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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re I.S. et al., Persons Coming Under the  
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

A.R. et al.,

Defendants and Appellants.

E057824

(Super.Ct.No. RIJ120269)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed with directions.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and  
Appellant A.R.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and  
Appellant J.S.

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

## I. INTRODUCTION

At a hearing held pursuant to Welfare and Institutions Code section 366.26,<sup>1</sup> the trial court terminated the parental rights of defendants and appellants, A.R. (Mother) and J.S. (Father), with respect to three children, I., Al., and An. The parents make the following contentions: (1) the evidence is insufficient to support the court's finding that the children are adoptable; (2) the court erred in denying Mother's request to change court order (commonly referred to as a § 388 petition); and (3) the court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA). We reject the first two contentions. We agree that the ICWA notice was deficient and will conditionally reverse the court's order.

## II. FACTUAL AND PROCEDURAL SUMMARY

### A. *Detention, Jurisdiction, and Disposition (August – October 2010)*

In August 2010, the parents had three children, all girls. I. was three years old, Al. was two years old, and An. was nine months old.

On August 8 or 9, 2010, Al. was taken to a hospital because she started to turn blue while eating a french fry. Al. weighed 50 pounds and was described by a social worker as "morbidly obese and very anemic." She had trouble breathing while sleeping

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

and would wake up gasping for air due to fat build-up. She was at high risk of pulmonary hypertension if her weight did not get under control. The matter was referred to plaintiff and respondent, Riverside County Department of Public Social Services (DPSS).

A DPSS social worker observed that Mother appeared to have a learning disability. She and maternal grandmother showed a lack of concern for, and were in denial about, Al.'s weight problem. Following Al.'s release from the hospital, Mother failed to make follow-up doctor appointments as directed.

When the social worker visited the family's home 10 days later, Mother said she did not know she was supposed to make follow-up appointments. She told the social worker that Al. had lost eight pounds in the preceding week.

In contrast to Al.'s obese condition, nine-month-old An. was underweight at 15 pounds. Mother told a social worker that An. had a "condition," but was unable to identify the condition. Mother said she had been given a prescription for the condition, but could not fill it.

A DPSS nurse visited the family and determined that An. had a disorder that caused her to spit up her infant formula. The social worker took Mother and An. to the hospital so An. could be examined. The hospital admitted the child "for failure to thrive." With medication, An. was able to keep her food down. She remained in the hospital for six days.

The social worker learned that Father used methamphetamine and was recently convicted of possessing controlled substances. Father had also been convicted in 2007 and 2008 of grand theft and robbery. Father admitted using methamphetamine, but explained: “I’m not a bad parent when I’m on that stuff. I play with my kids. They are in good hands.”

The social worker took the three children into protective custody and placed them in foster care. An employee at the foster care facility reported that three-year-old I. had a severe diaper rash and bumps on her back.

DPSS filed a petition under section 300, subdivision (b) (failure to protect). DPSS alleged: the parents neglected the medical needs of the children; Father abused methamphetamine while supervising the children and was convicted of drug-related charges in August 2010; and Mother knew Father abused methamphetamine, yet failed to intervene and ensure the safety and well-being of the children.

Following a detention hearing, the court ordered the children detained from the parents and placed them in the temporary custody of DPSS. They were placed together in a foster family home. The court ordered visits between the parents and the children at least twice each week.

At a jurisdictional/dispositional hearing held in October 2010, the court found the allegations of the petition true, adjudged the children dependents of the court, and removed the children from the parents.

Reunification services were ordered for the parents. Mother's case plan included counseling, a parenting education program, and a nutrition education program.

*B. Six-month Review and Termination of Services (October 2010 – April 2011)*

Although the weight and nutrition problems of Al. and An. were principal factors in initiating this dependency case, I. (the oldest child) became the focus of the social worker's attention going forward. In a status review report prepared in April 2011 for the six-month review hearing, the social worker described "bizarre behavior [I.] demonstrates in the foster homes. She smears her feces around the foster home and puts it in her mouth . . . ." I. told the foster parents that Mother would make her put her own feces in her mouth if she did not use the toilet. The child is also "destructive of property and defiant," and will "throw tantrums where she screams, pulls her hair, bites herself and throws herself on the floor." She curses in Spanish and screams during diaper changes, baths, and showers.

Although not mentioned in the social worker's reports until August 2012, I.'s problems and behaviors were apparently associated with encopresis. According to a social worker, encopresis is "a medical condition caused by chronic constipation that results in involuntary bowel movements." It also "involves a psychological component that frustrates the child as well as the caregivers." The condition "is not easily treated and can take years of treatment and maintenance before the child's intestinal tract returns to normal functioning . . . ."

