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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

T.D.,

Defendant and Appellant.

E054500

(Super.Ct.No. SWJ010016)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Michael J. Rushton,
Judge. Reversed with directions.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel,
for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, T.D. (Father), appeals from juvenile court orders terminating parental rights to his son, B.D., and placing B.D. for adoption. (Welf. & Inst. Code, § 336.26.)¹ Father claims he was denied due process and statutory rights to counsel at initial, critical stages of the proceedings. He also claims plaintiff and respondent, Riverside County Department of Public Social Services (DPSS), failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act (25 U.S.C.A. § 1901 et seq.) (ICWA) and related California law (§ 224.3, subd. (c)).

We reject Father's due process and statutory right to counsel claims. Father was aware of the proceedings from their inception and was twice conditionally appointed counsel. Still, he failed to avail himself of his conditionally appointed counsel and did not appear in the proceedings, establish his presumed father status, and seek services and visitation until after the second of two 6-month reunification periods had expired. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 453 [man who fails to achieve presumed father status before expiration of reunification period not entitled to reunification services].) In sum, Father was not denied counsel at any stage of the proceedings. Instead, he failed to vindicate his parental rights in a timely manner.

Still, the record shows B.D. may have been an Indian child, and DPSS did not obtain paternal family history information from the paternal grandmother, including her

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

date and place of birth, even though she was ostensibly available to DPSS throughout the inception of the proceedings, including at the inception of the proceedings when Father claimed B.D. may have Indian ancestry. (§ 224.3, subd. (c) [when child may be Indian child, social worker is to inquire of extended relatives to obtain family history information described in § 224.2, subd. (a)].) Accordingly, we conditionally reverse the orders terminating parental rights and placing B.D. for adoption and remand the matter with directions to the juvenile court to ensure that DPSS complies with the inquiry and notice requirements of the ICWA and related California law. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 704-705, 711.)

II. FACTUAL AND PROCEDURAL BACKGROUND

Here we describe the facts and procedural history of these proceedings beginning on May 4, 2010, when B.D. was taken into protective custody at the age of 14 months. Additional facts concerning DPSS's inquiries and notices given under the ICWA are described below in our discussion and analysis of Father's ICWA claim.

On May 4, 2010, the police responded to a report of a physical altercation between Father, then age 37, and his stepfather at the stepfather's home in Winchester. B.D., then age 14 months, and his mother, then age 17 (Mother), lived in the home with Father, the stepfather, and Father's mother, B.D.'s paternal grandmother. The stepfather and Father had been drinking since the night before, and Mother called the police to report that stepfather had threatened to kill Father. The police found multiple safety hazards in the parents' bedroom which were open and accessible to B.D. These included broken pipes

used for smoking methamphetamine, a broken bong, a marijuana scale, two hunting knives, razor blades, and a blow torch.

The police arrested Father for having unlawful sex with Mother, a minor, and contacted DPSS. Father and Mother were very cooperative with the social worker, who spoke with them before Father was taken into police custody. Father admitted using alcohol and marijuana but claimed he was “‘kicking’ meth,” and had last used methamphetamine seven days earlier. Mother admitted smoking methamphetamine the previous night, but claimed she used drugs only occasionally and had never used drugs in the presence of B.D.

Father was “very worried” about B.D. and “begged” the social worker not to take B.D. away from Mother. Father said he was willing to “do anything” to get B.D. back. Father told the social worker he had Native American heritage and his father was registered Cherokee. The social worker notified Father of the detention hearing and gave him her business card and a court information sheet.

Mother and B.D. were taken to DPSS offices. Mother spoke tearfully about her life as a dependent child. Father was not listed as the father of B.D. on B.D.’s birth certificate, but Mother said he was the father of B.D. and there were no other possible fathers. She began having consensual sex with Father when she was age 15. B.D. was taken to the home of his maternal great aunt and uncle, where Mother also went to live.

On May 6, DPSS filed a petition alleging that the parents placed B.D. at risk of harm because both abused controlled substances, including methamphetamine, and drug

paraphernalia was found within reach of B.D. (§ 300, subd. (b).) The petition also alleged that B.D. was at risk of physical and emotional harm based on Father's physical altercation in his presence and Father's criminal history, including his May 4 arrest for having unlawful sex with Mother. (*Ibid.*) Lastly, the petition alleged that Father was incarcerated, his release date was unknown, and he was unable to provide B.D. with care and support. (§ 300, subd. (g).)

