)

In support of his argument for removing Mother and permitting him to retain custody, Father relies on *In re Ashly F.* (2014) 225 Cal.App.4th 803 (*Ashly F.*). There, the juvenile court exercised jurisdiction over two children based on their mother's abuse and father's failure to protect, and ordered them removed from the parents' custody. (*Id.* at pp. 805-807.) The Court of Appeal reversed, noting the agency and juvenile court relied on conclusory findings and that removal of the mother was an available option, which the juvenile court failed to consider. (*Id.* at pp. 807-810.) *Ashly F.* is distinguishable. Here, neither the Agency, nor the juvenile court, relied on conclusory findings. More importantly, although removal of the mother may have been an option in *Ashly F.*, it was not a viable alternative in this case, for the reasons discussed *ante*.

Finally, Father contends that placement with him would have been in Collin's best interest, noting family preservation is the goal at this stage of a dependency proceeding. While Father is correct that family preservation is the goal at this stage of the proceedings, the juvenile court has "broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accord with this discretion." (*Christopher H.* (1996) 50 Cal.App.4th 1001, 1006.) Here, the juvenile court properly balanced Collin's best interests and family preservation; although it found removal was necessary under the circumstances, it also ordered reunification services.

We conclude there was no error in removal of Collin from Father's custody.

C. *ICWA Noncompliance Requires a Limited Remand*

Mother contends, and the Agency concedes, the juvenile court did not comply

with ICWA requirements.

Mother and Father each submitted form ICWA-20 (Parental Notification of Indian Status). In that form, Mother identified she had possible heritage with the Cherokee tribe and Viejas band, while Father indicated he might have Cherokee heritage. At the detention hearing, the juvenile court observed "ICWA may apply," noted the Cherokee and Viejas tribes were not intertwined, and asked Mother if she was a member of both tribes. Mother stated she went to the Viejas clinic and dentist and the court responded, "But do you think you are a member of the Viejas tribe?" The maternal uncle, who was present, responded "No" and explained they have Kumeyaay and Cherokee heritage. Mother changed her position, indicating she did not believe she was a member of the Viejas tribe. The court responded "You're probably not a member. The only tribe the Agency will be required to notice is the Cherokee."

Birdine assisted with preparation of the ICWA-30 (Notice of Child Custody Proceeding for Indian Child), which reflected Mother was claiming Cherokee and Seminole ancestry. The Agency sent the form to Cherokee tribes and the Seminole Nation. At the contested adjudication and disposition hearing, the court stated "ICWA notices have been sent out." The court subsequently held ICWA did not apply and notice was not required.<sup>10</sup>

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<sup>10</sup> The Agency requests we take judicial notice of the juvenile court minute order, dated November 17, 2015, encompassing this ruling. Mother does not oppose the request. We grant this request. (Cal. Rules of Court, rule 8.252(a); Evid. Code, § 452, subd. (d).) We note the order is relevant, was before the juvenile court, and pertains to ICWA compliance, rather than the merits of the dependency proceeding. (See *Alicia B.*

Mother contends the Agency did not adequately investigate Collin's possible Indian heritage, noting potential errors on the ICWA-30 and suggesting the Agency failed to contact the uncle. She also argues the Agency failed to provide notice to all relevant tribes, including the various Kumeyaay tribes. The Agency concedes it should have conducted an ICWA inquiry as to Kumeyaay heritage.

We find the juvenile court erred in determining ICWA did not apply. Where the court has reason to know an Indian child is involved, the Agency must notify the affected Indian tribes about the proceedings and of their right to intervene. (25 U.S.C. § 1912(a); see *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 994.) "The circumstances that may provide reason to know the child is an Indian child include the following: . . . [A] person having an interest in the child . . . informs or otherwise provides information suggesting that the child is an Indian child to the court. . . ." (Cal. Rules of Court, rule 5.481(a)(5)(A); § 224.3, subd. (b)(1); *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165 ["[T]he juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement."] ) The information provided by the maternal uncle was sufficient to trigger the Agency's obligation to investigate Kumeyaay heritage and provide notice as applicable.

### III

#### DISPOSITION

The judgment with respect to the jurisdictional and dispositional orders is affirmed. The finding that ICWA does not apply is conditionally reversed and the matter

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*v. Superior Court* (2004) 116 Cal.App.4th 856, 866-867.)

is remanded to the juvenile court with directions to order the Agency to comply with ICWA. After proper ICWA notice, if it is determined that Collin is an Indian child and ICWA applies to these proceedings, Collin, the parents, or any relevant tribe may petition the juvenile court to invalidate any orders that violated ICWA. If, after proper notice, the court finds Collin is not an Indian child, the finding that ICWA does not apply shall be reinstated.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.