Regarding Al., the social worker reported that, at 40 pounds, Al. was still overweight. She would soon be receiving in-home services based on delays in cognitive skills and communication skills. The social worker stated that Al. engaged in “regressive, self soothing and assaulting behaviors,” such as biting herself, throwing herself down when frustrated, being aggressive toward her siblings, and breaking toys. She would also take off her diaper and touch her private area. The social worker believed such behavior might be the result of observing and mimicking I.’s behavior.

An. is described as “a loving and happy child,” “energetic and inquisitive,” and “comfortable in the out of home placement.” She is “developing appropriately, and there are no overt signs of delay.” She does, however, have frequent colds and diaper rashes.

Visits between Mother and the children took place twice per week. Mother was occasionally late for visits and appeared to lack the ability to focus proper attention on all the children. According to the social worker, Mother “has consistently struggled with demonstrating a parental role in her visits.”

Mother consistently accused different foster parents of abusing and neglecting the children. She would undress the children during visits to examine them for bruises. She reported that a foster parent spanked I., but DPSS determined the allegation was unfounded. On one occasion, Mother intimidated a foster parent into taking Al. to a hospital emergency room even though the child had only a common cold. As a result of Mother’s behavior, DPSS decided Mother would not be allowed to take the children to the restroom alone or walk the children out of the office after visits.

Regarding Mother's progress on her case plan, the social worker reported that she was in compliance with a parenting course and had completed her nutrition course, but her counseling was incomplete and her progress "insufficient." The social worker further reported that Mother had not demonstrated adequate benefit from the services and her current housing was insufficient to meet the children's needs. However, Mother had reportedly demonstrated a willingness to learn and was determined to achieve the goal of reunification. Therefore, the social worker concluded that "there is a hopeful prognosis that [Mother] can reunify within six month[s]."

Mother gave birth to her fourth child in December 2010. In a separate dependency proceeding, the parents' parental rights as to this child were eventually terminated.

On December 13, 2010, the three children who are the subject of this case were placed with new caregivers. The new caregivers, however, became "overwhelmed with the needs of [Al.] and [I.] [and] the mother's accusations and allegations," and asked that the children be moved. The children were placed with new foster parents in March 2011.

In February 2011, Mother told Father to leave the family residence because he "was not doing nothing." The following day, Father was arrested on drug-related charges. He was convicted of possession of a controlled substance and incarcerated until November 2011.

At the six-month review hearing in April 2011, the court found that Mother and Father had failed to make substantive progress or complete their case plans. Mother's progress toward alleviating or mitigating the causes necessitating placement was

“minimal and unsatisfactory”; Father’s progress was “unsatisfactory.” The court terminated reunification services for both parents and set a hearing to be held pursuant to section 366.26.

*C. After the Termination of Services (April 2011 – December 2012)*

Twenty months passed between the termination of services and the section 366.26 hearing. During that time, the children had several changes in placement. The primary reason for the multiple changes was I.’s encopresis and her behavior associated with that condition. In August 2011, the social worker reported that I. continued to put her feces in her mouth and smear it around the house; she also destroyed property and had extreme tantrums.

Al. was described as “mildly mentally retarded” and appeared to be mimicking “[I.]’s maladaptive behaviors.” The social worker reported that managing Al.’s behavior takes constant monitoring and redirection.

An. was reportedly developing appropriately without any sign of delay. She was described as “a loving and happy child,” and “energetic and inquisitive.”

The children’s caregiver was reportedly “motivated to follow through with adoption.” However, in September 2011, the foster parent informed the social worker that adoption “would be a hardship for her” and she would not be able to adopt the children.

In a status review report filed in February 2012, DPSS reported that I. successfully underwent a procedure to unblock her bowel. There were no further reports that I. was

continuing to smear her feces in the house or that she was throwing extreme tantrums or destroying property. She was described as developmentally on track, a good communicator, and “a very kind and social girl [who] loves to make new friends.” She was also doing well in preschool.<sup>2</sup>

Three-year-old Al. was reportedly in good health and undergoing normal child development. Two-year-old An. was in “good general health” and developmentally on track. Al. and An. were “mentally and emotionally stable” and had “no behaviors of concern.”

Although the children were reportedly thriving in their current placement, the foster mother stated she could not provide for all three children and declined to adopt them. The children were placed with new caregivers, who were designated as prospective adoptive parents in July 2012.