At the May 7 detention hearing, the court conditionally appointed Attorney Casey to represent Father, who was not present, though he had been released from custody on May 6. The court found Father was an alleged father, given that he was not in court despite having notice of the hearing and was not named as the father on B.D.'s birth certificate. The court ordered B.D. detained out of the parents' custody and placed in the care of the maternal great aunt and uncle, along with Mother. The maternal great aunt and uncle were to supervise Mother's access to B.D. The court said it might consider returning B.D. to Mother under a family maintenance plan, but noted Mother needed "significant counseling and therapy" to address "years of exploitation." Father was granted supervised, weekly visitation, and Mother was not to be present during the visits.

By early June 2010, Father had not returned any of the social worker's telephone calls, attempted to visit B.D., or participated in any services. The paternal grandmother said Father was out of town working, and she did not have a telephone number for him. On June 7, DPSS mailed Father a certified letter asking him to contact DPSS to arrange visitation and services, but received no response. Mother was participating in services.

Father was not present at the jurisdictional/dispositional hearing on June 15. Attorney Casey told the court that Father was in the courthouse earlier that day. At that time, Attorney Casey gave Father a copy of the jurisdictional/dispositional report and told Father he would come back and talk to him, but Father apparently left the courthouse before Attorney Casey could talk to him. The court granted Attorney Casey's request to be relieved of his conditional appointment as Father's counsel, noting that Father knew about the hearing but decided not to participate.

The court sustained the substance abuse, drug paraphernalia, and criminal history allegations of the petition, but the allegations concerning Father's physical altercation and inability to provide B.D. with care and support were stricken. B.D. was placed with Mother under a family maintenance plan, upon the condition that Mother and B.D. continued living with the maternal great aunt and uncle and Mother complied with her case plan.

Father was not awarded services because he was still an alleged father and had not come forward and established his presumed father status. (§ 361.5, subd. (a).) Mother's counsel asked the court to discontinue Father's visitation because, as an alleged father, he was not entitled to visitation. The court terminated Father's visitation until Father "assert[ed] his position in the case." A review hearing (§ 364) was scheduled for December 15.

On July 9, a criminal bench warrant was issued against Father. The warrant was recalled on July 22, and Father was released on bail a few days later. Father was charged with the statutory rape of Mother and child endangerment.

On August 9, the maternal great aunt kicked Mother out of her home for violating house rules. Mother was leaving the home with B.D. for hours at a time without telling the maternal great aunt and uncle where she could be reached. Mother entered a residential drug treatment program on August 12, but left the program on August 20. Mother was in contact with Father prior to enrolling in the program, and told the social worker that she and Father wanted to get married. A paternal aunt confirmed that Father was living with the paternal grandmother in Winchester, and gave the social worker Father's address.

On August 25, DPSS filed a supplemental petition (§ 387) requesting the removal of B.D. from Mother's care. The petition alleged that Mother allowed Father unauthorized access to B.D., failed to remain in the maternal great aunt's home, and failed to drug test on at least one occasion. At an August 26 detention hearing, Attorney Vinson appeared on behalf of Attorney Casey, and accepted Attorney Casey's conditional appointment as Father's counsel. B.D. was detained out of Mother's custody, in the care of his maternal great aunt.

At the September 27 jurisdictional/dispositional hearing on the supplemental petition, Attorney Casey again asked to be relieved as Father's counsel. Attorney Casey had sent a letter to Father, but had not heard back from him. The court relieved Attorney

Casey, noting that Father was “great at staying in contact with [Mother], but he can’t figure out how to come to court.” The court sustained the allegations of an amended supplemental petition, and ordered reunification services for Mother. No services were ordered for Father because he was still an alleged father. A six-month review hearing was scheduled for March 28, 2011.

On October 13, 2010, another criminal bench warrant was issued against Father based on his failure to appear in criminal court. The warrant was recalled five days later, Father was again released on bail, and Father attended all subsequent criminal court hearings. Pursuant to a plea agreement, Father was incarcerated for 365 days beginning on February 16, 2011. He was to be sentenced to probation in February 2012 and released no earlier than February 3, 2012.

