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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re D.H., et al., Persons Coming Under the  
Juvenile Court Law.

TULARE COUNTY HEALTH & HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

DANIEL H.,

Defendant and Appellant.

In re NATHAN H., a Person Coming Under the  
Juvenile Court Law.

TULARE COUNTY HEALTH & HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

DANIEL H.,

Defendant and Appellant.

F064215

(Super. Ct. Nos. JJV064975D  
JJV064975E)

F064655

(Super. Ct. No. JJV064975F)

**OPINION**

**THE COURT**\*

APPEAL from a judgment of the Superior Court of Tulare County. Charlotte Wittig, Commissioner.

Carol A. Koeing, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Carol E. Holding, Deputy County Counsel, for Petitioner and Respondent.

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Daniel H. (father) is the presumed father of D. and Daniel and the alleged father of Nathan. This appeal arises after two separate hearings: (1) A Welfare and Institutions Code<sup>1</sup> section 366.26 hearing at which the juvenile court found D. and Daniel were adoptable, that termination of parental rights would not be detrimental, but that parental rights were not terminated pursuant to section 366.26, subdivision (b)(4)<sup>2</sup>; and (2) a separate section 366.26 hearing at which the court found that Nathan was adoptable, that termination of parental rights would not be detrimental, but that parental rights were not terminated, pursuant to section 366.26, subdivision (b)(4).

We find that father has forfeited his contention that the juvenile court should have proceeded as though D. and Daniel were Indian children pursuant to the Indian Child Welfare Act (ICWA; 25 U.S.C., § 1901 et seq.) after the Cherokee Nation reported the

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\* Before Wiseman, Acting P.J., Levy, J. and Franson, J.

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

<sup>2</sup> Section 366.26, subdivision (b)(4), provides that, if the trial court finds that termination of parental rights would not be detrimental to the child and that the child has a probability of adoption but is difficult to place, adoption is to be identified as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family within a period not to exceed 180 days.

children were eligible for membership if certain steps were taken. We also find that father has forfeited his claim that the juvenile court failed to comply with the notice requirements of the ICWA as to Nathan, and reject respondent's concession to the contrary. Judgment is affirmed.

### **PROCEDURAL AND FACTUAL HISTORY**

In September of 2010, police officers responded to a call regarding a welfare check on several children and possible drug use by the parents. The officers found four adults, including V.L. (mother),<sup>3</sup> and seven children at the house. All of the adults were under the influence of methamphetamine. The residence was filthy, as were the children, who smelled of urine and feces. The children's baby bottles were unsanitary; there was no refrigerator and no milk products in the house. A section 300 petition was filed by Tulare County Health and Human Services Agency (the agency) and all seven children, including D., almost two, and Daniel, almost one, were placed into protective custody.<sup>4</sup> At the time, father was incarcerated for a parole violation.

#### ***September 27, 2010, Detention Hearing (D. and Daniel)***

Father was not present at the September 27, 2010, detention hearing, but an attorney was appointed to represent him. Mother reported that she believed she had Cherokee Indian heritage. According to mother, her aunt, Mary, lived on a Cherokee Reservation in Oklahoma. Mother did not know her aunt's last name, but that it might be the same as her mother's, and that her mother was most likely to have the necessary information on the family's Native American ancestry. The social worker stated that she had been unsuccessful in contacting mother's mother prior to the detention hearing.

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<sup>3</sup> Mother is not a party to this appeal.

<sup>4</sup> The other children included mother's three older children (half siblings to D. and Daniel, who are not parties to this appeal) and two children of mother's sister, another one of the adults in the house at the time.

The juvenile court detained the children and found that the ICWA “may” apply. It directed mother to provide the social worker, within two court days, the names and addresses of any relative who may have information concerning her Native American ancestry.

Approximately two weeks later, mother provided the social worker with the contact information for her aunt Mary. The social worker subsequently contacted Mary, mother’s mother, another maternal aunt, Linda, and the Cherokee Nation. The social worker’s report detailed the efforts to obtain sufficient information to determine the children’s status with the Cherokee Nation. Father denied any Native American ancestry.

