

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re J.G., a Person Coming Under the  
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

E.G.,

Defendant and Appellant.

E054976

(Super.Ct.No. INJ020347)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Lawrence P. Best,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel,  
for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant E.G. (Mother) is the mother of J.G., the subject of this juvenile dependency case. After the juvenile court terminated reunification services for Mother, Mother filed a request to change court order, or “section 388 petition,” pursuant to Welfare and Institutions Code section 388.<sup>1</sup> After a hearing, the court denied the petition. Thereafter, at a hearing held pursuant to section 366.26, the court found that J.G. was adoptable and terminated Mother’s parental rights.

On appeal, Mother contends the court erred in denying her section 388 petition and that plaintiff Riverside County Department of Public Social Services (DPSS) failed to comply with its duty of inquiry under the Indian Child Welfare Act (25 U.S.C.A. § 1901 et seq.) (ICWA) and related California law.

We reject these arguments and affirm the court’s orders.

## II. FACTUAL AND PROCEDURAL SUMMARY

In this section, we summarize the facts and procedural history of this dependency proceeding. The salient facts concerning Mother’s ICWA claim are separately set forth below in our discussion and analysis of that claim.

### A. 2008 Detention, Jurisdiction, and Disposition

On November 12, 2008, when J.G. was one week old, DPSS filed a juvenile dependency petition under section 300, subdivisions (b) (failure to protect) and (g)

---

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

(abandonment). The petition alleged that Mother suffers from a mental illness, evidenced in part by a diagnosis of bipolar disorder and her history of suicidal ideations and attempts. This condition allegedly limits Mother's ability to care for J.G. and endangers his safety and well-being. DPSS further alleged that Mother: abused controlled substances, including methamphetamine and marijuana, during pregnancy; has had a "prior arrest for drug related crimes"; failed to benefit from substance abuse treatment services; and does not have necessary provisions for the care of a newborn child. In addition, DPSS alleged that relatives in Mother's home abused substances, have criminal histories for drug-related crimes, and suffer from mental illness. Finally, DPSS alleged that the whereabouts of J.G.'s father (Father) were unknown and Father has failed to provide support for J.G.

In a detention report, a social worker reported that Mother was diagnosed with bipolar disorder in 2003 and has not taken medication or been reassessed for this condition in four years. Mother's behavior at the hospital and at home indicated she may still have mental health problems. She also "has unaddressed substance abuse issues that have been ongoing for the past five years," and has "demonstrated little to no conceptual or practical knowledge concerning the care of an infant."

Mother was living with her parents (J.G.'s maternal grandparents). The social worker was concerned that the maternal grandmother and a maternal uncle living in the home "have either active charges or convictions on drug charges." In addition, the

maternal grandfather has a reported bipolar disorder for which he is not receiving services.

Following a contested detention hearing, the court ordered J.G. removed from Mother's home. He was placed in foster care.

In DPSS's jurisdictional/dispositional report, the social worker described the following reasons for DPSS intervention. "[Mother] has a long history of substance abuse and admits to having prior arrests for controlled substances. She also admits to having a history of unresolved mental health issues. [Mother] has been 5150'd<sup>[2]</sup> on two separate occasions and has failed to follow up with her mental health treatment. [Mother] admits using Methamphetamine and marijuana as recent as six months ago, during her pregnancy. [Mother] has failed to complete a previously offered substance abuse program after being released. [Mother] also did not bond with her son while in the hospital and required hospital staff to assist her throughout her stay. [Mother] has cancelled or refused visits on two occasions claiming that she does not have time to see her child."

At the jurisdictional/dispositional hearing in January 2009, the court found true the allegations in the dependency petition and declared J.G. a dependent of the court. DPSS was ordered to provide reunification services to Mother, and Mother was ordered to

---

<sup>2</sup> Section 5150 provides for the temporary detention of a person when there is probable cause to believe the "person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled."

participate in such services. No services were provided to Father because his whereabouts were unknown.<sup>3</sup>

*B. Six-month Review Period*

In the six-month status review report filed in April 2009, the social worker reported that Mother was arrested in January 2009 for being under the influence, and paid a fine of \$150. She was living with her parents, who provide her with support and are willing to assist her if J.G. is returned to her care. Mother receives food stamps and works about seven hours per week cleaning at an auto company.