At the six-month review hearing on March 28, 2011, Father appeared in juvenile court for the first time, in custody. Attorney Casey appeared for Father, and told the court that Father had filed paperwork referencing his Indian background. Father claimed, and Mother confirmed, that Father had lived with B.D. and Mother from the time of B.D.’s birth in February 2009 until May 4, 2010. Accordingly, the court designated Father a presumed father, and appointed Attorney Casey to represent Father. When asked why he had not previously appeared in the proceedings, Father claimed he had not been timely notified. When asked why he never contacted DPSS about B.D., Father said he did not know.

Because Father was now a presumed father and completed Judicial Council form ICWA-020 (Parental Notification of Indian Status), indicating he may have Indian ancestry, the court agreed with Attorney Casey that it was premature for the court to find that the ICWA did not apply. The court ordered DPSS to give further notice under the ICWA and continued the review hearing to April 28, 2011.

At the further review hearing on April 28, 2011, DPSS recommended terminating Mother's services and setting a section 366.26 hearing. DPSS argued that Father was not entitled to reunification services because he was serving a one-year jail sentence and would be unable to complete an appropriate case plan within the six-month reunification period. (§ 361.5, subd. (e)(1).) Attorney Casey claimed Father was entitled to six months of services from and after April 28, the date of the hearing. Father submitted several letters from longtime friends and relatives, including his stepfather, attesting to his good character. The court found that the ICWA did not apply.

The court denied Father's request for reunification services on the grounds (1) he would be incarcerated until February 2012, beyond the six-month reunification period, *even if* the reunification period commenced on April 28, 2011, and (2) reunification services for Father would not serve B.D.'s best interests. The court found that the ICWA did not apply, terminated Mother's services, and set a section 366.26 hearing. The court denied Father's request for visitation, finding it would not be in B.D.'s best interests to visit Father while Father was incarcerated.

In June 2011, Mother gave birth to a second child, a boy, who was promptly taken into protective custody and placed with the maternal great aunt and uncle, along with B.D.

Father was present at the section 366.26 hearing on August 29, 2011, in custody. The court found that none of the exceptions to the adoption preference applied, terminated parental rights, and placed B.D. for adoption. B.D.'s maternal great aunt and uncle were committed to adopting him, and B.D.'s counsel agreed with DPSS's recommendation to terminate parental rights and free B.D. for adoption. The court denied Father's request to place B.D. in a legal guardianship and not terminate parental rights.

III. DISCUSSION

A. *Father Was Not Denied His Due Process Right to Counsel*

Father claims the juvenile court deprived him of his due process right to counsel by leaving him unrepresented at early, critical stages of the proceedings, namely, the June 15 and September 27, 2010, jurisdictional/dispositional hearings on the original and supplemental petitions. We disagree. As we explain, Father was not deprived of his due process right to counsel at any stage of the proceedings.²

² DPSS argues that Father's challenges to the June 15, 2010 and September 27, 2010 dispositional orders are jurisdictionally barred by section 395, because Father did not timely appeal from those orders. Under section 395, a dispositional order is final and binding after the time for appeal from the order has passed, and may not be challenged on an appeal from a subsequent order. (*In re S.B.* (2009) 46 Cal.4th 529, 531-532.) The jurisdictional bar of section 395 is not enforced, however, if "due process forbids it" or when the error complained of "fundamentally undermined the statutory [dependency]

[footnote continued on next page]

An indigent parent does not have a general due process right to the assistance of court-appointed counsel at all stages of a state-initiated juvenile dependency proceeding, under the federal or state Constitution. (*Lassiter v. Department of Soc. Serv. of Durham Cty.* (1981) 452 U.S. 18, 31-32; *In re Sade C.* (1996) 13 Cal.4th 952, 986-987.) The appointment of counsel is a constitutional imperative only when fundamental fairness requires it. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1153, fn. 6.) In order to establish a deprivation of his or her due process right to counsel, the parent must show that the absence of counsel made a determinative difference in the outcome, and rendered the proceedings fundamentally unfair. (*In re Ronald R.* (1995) 37 Cal.App.4th 1186, 1196-1197.)