In an April 2012 addendum report, DPSS reported that Mother was pregnant (with her fifth child) and incarcerated on a shoplifting charge. She was released on June 18, 2012. In July, the parents informed a social worker that they were living at a homeless shelter. Their son, J., was born in August 2012. He became the subject of a separate dependency proceeding for which Mother was receiving reunification services.

In an August 2012 report, the social worker provided an extensive report on the history of I.’s encopresis condition, which required several doctor’s appointments and

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<sup>2</sup> Five months after the February 2012 report, the children’s foster mother told a social worker that the children had never gone to school.

two hospitalizations during the preceding year. The social worker also stated that I. had initially struggled to adjust in foster care and exhibited frequent and intense tantrums when she was not allowed to do what she wanted to do. However, the social worker reported that “[I.] does not appear to have any developmental lags at this time. [She] is a bright and enthusiastic young girl who has an outgoing personality.” She “has good vocabulary and is articulate in expressing her needs and wants for her chronological age.” Still, she “is significantly behind in mastering the basic preschool concepts.” She did not, for example, recognize basic shapes or written numbers and letters. It was unclear if this was due to a learning disability.

Al. was no longer obese and was described as being in good health. However, the social worker suspected Al. may have a cognitive deficit. “She does not appear to understand empathy, has difficulty communicating her needs and wants, and struggles to learn and retain new information as expected for children of her same age.” She qualified for special education services for speech and/or language impairment. The social worker further noted that Al. would become aggressive towards her sisters without provocation, and would try to choke them and fall on them. She also tried to hit the family dogs with stones.

An. was in good health and developmentally on track. She was reportedly adjusting well to her placement and showed no signs of significant anxiety or stress.

After Mother's release from incarceration, she visited the children once each month in May, June, and July. The social worker reported that Mother was appropriate with the children, attentive to their needs, and focused on having a good visit.

In the last report from DPSS prior to the section 366.26 hearing (filed in December 2012), the social worker stated that the children have "made great improvements regarding their health and emotional well-being." The three children refer to the prospective adoptive parents as "'Mommy' and 'Daddy,'" and are comfortable and secure in their home.

The social worker reported that I. has had no incidents associated with her encopresis since August 2012. She no longer used pull ups and could feel when she had to make a bowel movement. Although she had been behind developmentally in some ways, she was now "on track with her peers."

"[Al.] has also made great improvements since she has been placed with the prospective adoptive parents." Although she had some cognitive delays, she "has made huge improvements," no longer required speech therapy, and was catching up with her peers academically. She had extreme tantrums, for which she was receiving counseling.

An. was described as "a very smart and loving child." She was "independent," and yet "very bonded to her sisters and the prospective adoptive family." She was in preschool and had made great improvements with her speech.

The social worker summed up the children's situation after two years in the foster care system by stating: "The traumatic affects from their initial removal and . . . multiple

placements is evident in the children's overall health and behavior. Before moving into their current home the children were developmentally behind, [I.] suffered from encopresis, and [Al.] was thought to be delayed. As stated [elsewhere in the report], the children have made huge strides since [being] placed in their current home where they are receiving the consistent love, nurturing, and emotional support they deserve. The prospective adoptive parents are devoted to these children, which is evidenced by the children's growth since being placed in their home and the prospective adoptive parent's commitment to adopt. In addition, the prospective adoptive parents have already shown that they have the ability to appropriately advocate for services to address the children's special needs. In order for [I.], [Al.], and [An.] to establish healthy attachments and continue their developmental growth, it is imperative that they have a stable and consistent home. These girls have finally begun to attach to their caretakers and it would be detrimental to their well being to break that attachment."

*D. Section 388 Petition and Section 366.26 Hearing*

After several continuances, the section 366.26 hearing was set for December 19, 2012. On that date, Mother filed a section 388 petition. She requested that the section 366.26 hearing be vacated or continued. The request was supported by a report from a social worker regarding Mother's participation in a case plan in another dependency proceeding regarding the parents' infant son, J. According to the social worker, Mother had completed counseling and fulfilled all her goals. Mother was also participating in

parenting and substance abuse programs. She had tested negative on all random drug tests.

The court agreed to hear the section 388 petition. Mother testified about her progress with respect to reunification services regarding J. She also stated that she had been visiting the three girls that are the subject of the present case and would like to receive more services as to them. Mother's counsel argued that the section 366.26 hearing should be continued so that DPSS can "investigate mother's progress as to [J.]" and "translat[e]" such progress to the three children in this case. Counsel further argued that the change would benefit the children because they still recognize Mother "as mom," and are excited to see her at visits. The petition was opposed by DPSS and the children's counsel.