J.G., now seven months old, was developmentally on track and appeared to have bonded with his caregiver.

Following a mental health assessment, Mother was diagnosed with bipolar disorder, methamphetamine dependency, and mixed personality disorder. She was placed on medication for anxiety and depression. Mother said the medication has helped her. The social worker noted that Mother appears to have benefitted from the medication because she is making active efforts to bond with J.G. During visits, she hugged and held J.G., fed and changed him, and engaged him. However, she was still unable to make eye contact with J.G. and appears “stiff” around him.

---

<sup>3</sup> In February 2009, DPSS offered services to Father following his release from incarceration. He participated in substance abuse, anger management, parenting, and drug and alcohol programs, as well as Narcotics Anonymous meetings and individual counseling sessions. Eventually, services to Father were terminated. Because he is not a party to this appeal, we will limit our discussion of facts pertaining to Father.

Mother consistently attended and participated in her substance abuse treatment program and did not fail any drug test during the review period. According to her therapist, Mother attended six therapy sessions and had made significant progress.

The social worker concluded there is still a substantial risk of detriment to J.G. if returned to Mother's care. Although Mother was compliant with her case plan, J.G. could not be returned to her because she lives in the home of her parents, who have extensive criminal histories. In addition, Mother would require the assistance of the maternal grandparents to provide adequate care for J.G. due to Mother's mental health issues.

At the six-month hearing, the court found that the extent of the progress in alleviating and mitigating the causes that necessitated placement was "minimal." Mother "failed to make substantive progress in and/or complete the court ordered case plan." Nevertheless, the court further found that there was a substantial probability J.G. could be returned to the parents within six months and ordered services to continue.

### *C. 12-month Review Period*

In August 2009, J.G.'s caregiver informed a social worker that she has bonded with the child, wanted to adopt him, and intended "to file as a de facto parent to have the child remain in her care."

In the 12-month status review report, DPSS recommended that reunification services be terminated as to both parents and the court set a section 366.26 hearing. The report states that Mother had moved from her parents' home to a friend's home.

According to the social worker, although Mother's medication has helped stabilize her mental health issues, Mother "still appears incapable of bonding with the child or caring for the child on her own." Mother's therapist said that Mother is easily distracted, loses thoughts, gets confused, and is overly dependent on others. The social worker believed that Mother "will therefore always be limited in her ability to care for the child as a result of her mental disposition."

The social worker again reported that Mother appears to have benefitted from her medication and was making active efforts to bond with J.G. Mother was consistent with her attendance and participation in her substance abuse program and never failed a drug test. "However, she is still unable to focus on the child for a significant period of time." The social worker noted that Mother failed to meet all of her case plan objectives.

J.G. was diagnosed with asthma and an inhaler was prescribed for him. He remained developmentally on track.

The social worker opined that "[t]here is no likelihood that [J.G.] would be returned home to either of the parents by December 3, 2009 [the date of the 12-month review hearing]." "Although [Mother] is making concerted efforts to address her mental health issues and other safety issues that brought the family to the attention of [DPSS], it appears she would be unable to care for the child on her own."

In an addendum report filed in February 2010, the social worker reported that the maternal grandparents are under consideration for possible placement of J.G. However, the social worker noted several concerns. "First, the maternal grandparents have not

shown that they are totally invested in the care of the child.” Second, the social worker could not confirm that Mother had moved out of the maternal grandparents’ home. Third, the house had “a strong odor of cigarette smoke,” which was “particularly worrisome because [J.G.] is 15 months old and has asthma.” Fourth, the maternal grandparents’ lack of reliable transportation could be a problem if J.G. needed immediate attention due to his hemophilia. Finally, J.G. has developed a strong bond with his caregiver over the last 15 months.