The record unequivocally shows that Father was not deprived of his due process right to counsel at any stage of the proceedings. Attorney Casey was conditionally appointed to represent Father at the May 7, 2010, detention hearing on the original petition. Father did not appear at the May 7 hearing even though he had notice of the hearing and was out of custody. Then, shortly before the June 15, 2010, jurisdictional/dispositional hearing, Father was in the courthouse and briefly spoke to Attorney Casey, who gave Father a copy of the report and told Father he would get back to him. Father then left the courthouse before the hearing, and without telling Attorney

[footnote continued from previous page]

scheme so that [the parent] was kept from availing herself [or himself] of its protections [afforded by the scheme] as a whole.” (*In re Janee J.* (1999) 74 Cal.App.4th 198, 209.) Thus we address Father’s deprivation of counsel claims.

Casey that he wished to establish his presumed father status and obtain reunification services and visitation. The court thus properly relieved Attorney Casey of his conditional appointment at the June 15 hearing. At the August 26, 2010, detention hearing on the supplemental petition, Attorney Casey was again conditionally appointed to represent Father and sent Father a letter. By the time of the September 27, 2010, jurisdictional/dispositional hearing, Attorney Casey had not heard back from Father and was accordingly relieved of his second conditional appointment.

In February 2011, Father began serving a 365-day jail term for having unlawful sex with a minor, Mother, and child endangerment, the charges for which he was arrested on May 4, 2010, when B.D. was taken into protective custody. Despite his knowledge of the proceedings from their inception and having the social worker's telephone number, Father first appeared in the proceedings at the March 28, 2011, six-month review hearing on the supplemental petition, in custody. At that point, Father finally established his presumed father status and sought reunification services and visitation. When asked why he had not contacted DPSS to arrange services or visitation earlier during the proceedings, Father said he did not know. But in July and October 2010, bench warrants were issued against Father based on his failure to appear in criminal court. As the juvenile court pointed out, Father had apparently been "on the [lam]" or hiding from law enforcement following his May 4, 2010, arrest. Father does not claim he was not properly notified of the proceedings from their inception.

It was incumbent upon Father to avail himself of the services of his conditionally appointed counsel, establish his presumed father status, and seek reunification services and visitation *before* the expiration of the six-month reunification periods following the June 15 and September 27 dispositional hearings. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 453.) He did not do so. The juvenile court had no obligation to *appoint* counsel for Father—much less direct counsel to establish Father’s presumed father status or order services and visitation for Father—without Father’s participation or consent.

Nevertheless, Father claims that “uncontradicted” evidence—namely, the evidence he lived with B.D. since the child’s birth and held the child out as his own—showed he was B.D.’s presumed father. (Fam. Code, § 7611, subd. (d); *In re Jerry P.* (2002) 95 Cal.App.4th 793, 801-802, fn. omitted [for purposes of dependency proceedings, presumed father is one who “promptly comes forward and demonstrates a full commitment to his paternal responsibilities—emotional, financial, and otherwise[.]”].) Accordingly, Father argues that had counsel been appointed to represent him at the June 15 dispositional hearing, his counsel would have “first and foremost” established his presumed father status. And, had that happened, Father argues that the court would have been required to award him reunification services because none of the bypass provisions applied (§ 361.5), and would not have terminated its May 7 visitation order. Father also claims that, as B.D.’s presumed father, he was “entitled” to reunification services at the September 27 dispositional hearing because B.D. was placed out of Mother’s custody (§ 361.5), and competent counsel would have so advised the court.

All of these arguments are unavailing simply because Father did not come forward and timely establish presumed father status. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 453.) Father did not appear in the proceedings and establish his presumed father status until March 28, 2011, just after the second six-month reunification period following the September 27, 2010, dispositional order had expired, even though he had notice of the proceedings from their inception. Contrary to Father's claim, he was not entitled to the benefits of presumed father status at any earlier point during the proceedings, absent his participation or consent.

In sum, Father has not shown he was deprived of his due process right to counsel at any point during the proceedings. The juvenile court *never* refused to appoint counsel for Father. Thus, Father cannot show that the absence of appointed counsel at any point made a determinative difference in the outcome, or rendered the proceedings fundamentally unfair. (*In re Ronald R.*, *supra*, 37 Cal.App.4th at pp. 1196-1197.)