The court acknowledged that Mother "very well may be in the process of changing her circumstances." However, the change is insufficient to "justify changing the current court order." The court further found that it was not in the children's best interests to grant the petition because "the children are in a very good and loving adoptive home and they are being well taken care of and certainly bonded with their caretakers." Accordingly, the court denied the section 388 petition.

With respect to the section 366.26 hearing, DPSS submitted, and the court received into evidence, the various reports that had been filed since August 2011. The parents made no objections and offered no further evidence. The court then found (among other findings) that the children would likely be adopted, that adoption was in the

best interests of the children, and that none of the statutory exceptions to terminating parental rights applied. It stated that it based these findings on clear and convincing evidence. The court then terminated the parents' parental rights.

### III. ANALYSIS

#### A. *The Juvenile Court's Adoptability Finding*

The parents contend there is insufficient evidence to support the court's adoptability finding.<sup>3</sup> We disagree.

At the section 366.26 hearing, the juvenile court, after terminating reunification services, "determines whether the child is adoptable on the basis of clear and convincing evidence. [Citations.]" (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732; § 366.26, subd. (c).) The focus of the court's inquiry is on the child, "and whether the child's age, physical condition, and emotional state may make it difficult to find an adoptive family. [Citations.]" (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400; see also *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) A proposed adoptive parent need not be identified and ready to adopt, but "there must be convincing evidence of the likelihood that adoption will take place within a reasonable time. [Citation.]" (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) "Although a finding of adoptability must be supported by clear and convincing evidence, it is nevertheless a low threshold: The court must merely

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<sup>3</sup> Only Mother makes substantive arguments challenging the adoptability finding. Father states that he joins in and adopts Mother's arguments.

determine that it is ‘likely’ that the child will be adopted within a reasonable time.” (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292 [Fourth Dist., Div. Two].)

On review, we determine whether the record contains substantial evidence from which the juvenile court could find clear and convincing evidence the children were likely to be adopted within a reasonable time. (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.) Under this standard, we must “determine whether there is evidence, contested or uncontested, from which a reasonable court could reach that conclusion.” (*In re K.B.*, *supra*, 173 Cal.App.4th at p. 1292.) On appeal, it is the parents’ “‘burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order.’ [Citation.]” (*In re Jose C.* (2010) 188 Cal.App.4th 147, 158.)

Initially, we observe that Mother, in the context of her argument regarding the sufficiency of the evidence of adoptability, devotes substantial space in her brief to arguments that DPSS failed to provide an adequate adoption assessment for the children. The requirements of an adoption assessment are statutorily prescribed in section 366.21, subdivision (i)(1). As DPSS points out, the parents did not assert any failure to comply with these requirements in the trial court proceedings or object to any of the reports submitted at the section 366.26 hearing. They have therefore waived or forfeited any argument on appeal concerning compliance with these requirements. (See, e.g., *In re G.M.* (2010) 181 Cal.App.4th 552, 563-564; *In re Urayna L.* (1999) 75 Cal.App.4th 883, 886.)

However, the failure to preserve for appeal any challenge to the adoption assessment does not preclude the parents from challenging the sufficiency of the evidence as to adoptability. (See *In re Brian P.*, *supra*, 99 Cal.App.4th at p. 623; *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1561.) Therefore, although we need not address the parents' arguments regarding the adequacy of the adoption assessment, we must still determine whether there is sufficient evidence to support the court's adoptability finding.

The parents do not contend that the children's ages (five, four, and three) made them difficult to adopt. Their focus is on the children's history of medical and behavioral problems. For example, Mother points to: I.'s "history of smearing feces on the walls and putting it in her mouth"; I. being "significantly behind academically"; and Al.'s "cognitive limitations, possibly mild mental retardation," and "unprovoked tantrums." These arguments, however, ignore the most recent reports regarding the children. According to the social worker's December 2012 report, I. has had no recent incidents with respect to encopresis, and "the children have made great improvements regarding their health and emotional well-being."

Mother's claim that I. is behind academically is also belied by the most recent report in which the social worker reported that I. has, academically, "made huge improvements and she is reported to be on track with her peers."

Al., the social worker stated, "has also made great improvements." Although she has an active Individual Education Plan, she "has made huge improvements and has accomplished almost all of her [Individual Education Plan] goals." In addition, Al. "no

longer requires speech therapy services and the team hopes she will no longer be in need of specialized academic instruction by the time she starts Kindergarten next school year.” Although Al. started having extreme tantrums after the first month in the prospective adoptive parents’ home, she has been participating in counseling and the prospective adoptive parents “are very proud of [her] accomplishments.”