A contested 12-month hearing was held in March 2010. At the conclusion of the hearing, the court found that Mother had regularly visited J.G. and “made major progress in solving problems that led to the removal.” The court noted that there was no evidence of any positive drug tests and that Mother “has done pretty much everything that [DPSS] has requested of her to do.” The court concluded that DPSS “has not met its burden” and ordered the child placed with Mother on family maintenance status. At a subsequent hearing, the court made “formal findings” to support its ruling. Reunification services for Father were terminated.

#### *D. Family Maintenance*

In May 2010, Mother and J.G. were living with the maternal grandparents at the grandparents’ house. The grandparents assisted with the care of J.G. According to the social worker, Mother has been caring for the child and there have been no safety issues. However, she still has problems communicating with J.G. DPSS authorized further

counseling to assist Mother in transitioning to active parenting and to increase her communication skills.

J.G. was diagnosed with hemophilia. Mother completed “medical fragile training.” J.G. had no asthmatic attacks during the review period. His doctor advised to discontinue regular use of the inhaler. J.G. remained developmentally on track for his age.

The social worker stated that while J.G. “appears to be settling down, there still appears to be some adjustment problems. There appears to be no verbal communication between the child and [Mother]. The child is not using any words at all to communicate. . . . Although [Mother] is making concerted efforts to address her mental health issues and other safety issues that brought the family to the attention of [DPSS], [DPSS] still needs further time to assess the child’s bonding with [Mother] and his continued adjustment in the home.”

DPSS recommended that family maintenance services be continued. At a hearing in June 2010, the court so ordered.

#### *E. 2010 Section 342 Petition*

In August 2010, J.G. was 21 months old and had been living with Mother and the grandparents for approximately five months. On August 19, 2010, DPSS received a report that Mother “is spanking [J.G.] and squeezing him when she felt frustrated.” When a social worker asked Mother if she was physically abusing her child, Mother said, “I spank him on the butt and sometimes I would also squeeze his mouth.” The social

worker observed no marks or bruises on J.G. The social worker also questioned Mother about a report of domestic violence between the grandparents. Mother said that the grandparents have altercations, but it has never been physical.

When the social worker returned to her office, she received a voice mail message from Mother in which she stated: “I do not think it is safe for [J.G.] in this home, with my parent[s] arguing and all that. I don’t know what to do. Maybe we can work something out. Maybe you can give me some more time with my sobriety and I can attend classes. Give him back to [J.G.’s former caregiver], so he can be in a safe environment, and I want him to get away from this. Maybe I can have him weekends. I just want the best for him. I am scared of my parents and I know what they will do if I told them, I told you this. I need your help, [m]aybe, help me find a place and get a job.”

The social worker returned to the home to detain J.G. Mother told the social worker that the grandparents fight every day and have had physical altercations, including one in which the grandfather broke a television. She said the altercations cause J.G. to cry, and she then spanks him or squeezes his mouth to make him stop. She added that her father engaged in domestic violence when she was a child and she did not want J.G. to be in that environment.

DPSS filed a juvenile dependency petition concerning J.G. under section 342.<sup>4</sup>

DPSS alleged: Mother is unable to provide a safe, stable and suitable living environment

---

<sup>4</sup> Section 342 provides in part: “In any case in which a minor has been found to be a person described by Section 300 and the petitioner alleges new facts or circumstances, other than those under which the original petition was sustained, sufficient  
*[footnote continued on next page]*

for J.G. as evidenced by the grandparents in the home engaging in acts of domestic violence in the presence of the child; Mother places the child at risk for suffering serious physical harm as evidenced by her statement that she spans and squeezes the child when she is frustrated; and Mother is unable to provide J.G. with appropriate shelter, care, and support.

In DPSS's jurisdictional/dispositional report, the social worker reported that Mother recanted some of her prior statements regarding domestic violence between the grandparents and her spanking and squeezing J.G. Mother's therapist told the social worker that Mother may have been pressured by the grandparents to recant her statements.

In an addendum report, the social worker reported on a conversation she had with Mother's therapist. The therapist told the social worker that Mother "has severe mood swings . . . and is in need of a psychological evaluation and possibly a medication evaluation. She stated [Mother] does not appear to be mentally stable at this time."

After a contested hearing, the court found the allegations of the petition true and ordered J.G. removed from Mother's custody. DPSS was ordered to provide reunification services to Mother and Mother to participate in such services. Supervised visits were to take place three times each week.