Lastly, we note that Father's reliance on *Katheryn S. v. Superior Court* (2000) 82 Cal.App.4th 958 (*Katheryn S.*) is entirely misplaced. There, the juvenile court appointed counsel for the mother and placed the child with the mother under agency supervision, after finding the mother failed to protect the child from being sexually abused. (*Id.* at p. 964.) The mother then absconded with the child, and the court relieved the mother's appointed counsel based on her failure to participate in the proceedings. (*Id.* at pp. 964-965.) In the mother's absence and without her being represented by counsel, the court sustained a supplemental petition, removed the child from the mother's care, ordered

reunification services for the mother, and terminated the services. (*Id.* at p. 965.)

Thereafter, the mother was arrested for child abduction in Washington, and the child was returned to California. (*Ibid.*) The court held a section 366.26 hearing, found that adoption was in the best interests of the child and terminated parental rights, also without the mother being present or represented by counsel. (*Katheryn S., supra*, at pp. 965-968.) The juvenile court made these “crucial findings” despite the requests or “pleadings” of the social worker and the minor’s counsel to continue the hearing on the grounds the child had only recently been separated from her mother and wanted her relationship with the mother to continue. (*Id.* at pp. 966-969.)

The mother later returned to California and was appointed counsel in her criminal matter. (*Katheryn S., supra*, 82 Cal.App.4th at pp. 967-968.) Her counsel then filed an untimely statutory writ petition, which the appellate court treated as a petition sounding in habeas corpus. (*Id.* at pp. 968-969.)

The *Katheryn S.* court concluded that the juvenile court violated the mother’s statutory and due process rights to counsel by relieving her appointed counsel while she was still in hiding with her daughter, and by failing to ensure that the mother had an opportunity to attend or “validly waive her appearance” at the hearings at which the juvenile court terminated her services and parental rights. (*Katheryn S., supra*, 82 Cal.App.4th at pp. 971-972.) In concluding that the mother’s statutory right to counsel was violated, the court emphasized there was no indication that the mother had abandoned her child. (*Id.* at pp. 970-971; cf. *Janet O. v. Superior Court* (1996) 42

Cal.App.4th 1058, 1064-1067 (*Janet O.*) [indigent parent’s appointed counsel may be relieved following notice to the parent and based on good cause, and good cause appears if the parent has apparently “lost all interest in not only the dependency proceedings, but in their children as well.”]; § 317, subd. (d).]

In concluding the juvenile court also violated the mother’s due process right to counsel, the *Katheryn S.* court emphasized that, given the circumstances of the case, it was clear that the absence of counsel for the mother was likely to lead to erroneous decisions at the section 366.26 hearing. (*Katheryn S.*, *supra*, 82 Cal.App.4th at pp. 971-972.) Indeed, there was no evidence to support the juvenile court’s findings that the child was adoptable, would not suffer detriment if parental rights were terminated, and that none of the statutory exceptions to adoption applied. (*Id.* at p. 972.) It was also clear that the mother had not abandoned her child (cf. *Janet O.*, *supra*, 42 Cal.App.4th at pp. 1064-1067) but had instead absconded with her child based on her fear that the state would take her child away. Additionally, the mother’s whereabouts were known at the time of the section 366.26 hearing. (*Katheryn S.*, *supra*, at pp. 972-973.)

Father’s circumstances are not remotely similar to the mother’s circumstances in *Katheryn S.* From the inception of the proceedings and continuing through the time Father finally appeared in court and established his presumed father status, Father indicated he was not interested in the proceedings or in B.D. Despite having notice of the proceedings, he elected not to participate and not to avail himself of his conditionally appointed counsel—both when the original and the supplemental petitions were filed.

The court did not violate Father’s due process right to counsel by failing to appoint him counsel before Father established his presumed father status.

B. Father Was Not Denied His Statutory Right to Counsel

Father also claims the juvenile court violated his statutory right to counsel by relieving Attorney Casey of his two *conditional appointments* without advance notice to Father. (§ 317, subd. (d).) We find no statutory violation.