The parents make no argument concerning the youngest child, An., who has been consistently described in terms of being “loving and happy,” “energetic and inquisitive,” in good health and developmentally on track, “smart,” and “independent,” yet still “very bonded to her sisters and the prospective adoptive family.”

The parents point to the numerous foster care placements as evidence the children are not adoptable.<sup>4</sup> However, the changes in placements must be viewed in light of the reasons for the changes. According to DPSS, the primary reasons for the multiple changes in placements were I.’s encopresis and the related behavioral problems. However, it appears from the most recent reports that I.’s condition is being successfully treated and the related behavioral problems are resolved or diminishing.

Mother asserts that the sibling group of three makes placing them for adoption more difficult. However, the prospective adoptive parents are reportedly “committed to

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<sup>4</sup> The parents and DPSS disagree as to the number of placements; Mother asserts there were seven different placements, DPSS says there were five. The record is not entirely clear. In the trial court proceedings, DPSS reported in August 2011 that the children had been in five different placements. In August 2012, DPSS reported “six placement changes.” However, in December 2012, shortly before the section 366.26 hearing, DPSS reported that the children “have had four foster care placements.”

adopting all of them . . . . They know the importance of keeping siblings together and are willing to do whatever necessary to keep the connection between [the children].”

Moreover, even if the current caregivers do not adopt the children, DPSS reported that “there are other prospective adoptive parents who will take all three children.”

Mother also asserts that the children have expressed love and affection for their Mother. She does not explain how such love and affection is contrary to the court’s adoptability finding; a child can certainly be loving and affectionate toward a parent and be adoptable. The only authority cited by Mother for this argument, *In re Brian P.*, *supra*, 99 Cal.App.4th at page 624, does not support the assertion. Second, the citation to the record Mother provides as evidence of the children’s love and affection toward her refers to a single incident at one visit in which, as the visit was ending, I. asked Mother: “Do you miss me?” Mother reportedly hesitated and struggled to find the right words. Eventually, the social worker interjected, telling I.: “Of course she misses you, silly girl.” I. and Mother then laughed and hugged each other. Regardless of what this may say about the relationship between Mother and I., it is not inconsistent with the court’s finding of adoptability.

In short, although I. and Al. presented significant problems for their caregivers over the course of their two years in foster care, the most recent reports indicate remarkable improvements in their physical and emotional well-being to the point where the trial court could reasonably find that they (along with An.) are adoptable.

Mother relies on three cases, *In re Valerie W.* (2008) 162 Cal.App.4th 1, *In re Asia L.* (2003) 107 Cal.App.4th 498, and *In re Brian P., supra*, 99 Cal.App.4th 616. In *In re Valerie W.*, the child protective agency failed to include any information in its reports as to the character, criminal record, employment history, or financial resources of one of the two prospective adoptive parents. (*In re Valerie W., supra*, at pp. 14-15.) Because the agency failed to assess the prospective adoptive parent's ability and willingness to adopt, the court's adoptability finding was not supported by substantial evidence. (*Id.* at p. 15.) In addition, the agency failed to identify or document one child's medical conditions, thereby preventing the court from assessing whether the prospective adoptive parents had the capability to meet the child's needs and understand their legal and financial rights and responsibilities. (*Ibid.*) *In re Valerie W.* is easily distinguishable. Here, there is no deficiency regarding DPSS's discussion of the prospective adoptive parents' willingness and ability to adopt. Furthermore, as summarized above, the reports introduced at the section 366.26 hearing provide ample discussion of the children's medical conditions and the prospective adoptive parents' knowledge of those conditions.

*In re Asia L.* is also distinguishable. In that case, the children required a "specialized placement" due to their "emotional and psychological development," and the agency had not identified a prospective adoptive parent. (*In re Asia L., supra*, 107 Cal.App.4th at pp. 511-512.) Here, the prospective adoptive parents have been identified and, given the "great improvements regarding [the children's] health and emotional well-

being,” there is no reason to believe that the children could not be placed with other adoptive parents if necessary.

Mother relies on *In re Brian P, supra*, 99 Cal.App.4th 616 for the assertion that the social worker’s opinion as to adoptability is insufficient by itself to support an adoptability finding, and that the facts in this case do not support the social worker’s opinion. We agree that a social worker’s opinion of adoptability is, by itself, insufficient to support a finding of adoptability. However, as explained above, the most recent reports regarding the children provide ample support for the court’s adoptability findings.