---

*[footnote continued from previous page]*

*[footnote continued from previous page]*

to state that the minor is a person described in Section 300, the petitioner shall file a subsequent petition."

#### *F. Six-month Review Period*

In November 2010, Mother was living with her grandparents and providing in-home support services for her father. She told a social worker she has been depressed because J.G. was removed from her. She requested additional services to assist her in stabilizing herself.

Mother visited J.G. consistently. However, the caregiver reported that she will be unable to supervise the visits on her own due to Mother's aggressive and abrupt behaviors. DPSS then provided an assistant to supervise visits.

The social worker believed that J.G. "is at a high risk of neglect and abuse by [Mother]." The social worker noted that Mother continues to participate in counseling and substance abuse testing and is compliant with her case plan. However, Mother's "mental health status seems to be deteriorating as her therapist reports that she presents with a very flat affect, minimum eye contact and tangential thinking, which appears dissociated at times." The social worker further believed that Mother is unable to provide safety and stability for J.G. because of reports of domestic violence at the maternal grandparents' home.

In an addendum report, the social worker reported on the results of a psychological evaluation of Mother. According to the psychologist, Mother's intellectual functioning was in the low average to below average range. She "is unpredictable, characterized by depressive moods, edgy irritability, and feelings of being cheated, misunderstood, and unappreciated." She "seems to have had a dysfunctional childhood and is still living in

that dysfunctional environment with her father and mother who seem to be acting out in spite of their advanced age. . . . [She] seems to be bipolar disordered with a borderline personality. . . . Her mental condition is poor and . . . she needs continued mental health services and medication.” The psychologist concluded that, at this time, “it is clear” that Mother is not “capable of functioning in a parental capacity on a daily basis.”

Following a contested review hearing in December 2010, the court found that returning J.G. to Mother’s custody would create a substantial risk of detriment to the safety, protection, or physical, or emotional well-being of the child. Mother’s progress toward alleviating or mitigating the causes necessitating placement has been adequate, but incomplete. Reunification services were continued for six months.

#### *G. 12-month Review Period*

In a status review report for the 12-month review hearing, the social worker reported that Mother told her therapist that the maternal grandmother is smoking a lot, the maternal grandfather is consuming alcohol, and that she has had verbal and physical altercations with her parents. Mother also stated that her parents took her income tax refund check and credit card.

Mother is apparently in a “new romantic relationship,” which, according to her therapist, has “added to the chaos in her life putting her continued recovery at risk.” The social worker stated that Mother’s “significant other also had a [Child Protective Services] case and his child is not with him.”

Regarding visits, the social services aide and the caregiver were concerned about Mother's ability to care for J.G. because she had left the child unattended, showed lack of initiation or poor interaction, and exhibited frustration with J.G. After each visit, J.G. "went through emotional adjustment periods of at least a day or so with nightmares or negative behaviors such as biting other children or hitting himself."

J.G. has been identified as a child with "Special Health Care Needs" based on his hemophilia. He is reportedly "very comfortable and attached to his caregiver," who he looks for during visits with Mother. He had a "very difficult time adjusting emotionally and calming down right after each visit with [Mother]."

The social worker opined that J.G. is still "at a high risk of neglect and abuse by [Mother]." Mother "continues to struggle" with her mental health issues, use of inappropriate discipline, and domestic violence in the home. She "has no means of providing a safe and secure environment for [J.G. because] the maternal grandparents, whom she is residing with, were reported to be consuming alcohol and continuing to have verbal and physical altercations." The "home environment appears unstable and chaotic." The social worker concluded that, despite compliance with portions of her case plan, "there still remains a continued risk to the child if returned to the parent as the protective issues that brought [J.G.] to the attention of this Agency has not been alleviated."

DPSS recommended that reunification services be terminated and that the court set a section 366.26 hearing.