Section 317 affords an indigent parent a statutory right to counsel in dependency proceedings when the child may be placed out of the parent’s custody. (§ 317, subd. (b); *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1659.) The court is not required to appoint counsel unless the parent “desires” counsel, however. (§ 317, subd. (a); see *Janet O.*, *supra*, 42 Cal.App.4th at p. 1064.) The purpose of section 317 is “to provide an attorney for a parent who “desires counsel but is presently financially unable to afford and cannot for that reason employ counsel” (§ 317, subd. (a)) and the attorney, once appointed, is to represent the parent at “the detention hearing and at all subsequent proceedings before the juvenile court . . . unless relieved by the court upon the substitution of other counsel or for cause.” (§ 317, subd. (d).)” (*In re Ronald R.*, *supra*, 37 Cal.App.4th at p. 1193.)

A court may not summarily relieve a parent’s court-appointed counsel merely because the parent has not been in contact with the appointed counsel, and it appears the parent no longer desires representation. (*Janet O.*, *supra*, 42 Cal.App.4th at pp. 1065-1066.) Instead, before appointed counsel may be relieved under section 317, subdivision

(d), the court should give the absent parent notice and an opportunity to state whether he or she desires continued representation. (*Janet O.*, *supra*, at p. 1066.)

Father argues that the juvenile court erroneously relieved Attorney Casey of his conditional appointments at the June 15 and September 27, 2010, dispositional hearings without giving Father advance notice and an opportunity to state whether he desired to be represented in the proceedings. (§ 317, subd. (d); *Janet O.*, *supra*, 42 Cal.App.4th at p. 1066.) We disagree.

At the May 7 and August 26, detention hearings on the original and supplemental petitions, Attorney Casey was conditionally appointed to represent Father—the condition being Father desired representation. (§ 317, subd. (a).) Father had notice of the proceedings from their May 4, 2010, inception, and spoke with Attorney Casey in the courthouse shortly before the June 15 dispositional hearing on the original petition. Father then left the courthouse without appearing at the June 15 hearing and without telling Attorney Casey that he desired representation. Then, following Attorney Casey's second conditional appointment on August 26, Attorney Casey sent Father a letter to which Father never responded. And by the time of the September 27 dispositional hearing on the supplemental petition, Father had still not communicated with Attorney Casey or told him he desired representation.

Accordingly, when the juvenile court relieved Attorney Casey of his two conditional appointments on June 15 and September 27, it had no reason to believe that Father desired representation and every reason to believe he did not wish to participate in

the proceedings. Furthermore, Father cites no authority to support his claim that the court was required to give him advance notice before it relieved Attorney Casey of his *conditional* appointments on June 15 and September 27. (Cf. *Janet O.*, *supra*, 42 Cal.App.4th at pp. 1065-1066.) The cases Father relies on, including *In re Ronald R.*, *supra*, 37 Cal.App.4th 1186, *Janet O.*, *supra*, 42 Cal.App.4th 1058, and *Katheryn S.*, *supra*, 82 Cal.App.4th 958, each involved previously appointed counsel. Here, Attorney Casey was not relieved of his March 28, 2011, appointment to represent Father.

C. *Inadequate Inquiries Were Made Under the ICWA*

Father claims the juvenile court erroneously found that the ICWA did not apply to the proceedings. He points out that two tribes, the Cherokee Nation and the Sac and Fox Nation of Missouri in Kansas and Nebraska requested additional family history information in order to determine whether B.D. was eligible for membership. He claims that DPSS made inadequate inquiries of the paternal grandmother, Cindy Williamson, and a paternal aunt, concerning B.D.'s paternal family history, and had such inquiries been made either or both tribes may have determined that B.D. was an Indian child. (§ 224.2, subd. (a)(5)(C).) We agree.

1. Applicable Legal Principles

The ICWA was enacted “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families” (25 U.S.C.A. § 1902.) “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

...” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) To this end, section 1911 of the ICWA allows a tribe to intervene in state court dependency proceedings. (25 U.S.C.A. § 1911(c).)

Notice of the proceedings is required to be sent whenever it is known or there is reason to know that an Indian child is involved. (25 U.S.C.A. § 1912(a); Welf. & Inst. Code, § 224.2, subd. (a); see *In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 469.) Notice serves a twofold purpose: “(1) it enables the tribe to investigate and determine whether the minor is an Indian child; and (2) it advises the tribe of the pending proceedings and its right to intervene or assume tribal jurisdiction.” (*In re Desiree F.*, *supra*, at p. 470.)