*B. Denial of Mother’s Section 388 Petition*

At the time set for the section 366.26 hearing, Mother presented her section 388 petition. Following Mother’s testimony and the argument of counsel, the court denied the petition. Mother contends the denial was an abuse of discretion. We disagree.

Section 388 allows the parent of a dependent child to petition the juvenile court to change, modify, or set aside a previous order of the court. Under the statute, the parent has the burden of establishing by a preponderance of the evidence that (1) there is new evidence or changed circumstances justifying the proposed change of order, and (2) the change would promote the best interest of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; § 388, subds. (a), (b).) In this case, the court found that Mother had failed to establish either prong. The decision to grant or deny the petition is addressed to the sound discretion of the juvenile court, and its denial of the petition will not be overturned

on appeal unless an abuse of discretion is shown. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959-960 [Fourth Dist., Div. Two].)

“After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability’ . . . .” (*In re Stephanie M., supra*, 7 Cal.4th at p. 317, quoting *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Still, it is at this very point that “[s]ection 388 plays a critical role in the dependency scheme. Even after family reunification services are terminated and the focus has shifted from returning the child to his parent’s custody, section 388 serves as an ‘escape mechanism’ to ensure that new evidence may be considered before the actual, final termination of parental rights.” (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.)

Mother supported her section 388 petition with a letter from a DPSS social worker in the dependency case involving Mother’s fifth child, J. This letter indicated that Mother had completed counseling and was participating in parenting and substance abuse programs. The letter and Mother’s testimony regarding her participation in services do not establish that Mother has adequately addressed the primary concern that led to this dependency proceeding—the parents’ neglect of the children’s health and medical conditions. Thus, although such evidence indicates that Mother may, as the juvenile court stated, “be in the process of changing her circumstances,” it does not establish a change in circumstances for purposes of section 388.

Nor has Mother established an abuse of discretion as to the court's finding that the requested change would not be in the children's best interests. Mother argues that the children were happy to see her at visits and that DPSS described her as loving, attentive, and caring toward the children. However, other than the evidence regarding her incomplete participation in reunification services with respect to J., Mother offered no substantial evidence that she had the ability to parent the three children in this case. According to an August 2012 report, Mother was living in a homeless shelter and there was nothing offered in support of the section 388 petition to indicate that she could provide a stable or permanent home for the three children. Nor was there any evidence indicating that Mother was able to handle the particular medical and emotional needs of these children. By contrast, the prospective adoptive parents reportedly "have the capability to meet [the children's] needs both emotionally and physically." Moreover, while in the prospective adoptive parents' care, the children "have made great improvements regarding their health and emotional well-being," and have "developed a strong bond and connection to the prospective adoptive parent's extended family members and refer to them as their family."

Based on our review of the record, the court's denial of Mother's section 388 petition was not an abuse of discretion.

### *C. Failure to Comply with the Notice Requirements of the ICWA*

Mother and Father make two arguments regarding DPSS's compliance with the ICWA. Father argues that DPSS failed to notify a specific tribe. Mother asserts that the

ICWA notices sent to the Indian tribes did not include enough information about the parents' ancestry. We reject Father's argument and agree with Mother.

1. Background 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, the ICWA allows a tribe to intervene in state court dependency proceedings. (25 U.S.C.A. § 1911(c).)

Notice to Indian tribes 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); *In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 469.) The notice of the proceeding 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.) 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 (BIA) 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.)

California law requires that notice "be sent to all tribes of which the child may be a member or eligible for membership, until the court makes a determination as to which

tribe is the child's tribe . . . ." (§ 224.2, subd. (a)(3).) The tribes to which notice must be sent are "all federally recognized tribes within the general umbrella identified by the child's parents or relatives." (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1202.) Thus, if a parent indicates a child may have "Apache" ancestry, notice must be sent to all tribes the federal government recognizes as Apache tribes. (*Ibid.*; see also *In re J.T.* (2007) 154 Cal.App.4th 986, 992 [indication of Sioux ancestry required notice be given to all 16 federally recognized Sioux tribes].)

The notice must "contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership." (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576 [Fourth Dist., Div. Two].) In addition to other information, the notice must include the following information "if known": The child's name, birth date, and birthplace, and "[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 . . . ." (Welf. & Inst. Code, § 224.2, subd. (a)(5)(A), (C); see also 25 C.F.R. § 23.11(d).)