In an addendum report, the social worker reported on Mother's recent visits with J.G. On May 2, 2011, grandmother played with J.G. while Mother sat on a couch and watched with little or no interaction with him. On May 9, 2011, she hugged and kissed J.G.; they then watched a movie together. She had little verbal interaction with J.G. and did not play with him when he got up to play with toys. On May 16, 2011, maternal grandmother played with J.G.; Mother's "involvement and interaction was minimal." On May 23, 2011, Mother and J.G. watched movies, but otherwise had very limited interaction. The social worker reported that J.G. exhibits negative behavior changes before and after the visits and, on one occasion, refused to get out of the car when they arrived for a visit. The social worker also noted evidence of "negative interactions" and "discord" between Mother and maternal grandmother that would be stressful if J.G. returned to their home.

On May 26, 2011, maternal grandmother filed a request to be appointed a de facto parent. She stated, among other facts, that during the five-month period J.G. lived in her home she provided day-to-day care for J.G. One week later, she filed a section 388 petition, requesting that she and maternal grandfather be given de facto parent status and custody of J.G. The court denied the request for de facto parent status and her section 388 petition.

Following a contested 12-month status review hearing, the court found that returning J.G. to Mother's custody would create a substantial risk of detriment to the safety, protection, or physical, or emotional well-being of J.G. The court further found

that Mother's progress toward alleviating or mitigating the causes necessitating placement has been unsatisfactory because she has failed to make substantive progress or complete her case plan. The court then terminated services and set a hearing to be held pursuant to section 366.26.

#### *H. Section 388 Petition and Section 366.26 Hearing*

In October 2011, J.G. remained developmentally on track and "very bonded with his caregiver." The social worker reported that J.G. "has thrived under the consistent, nurturing parenting and affectionate individual attention of the prospective adoptive parent."

A social services assistant who supervised Mother's visits expressed concern about Mother's ability to handle J.G. and her lack of parenting skills. She reported that Mother left J.G. unattended, showed a lack of initiation, poor interaction, and exhibited frustration. J.G.'s caregiver reported that J.G. "went through emotional adjustment periods of at least a day or so with nightmares or negative behaviors such as biting other children or hitting himself." J.G. appeared fearful and anxious after visits with Mother, and indicated what Mother "had done to him previously by showing biting his arm and hitting his head and chest." The social worker agreed to refer him to therapy, if needed, after he turns three years old or later.

The social worker stated that Mother "continues to struggle with her mental health issues and has expressed several concerns with her current situation and her strained

relationship with her parents.” The social worker concluded that placing J.G. in Mother’s care “would pose a significant threat to his health and safety.”

Mother filed a section 388 petition. She requested that J.G. be returned to her under family maintenance status or, alternatively, to reinstate reunification services. She pointed to the following changed circumstances: She has completed asthma, hemophilia, and CPR classes; she has attended 36 individual therapy sessions; she is stable on her medications; she has obtained her own housing and lives with her maternal grandmother (i.e., she is no longer in the home of maternal grandfather); she has a legal source of income; and she has regular visits with J.G.

Mother asserted that the requested change will benefit J.G. because he “will be with his biological family in a warm, loving, non-hostile environment.” (Capitalization omitted.) She added that he has received the training necessary to care for J.G.’s medical needs and “has her life in order.” (Capitalization omitted.)

Mother provided supportive statements written by herself, her mother, and another relative. She also submitted: medical records; a residential lease for a six-month term commencing on August 1, 2011; paystubs for her in-home care of her father indicating gross pay of between \$283 and \$345 per month; a certification of completion of a child abuse program; and a statement from her therapist that she has attended 36 therapy sessions and has been compliant with attendance, cooperative, and open throughout her therapy.

The court ordered a hearing on the petition.

DPSS responded to the section 388 petition in an addendum report. The social worker stated that Mother and maternal grandmother moved out of the grandparents' home to avoid domestic violence by maternal grandfather. They have signed a six-month lease for their new residence. Although the lease is dated August 1, 2011, DPSS was not notified of the new residence prior to receiving the section 388 petition in late October 2011, and had not yet evaluated the home. The social worker noted that DPSS had not received any verification that Mother had completed asthma, hemophilia, and CPR classes, and that Mother failed to complete court-ordered medically fragile training.