If the tribe is unknown, notice must be given to the Bureau of Indian Affairs. (25 U.S.C.A. § 1912(a); *In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 469; *In re Daniel M.* (2003) 110 Cal.App.4th 703, 707.) No foster care placement or termination of parental rights proceeding may be held until at least 10 days after the tribe, or the Bureau of Indian Affairs where the tribe is unknown, receives notice. (25 U.S.C.A. § 1912(a); *In re A.B.* (2008) 164 Cal.App.4th 832, 838.)

In addition to the child’s name and date and place of birth, if known, the notice is required to include the name of the Indian tribe in which the child is a member or may be eligible for membership, if known. (§ 224.2, subd. (a)(5)(B).) The notice is also required to contain “[a]ll names known of the Indian child’s biological parents, grandparents, and great-grandparents . . . as well as their current and former addresses, birthdates, places of

birth and death, tribal enrollment numbers, and any other identifying information, if known.” (§ 224.2, subd. (a)(5)(C).)

Juvenile courts and child protective agencies have “an affirmative and continuing duty” to inquire whether a dependent child is or may be an Indian child. (*In re H.B.* (2008) 161 Cal.App.4th 115, 121; § 224.3; Cal. Rules of Court, rule 5.481.) As soon as practicable, the social worker is required to interview the child’s parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child’s membership status or eligibility. (§ 224.3, subd. (c); *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539; Cal. Rules of Court, rule 5.481(a)(4).)

2. Relevant Background

When B.D. was taken into protective custody on May 4, 2010, Father told the social worker that his father, the paternal grandfather, was a registered Cherokee Indian. Father also claimed Blackfeet and Sac and Fox Indian heritage. On May 5, the social worker spoke with the paternal grandmother, Cindy Williamson, who said she had Sac and Fox heritage on her great, great, grandmother’s side and that Father has Cherokee heritage on his father’s side. Ms. Williamson denied that “anyone was a registered member of any tribe.”

At the May 7 detention hearing, the court ordered DPSS to provide notice of the proceedings to the relevant Indian tribes.

In June 2010, DPSS gave notice of the June 15 jurisdictional/dispositional hearing to several tribes, including the Cherokee, Blackfeet, and two Sac and Fox tribes. The notices, printed on the ICWA-030 form (Notice of Child Custody Proceeding for Indian Child), contained the names of B.D.'s paternal grandparents, but not their dates or places of birth, their tribal membership or enrollment numbers or any other information. (§ 224.2, subd. (a)(5)(C).) The notices listed "Cherokee" as the paternal grandfather's tribe, and "Sac & Fox" as the paternal grandmother's tribe. The notices did not indicate that the paternal grandfather was a "registered Cherokee," as Father had represented. Nor did the notices include any information concerning B.D.'s four paternal great grandparents.

The Sac & Fox Tribe of the Mississippi in Iowa, the Sac and Fox Nation of Missouri in Kansas and Nebraska, and the Blackfeet Tribe of Browning, Montana, all responded that B.D. was ineligible for membership. The United Keetoowah Band of Cherokee Indians in Oklahoma responded that there was no evidence that B.D. was descended from anyone on the Keetoowah Roll, and the tribe would not intervene in the case.

By contrast, the Cherokee Nation of Tahlequah, Oklahoma requested additional family history information, including the paternal grandmother Cindy Williamson's full name, including her maiden name, and her date of birth. This Cherokee Nation's letter stated it was "impossible to validate or invalidate [whether B.D. was eligible for tribal membership] without more complete family information."

On March 11, 2011, DPSS gave notice of the March 28 six-month review hearing to the two Sac and Fox tribes and the Cherokee Nation. This further notice did not provide any family history information; it merely provided notice of the review hearing. In response to this notice, the Sac and Fox Nation of Missouri in Kansas and Nebraska sent a letter indicating that, in the event additional family lineage information were provided, further research could be done to rule out B.D.'s eligibility.

When Father first appeared in the proceedings on March 28, 2011, he submitted ICWA-020 form (Parental Notification of Indian Status), claiming he had Indian ancestry. The form indicated that Father had Cherokee, Blackfeet, and Sac and Fox Indian ancestry, as Father had previously disclosed, but did not include any specific family history information.