To fulfill the notice requirement, juvenile courts and county welfare departments have "an affirmative and continuing duty to inquire" whether a dependent child is or may be an Indian child. (*In re W.B.* (2012) 55 Cal.4th 30, 53; § 224.3; Cal. Rules of Court, rule 5.481.) To satisfy this duty, 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).) This duty, however, does not require the welfare agency "to conduct a comprehensive investigation into the child's Indian status." (*In re C.Y.* (2012) 208 Cal.App.4th 34, 39.)

"If proper and adequate notice has been provided . . . , and neither a tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that [ICWA] does not apply to the proceedings . . . ." (§ 224.3, subd. (e)(3).) A trial court's findings regarding the applicability of the ICWA to a juvenile proceeding and the adequacy of notice under the ICWA are reviewed for substantial evidence. (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.)

## 2. Summary of Facts Regarding the ICWA Notice

At the time of the detention hearing, Mother checked a box on an ICWA-020 form indicating she is or may be a member of, or eligible for membership in, the "Cherokee" tribe. Father made a similar indication on his form as to the "Apache" tribe. The court found that the ICWA may apply and ordered DPSS to provide notice as required by law.

Ten days after the detention hearing, the parents were interviewed by a social worker. Mother said she may have Indian ancestry through the Cherokee tribe; Father said he may have Indian ancestry through the Apache tribe. Each denied knowing any

family members who were registered members of the respective tribes. The record does not otherwise indicate what social workers did to obtain information regarding the parents' ancestors.

DPSS sent ICWA notices on form ICWA-030 regarding the proceedings to the BIA, three Cherokee-affiliated tribes and eight Apache-affiliated tribes.<sup>5</sup> The notices included: the names, addresses, and dates of birth of Mother, Father, and the maternal grandmother; the name and date of birth of the maternal grandfather (deceased); and the name of one maternal great-grandfather (deceased). In the spaces on the ICWA-030 form for stating the person's tribe, DPSS indicated: eight Apache tribes for Father; three Cherokee tribes for Mother, the maternal grandfather, and the maternal great-grandfather; "Does Not Apply" as to the maternal grandmother; and "No information available" as to the maternal great-grandmother and each of Father's ancestors. Attached to the ICWA-030 forms are declarations signed by a social worker under penalty of perjury that the social worker has given all the information she has about the children's relatives.

None of the noticed tribes indicated that any of the children were Indian children for purposes of the ICWA.

At a six-month review hearing held in April 2011, the court found that there was "good notice" under the ICWA and that the ICWA did not apply.

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<sup>5</sup> The tribes are: (1) Cherokee Nation; (2) Eastern Band of Cherokee Indians; (3) United Keetoowah Band of Cherokee; (4) Apache Tribe of Oklahoma; (5) Fort Sill Apache Tribe of Oklahoma; (6) Jicarilla Apache Nation; (7) Mescalero Apache Tribe; (8) San Carlos Tribal Council; (9) Tonto Apache Tribal Council; (10) White Mountain Apache Tribe; and (11) Yavapai-Apache Nation.

3. Father's Argument Regarding the Failure to Give Notice to the Fort McDowell Yavapai Nation

Father contends DPSS should have sent the ICWA notice to the Fort McDowell Yavapai Nation. We disagree. Because Father indicated he might have Apache heritage, DPSS was obligated to send notices to Apache-affiliated tribes. The BIA has indicated which tribes the federal government recognizes as Apache-affiliated in its list of designated tribal agents for service of notice. (See, e.g., 75 Fed.Reg. 28104 (May 19, 2010).) At the time DPSS sent its ICWA notices, the BIA listed the eight Apache tribes to which DPSS sent its notices. (*Id.* at p. 28125.) The Fort McDowell Yavapai Nation is not listed as an Apache-affiliated tribe; it is listed as a Yavapai-affiliated tribe. (*Id.* at p. 28142.) There is nothing in the record to indicate that anyone knew or had reason to know that any of the children have Yavapai ancestry.

Father cites *In re Glorianna K.* (2005) 125 Cal.App.4th 1443 as authority for the assertion that the Fort McDowell Yavapai Nation was “formerly known as the Fort McDowell Mohave-Apache Community of the Fort McDowell Indian Reservation.” In *In re Glorianna K.*, the court does refer to the “Fort McDowell Mohave Apache” tribe. (*Id.* at p. 1449.) However, it does not indicate that it is the former name of the Fort McDowell Yavapai Nation. Moreover, the pertinent information for service of ICWA notices is the BIA’s list of tribes in effect at the time the notices are sent. (See *In re Alice M.*, *supra*, 161 Cal.App.4th at p. 1202.) Thus, even if the Fort McDowell Yavapai

Nation is a successor to the tribe referred to in *In re Glorianna K.*, at the time relevant here, it was not (according to the BIA) an Apache-affiliated tribe.<sup>6</sup>

Because the federal government does not recognize the Fort McDowell Yavapai Nation as an Apache-affiliated tribe and there is nothing to indicate that the children have any Yavapai ancestry, DPSS was not required to send ICWA notice to the Fort McDowell Yavapai Nation.