In response to Mother's statement that her visits with J.G. "are ok," the social worker stated that Mother did not interact with J.G. during visits unless the social worker was in the room. J.G. was reluctant to play with Mother and would not sit next to her. He needed to be encouraged several times before he would hug her. The caregiver reported that the visits made J.G. relive his bad memories and cause him fear and anxiety.

In response to Mother's statement that, "[i]f given the chance I believe I would be a good mom," the social worker pointed out that the case has been open for 35 months—J.G.'s entire life. Mother has received 26 months of reunification services over two periods of time, separated by five months of family maintenance services. Yet, the court eventually terminated services based on clear and convincing evidence that there was no substantial probability of return if given additional services.

The social worker opined that although Mother "reports some changes in circumstance and benefit from services, there still remains a continued risk to the child if

returned to [Mother] as the protective issues that brought the minor to the attention of the Court have not been fully alleviated with an extended period of stability.” The social worker added that J.G. “is in a loving home and his prospective adoptive parent has provided a stable and loving environment.” She concluded that it is in J.G.’s best interest for him to continue living in his current prospective adoptive placement.

J.G.’s prospective adoptive parent filed a statement in which she states that she and her two children have bonded with J.G. and love him. She notes that J.G. is scared after his visits with Mother and will hold on to her “for days” saying “my mommy, my mommy.”

At the hearing on the section 388 petition, counsel for Mother argued that Mother and maternal grandmother no longer live with maternal grandfather and have adequate room for J.G. Counsel acknowledge that Mother “struggles with sobriety [and] mental health issues,” but she is “doing everything she can.”

Counsel for DPSS argued that Mother has failed to show either a change of circumstances or that the requested change was in J.G.’s best interest. Counsel noted that Mother “attended a couple of appointments with her psychiatrists and some therapy sessions, but other than that we have no evidence of her really doing anything since [services were terminated].” He added that the social worker’s response to the petition “specifically address[es] every single one of [Mother’s] claims . . . and does an admirable job of contradicting them.”

The court then stated: “I agree. I think three years is long enough for this child, and I do not believe it is in his best interest. Therefore the request to change court order is denied.”

The court then held the section 366.26 hearing, found that J.G. was adoptable, and terminated the parents’ parental rights.

### III. DISCUSSION

#### A. *Denial of Mother’s 388 Petition*

##### 1. Legal Background and Standard of Review

A parent may petition the juvenile court to change, modify, or set aside a previous order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) The petition must state why the requested relief is “in the best interest of the dependent child.” (*Id.*, subd. (b).) Indeed, when the section 388 petition is filed after the termination of reunification services, as in this case, the court must focus on whether the requested change is in the best interest of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Mother bears the burden of proving by a preponderance of the evidence both a change in circumstances and that the change is in the child’s best interest. (See *ibid.*)

We will not reverse a trial court’s ruling on a section 388 petition “unless an abuse of discretion is clearly established.” (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.) The scope of a court’s discretion in a particular context is determined by the legal principles that govern the subject of the court’s action. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) In

determining whether to grant a section 388 petition, our Supreme Court has made clear that the trial court’s discretion is limited only by “the bounds of reason,” and its determination should be disturbed on appeal only when it is “arbitrary, capricious, or patently absurd.” (*In re Stephanie M.*, *supra*, at pp. 318-319.)

## 2. Court’s Comment That Three Years is Enough

Initially, we address Mother’s argument that “the juvenile court abused its discretion in denying her [section] 388 petition because ‘three years is long enough for this child. . . .’” She explains this further by stating: “Because there is no time limit on completing a change to file a [section] 388 petition, it was an abuse of discretion for the trial court to find three years was enough time for the child to be in foster care.”

Mother’s argument implies that the court denied the section 388 petition *because* the case was three years old without regard to whether circumstances have changed. This is not a fair interpretation of the court’s ruling.

In response to Mother’s argument that she would be a good mother “[i]f given the chance,” the social worker referred to the three-year span of this case, which covered J.G.’s entire life. The social worker’s point was that Mother *was* “given the chance”; i.e., she was provided with ample opportunity to reunify with J.G., but failed to do so.