After the court designated Father a presumed father on March 28, it ordered DPSS to give further notice of the proceedings under the ICWA and continued the hearing to April 28. The record does not indicate that any further ICWA notices were given, however. Nor does the record indicate whether the social worker or DPSS attempted to obtain any additional family history information from, among others, the paternal grandmother, Cindy Williamson.³

The record indicates that Ms. Williamson was available to DPSS throughout the proceedings. A social worker spoke with Ms. Williamson on May 4 and June 1, and she

³ At the August 26, 2010, detention hearing on the supplemental petition, county counsel told the court that the Cherokee Nation had requested more information, but DPSS had not received any new information as of August 26.

appeared in court on April 28 and August 29, 2011. On April 28, 2011, the court adopted DPSS's recommended finding that the ICWA did not apply without expressly addressing the ICWA inquiry or notice issues.

3. DPSS Did Not Make Adequate Inquiries Concerning B.D.'s Indian Ancestry

Father claims the juvenile court erroneously found that the ICWA did not apply. He specifically argues that DPSS failed to adequately inquire of the paternal grandmother and the paternal aunt concerning B.D.'s paternal family history information under the ICWA and related California law. We agree.

As Father argues, the record shows that DPSS did not make adequate inquiries of the paternal grandmother, Ms. Williamson, concerning either the paternal grandmother's or the paternal grandfather's family histories. (§ 224.3, subd (c).) At the very least, it appears that DPSS could have obtained Ms. Williamson's date and place of birth had it simply asked her for this information. It appears that DPSS did not do so, however, because the notices to the tribes did not include Ms. Williamson's date and place of birth even though Ms. Williamson was available to DPSS from the inception of the proceedings.

Indeed, it appears that DPSS failed to ask Ms. Williamson, the paternal aunt, or any other available paternal relatives to provide any of the information required to be included in the ICWA notices under section 224.2, subdivision (a)(5)(C). In addition to Ms. Williamson's date and place of birth, the information that may have been but was not obtained included the paternal grandfather's date and place of birth and the paternal

grandparents' current and former addresses. Further, no identifying information concerning B.D.'s four paternal great grandparents was obtained, even after the Cherokee Nation (the paternal grandfather's potential tribe) and one of the two Sac and Fox Nations (one of the paternal grandmother's potential tribes), indicated that additional family history information might help them determine whether B.D. was eligible for enrollment.

Accordingly, on this record DPSS failed to make adequate inquires to obtain B.D.'s paternal family history information described in section 224.2, subdivision (a)(5)(C). The notices to the tribes were therefore inadequate. "Notice is meaningless if no information *or insufficient information* is presented to the tribe." (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1116, italics added, fn. omitted.)

This is not a case in which Father has failed to make any showing that he and B.D. have Indian ancestry. (Cf. *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430 [Fourth Dist., Div. Two] [no reversal required when father claimed agency failed to "ensure" he was asked whether he had any Indian ancestry, when father failed to make any showing on appeal that he had (or may have had) Indian ancestry]; *In re N.E.* (2008) 160 Cal.App.4th 766, 770 [same].) Nor may we presume that DPSS discharged its duty of inquiry (Evid. Code, § 664 [presumption of duty regularly performed]), because the record shows it did not. The responsibility for compliance with the ICWA falls "squarely and affirmatively" on the court and DPSS. (*Justin L. v. Superior Court* (2008) 165 Cal.App.4th 1406, 1410; Welf. & Inst. Code, § 224.3, subd. (a).) Thus here, limited

reversal is required as set forth below. (*In re Francisco W.*, *supra*, 139 Cal.App.4th at pp. 704-705, 711.)

IV. DISPOSITION

The August 29, 2011, orders terminating parental rights and placing B.D. for adoption are conditionally reversed and a limited remand is ordered as follows. Upon remand, the court shall direct DPSS to make further inquiries regarding B.D.'s Indian ancestry pursuant to section 224.3 and send new ICWA notices in accordance with the ICWA and California law. DPSS shall thereafter file certified mail return receipts for the ICWA notice, together with any responses received. If no responses are received, DPSS shall so inform the court. The court shall determine whether the ICWA notices and the duty of inquiry requirements have been satisfied and whether B.D. is an Indian child. If the court finds B.D. is not an Indian child, it shall reinstate the orders terminating parental rights and placing B.D. for adoption. If the court finds B.D. is an Indian child, it shall conduct all further proceedings in compliance with the ICWA and related law.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.