#### 4. Mother's Argument Regarding the Sufficiency of the ICWA Notice

Mother argues that DPSS did not comply with the ICWA notice requirements because the agency did not supply the Indian tribes with information about Father's heritage and only limited information about Mother's heritage. Although we disagree with Mother as to the adequacy of the ICWA notice regarding her ancestry, we agree that DPSS failed to provide known information regarding Father's ancestry.

Shortly after the detention hearing, a social worker interviewed Mother and Father and asked about their Indian ancestry. It appears that each parent could state only that they "may" have Indian ancestry; Mother through the Cherokee tribe; Father through the Apache tribe. Each parent denied knowing any family member who was a registered member of a tribe.

From the ICWA-030 forms sent to the tribes, it appears that any possible Cherokee ancestry was through Mother's father's side of the family. This is because DPSS indicted

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<sup>6</sup> Father also cites to a Wikipedia Internet site. The BIA, not Wikipedia, is the appropriate authority for determining which tribes receive notice under the ICWA.

“Does Not Apply” in the space for indicating Mother’s mother’s tribal affiliation, but did set forth the names of Cherokee tribes with respect to Mother’s father’s tribe or band. Mother’s father, however, was deceased and there was no information regarding the maternal great-grandfather. Mother’s father’s birth date and birthplace are included on the ICWA-030 form. There is no reason to believe that the social worker did not make a sufficient inquiry regarding Mother’s ancestry or that further inquiry could have revealed further information. (See, e.g., *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 994-995 [silent record as to extent of inquiry does not mean that inquiry was inadequate]; *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].)

Regarding Father’s ancestry, the record indicates that on the same date that Father told the social worker of his possible Apache ancestry, he told the social worker his mother’s name and said he currently has a good relationship with her. The record does not indicate whether he had contact information for his mother or that she might be available for questioning, or whether Father was asked about such information and availability. Father denied knowing his father or his father’s last name.

As DPSS concedes, the ICWA-030 forms could have included at least Father’s mother’s name, which was known to the social worker, but did not. In addition, Father’s statement that he currently has a good relationship with his mother strongly suggests that he had her contact information and could find out additional biographical information

about her and possibly other relatives. Yet it appears the social worker made no attempt to get that information or to contact Father's mother as required. (See § 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4).) The record thus indicates a failure to fulfill the duty of inquiry and to satisfy the requirement of providing meaningful notice of the children's ancestors to the tribes. We agree with Mother that the errors are not harmless because the absence of the required information prevented the tribes from having a meaningful opportunity to determine the children's tribal heritage. (See, e.g., *In re S.M.* (2004) 118 Cal.App.4th 1108, 1116.)

“Because the juvenile court failed to ensure compliance with the ICWA requirements, the court's order terminating parental rights must be conditionally reversed. This ‘does not mean the trial court must go back to square one,’ but that the court ensures that the ICWA requirements are met. [Citations.] ‘If the only error requiring reversal of the judgment terminating parental rights is defective ICWA notice and it is ultimately determined on remand that the child is not an Indian child, the matter ordinarily should end at that point, allowing the child to achieve stability and permanency in the least protracted fashion the law permits.’ [Citation.]” (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1168, fn. omitted.)

#### IV. DISPOSITION

The orders terminating parental rights to and placing the children 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 the children's Indian ancestry

pursuant to section 224.1 and, if additional information regarding their ancestry is obtained, send ICWA notices to all relevant tribes in accordance with the ICWA and California law. If additional information is obtained and new notices are sent, DPSS shall thereafter file certified mail, return receipts, for the ICWA notices, 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 any of the children is an Indian child. If the court finds that any of the children are not Indian children, it shall reinstate the orders terminating parental rights as to such child or children and place such child or children for adoption. If the court finds any of the children is an Indian child, it shall conduct all further proceedings as to such child or children in compliance with the ICWA and related California law.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING  
J.

We concur:

RAMIREZ  
P. J.

HOLLENHORST  
J.