DPSS’s counsel at the hearing on the section 388 petition alluded to this point by stating that J.G. is 36 months old and has been a dependent since birth. He also referred to the social worker’s written response to Mother’s claims.

The court then made the statement: “I agree. I think three years is long enough for this child, and I do not believe it is in his best interest.”

We do not believe the court is expressing the view suggested by Mother that a section 388 petition should be denied *because* the case is three years old. Rather, viewing the statement in the context of Mother’s argument that she should be “given the chance [to] be a good mom” and DPSS’s response, the court was commenting on Mother’s failure to successfully reunify with J.G. despite three years of services. There is nothing improper about the comment; nor does it suggest an erroneous standard for evaluating the petition.

### 3. The Child’s Best Interest

“It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) An “important factor . . . is the strength of the existing bond between the parent and child.” (*Id.* at p. 531.) “Correlatively, the strength of a child’s bond to his or her present caretakers, and the length of time a child has been in the dependency system in relationship to the parental bond are also vital. [Citation.] While the bond to the caretaker cannot be dispositive [citation], lest it create its own self-fulfilling prophecy, our Supreme Court made it very clear . . . that the disruption of an existing psychological bond between dependent children and their *caretakers* is an extremely important factor bearing on any section 388 motion.” (*Ibid.*)

Here, there is no evidence of a close bond between Mother and J.G. J.G. was detained upon birth. Although Mother regularly attended visits, the observations of the social workers and the caretaker not only indicate the absence of a parent-child bond during visits, but that J.G. grew to dislike them. The apparent physical abuse J.G. suffered during the five months he lived with Mother appears to have left J.G. fearful and anxious about visits with Mother. According to his caregiver, J.G. would go through an emotional adjustment period after visits that involved nightmares or negative behaviors, such as biting other children or hitting himself.

By contrast, there appears to be a strong bond between J.G. and his prospective adoptive parent. With the exception of the five-month period when J.G. lived with Mother, J.G. has lived with his caregiver and knows her as his “mommy.” The social worker stated he “appears very comfortable and attached to his caregiver [and] looks for his caregiver even during his visitation with [Mother]”; he “is very bonded and slips easily into [his caregiver’s] arms and hugs her”; and “he is very excited about being adopted and staying with his ‘mom and his sisters.’”

In light of the absence of a bond between Mother and J.G. and the evidence of a close and strong bond between J.G. and his prospective adoptive parent, the trial court could easily conclude that the requested change was not in J.G.’s best interest. Therefore, the court did not abuse its discretion in denying Mother’s section 388 petition.

## B. *Compliance With the ICWA*

Mother contends DPSS violated its duty of inquiry under the ICWA and related California law when, after being informed by Mother that maternal grandmother is Cherokee, social workers failed to ask maternal grandmother for information that might assist Indian tribes in determining whether J.G. is an Indian child. In particular, Mother asserts that the failure to obtain the maternal grandmother's maiden name, which "was essential for the Tribes to determine Indian heritage," rendered the information sent to the tribes "worthless." We conclude that Mother has failed to show that DPSS failed to comply with its duty of inquiry. Moreover, as to whether the ICWA notice included the "essential information" of maternal grandmother's maiden name, Mother misstates the record: DPSS did include that information in its notice. Accordingly, we reject Mother's argument.

### 1. Background 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 . . . , including maiden, married and former names or aliases, 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).)

To fulfill the notice requirement, 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 Factual Background

Mother initially denied having any Indian ancestry. Prior to the original jurisdictional/dispositional hearing, however, she told a social worker that her mother is Cherokee, but was unable to say to what particular tribe her mother belonged.<sup>5</sup> The social worker concluded that the ICWA may apply. DPSS requested, and was granted, a continuance of the jurisdictional/dispositional hearing to allow time to give proper notice under the ICWA.

The record is silent as to what social workers did, if anything, to investigate Mother’s possible Indian ancestry.

---

<sup>5</sup> The social worker’s jurisdictional/dispositional report states that Mother told the social worker that her mother is Cherokee on December 8, 2008. A November 20, 2008, entry in the social worker’s service log, however, indicates that Mother “reported Indian Ancestry at the detention hearing,” which took place on that date.

In January 2009, DPSS sent notices of the jurisdictional hearing on form ICWA-030 (Notice of Child Custody Proceeding for Indian Child) to the Cherokee Nation (Oklahoma), the Eastern Band of Cherokee Indians (North Carolina), the United Keetoowah Band of Cherokee (Oklahoma), the Bureau of Indian Affairs, and the U.S. Department of the Interior. The notice included: J.G.'s name and date of birth; Mother's name, address, and birth date; maternal grandmother's name, maiden name, address, and birth date; and maternal grandfather's name and birth date. No other identifying information was provided.

The Cherokee Nation of Tahlequah, Oklahoma, and the Eastern Band of Cherokee Indians responded to the notice by stating that, based on the information provided, J.G. is not considered an Indian child under the ICWA. The Bureau of Indian Affairs returned the notice, stating that the County has provided an appropriate notice to the tribes.

Following the jurisdictional/dispositional hearing, the court found that proper notice had been given under the ICWA, and thereafter determined that the ICWA did not apply.

In April 2009, Father filed a parental notification of Indian status (form ICWA-020) stating that he has "no Indian ancestry as far as I know."

After J.G. was detained the second time, in August 2010, Mother filed a parental notification of Indian status (form ICWA-020) stating that she has "no Indian ancestry as far as I know."

### 3. Analysis

Mother contends DPSS failed to comply with its duty of inquiry by failing to ask the maternal grandmother about her Indian ancestry, if any. She does not cite to the record for support of these statements. In fact, the record is silent as to what social workers did or did not do to comply with their duty of inquiry. Error, however, is never presumed and Mother, as the appellant, has the burden on appeal of affirmatively establishing error on appeal. (*In re D.W.* (2011) 193 Cal.App.4th 413, 417-418; *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 995.)

In *In re Gerardo A.*, the minors' father argued that social workers spoke only to the children's mother and maternal aunt regarding Indian heritage and should have inquired of the maternal grandmother or other older maternal relatives for more information. (*In re Gerardo A., supra*, 119 Cal.App.4th at pp. 994-995.) The Court of Appeal rejected the argument as "based on speculation," and stated: "The fact that the record is silent regarding whether the department spoke with anyone other than the children's mother and maternal aunt does not necessarily mean the department failed to make an adequate inquiry for Indian heritage information." (*Id.* at p. 995; see also *In re S.B.* (2005) 130 Cal.App.4th 1148, 1161 [Fourth Dist., Div. Two] [from the social worker's statement that the ICWA does not apply, the court may infer that the social worker made the necessary inquiry].)

Here, once Mother informed the social worker that she believed her mother was Cherokee, the social worker concluded that the ICWA may apply and requested time to

give proper notice under the ICWA. According to Mother, the critical information to be obtained from an inquiry made to maternal grandmother is the maternal grandmother's maiden name. Contrary to Mother's assertion, DPSS did obtain and include in the notice to the Tribes the maternal grandmother's maiden name, as well as her current name, address, and birth date. Mother does not state what additional information could have been obtained that would have aided the Indian tribes in determining whether J.G. was an Indian child.

Moreover, the Mother's 2010 statement (made under penalty of perjury) that she has "no Indian ancestry as far as [she] know[s]" indicates that Mother's prior statement (which was not made under oath) was incorrect. If so, the failure to make a more complete inquiry is necessarily harmless. Although DPSS points to the 2010 statement in opposing Mother's argument, Mother does not mention it in her arguments or attempt to explain why it should not be given credence. It is possible that Mother made the later statement based on DPSS's conclusion that the ICWA does not apply; if DPSS's inquiry was incomplete, then Mother's statement in reliance on that insufficient inquiry might be incorrect. However, it is also reasonable to conclude that after making the earlier statement, Mother's belief of possible Cherokee heritage was dispelled as a result of an inquiry to the maternal grandmother or other reasons. Our record does not reveal how or why Mother made the 2010 statement. Again, because our record is silent, Mother has failed to satisfy her burden of establishing error on appeal.

IV. DISPOSITION

The orders appealed from are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING  
J.

We concur:

RAMIREZ  
P.J.

RICHLI  
J.