***October 28, 2010, Jurisdiction/Disposition Hearing (D. and Daniel)***

Father, who was still incarcerated, was present at the October 28, 2010, jurisdiction/disposition hearing; mother was not. The juvenile court found the section 300, subdivision (b) allegations true as to mother and the section 300, subdivision (g) allegation true as to father.

Recognizing that the applicability of the ICWA was still unresolved, all counsel stipulated to proceeding with the disposition hearing, except for findings related to the ICWA. Reunification services were ordered for both mother and father, including drug treatment and testing, as well as visitation. A further disposition hearing was scheduled to address the applicability of the ICWA.

***Disposition Hearing on the ICWA Issue November 18, 2010 (D. and Daniel)***

The social worker, in anticipation of the further disposition hearing, continued to make efforts to determine the children’s status with the Cherokee Nation. Notice was sent to the Cherokee Nation, as well as the birth and death certificates for the children’s maternal great-grandfather, Dennis O. The tribe had requested such records as proof that mother was related to Dennis O., through whom mother claimed Cherokee ancestry.

At the November 18, 2010, further disposition hearing, the agency reported that a letter was received from the Cherokee Nation “a few moments ago.” The letter,

submitted as part of the file, indicated that the children's maternal great-great grandmother and great-great grandfather were enrolled members, that the children were "eligible for enrollment and affiliation with Cherokee Nation," and further that the tribe was "not empowered to intervene in this matter unless the child/children or eligible parent(s) apply and receive membership." The letter did not indicate that mother or father was a member of the tribe. A membership application for the children was enclosed with the letter. The matter was continued to December 10, 2010.

***December 10, 2010, Disposition Hearing on the ICWA Issue (D. and Daniel)***

A report filed by the agency in anticipation of the continued ICWA hearing included a declaration from an ICWA expert opining that the ICWA did not apply. At the hearing, father, who was at this point released from custody, was not ordered to appear, but was represented by counsel. The juvenile court noted that, based on the affidavit submitted by the social worker, it appeared that the ICWA did not apply and asked if any counsel wished to be heard. All counsel, including father's replied "No." The court then found that the ICWA did not apply. The evidence underlying this finding is summarized in our discussion, *post*. Father did not file an appeal.

***Six-Month Review April 6, 2011 (D. and Daniel)***

The report prepared in anticipation of the April 6, 2011, review hearing stated that neither mother nor father were able to comply with their case plan services. Both father and mother tested positive for methamphetamine on December 1, 2010. Shortly thereafter, father was returned to custody on a parole violation. When he was released in March of 2011, he entered an in-custody substance abuse program.

The agency continued efforts to complete the Cherokee Nation membership applications on behalf of the children. They were eventually completed, with mother's assistance, and submitted on February 15, 2011. A month later, the agency followed up with the tribe, but no further information had been received at the time of the review hearing.

The juvenile court terminated reunification services for mother, but continued them for father.

***Nathan's Birth August 2011***

In August of 2011, a month prior to the 12-month review hearing for D. and Daniel, mother gave birth to Nathan. Both mother and baby tested positive for methamphetamine at the time of his birth. Nathan was detained and placed in foster care with D. and Daniel. By this time, father, who was listed in the petition as Nathan's father, was once again in prison on a parole violation.

***August 10, 2011, Detention Hearing (Nathan)***

At the detention hearing for Nathan, held August 10, 2011, father was in custody and appeared with counsel; mother was not present. The juvenile court had before it information that mother had told a hospital social worker at the time of Nathan's birth that her mother was Native American and that mother was trying to register with the Cherokee Nation. Father stated that he did not have any reason to believe that Nathan was eligible for membership in a Native American tribe. No notice was sent to the Cherokee or any other tribe.

The juvenile court found that father was Nathan's alleged father, that the ICWA did not apply and ordered Nathan detained.

***September 21, 2011, 12-Month Review Hearing (D. and Daniel)***

The report prepared in anticipation of the 12-month review hearing for D. and Daniel stated that father had failed to complete an in-custody substance abuse program, that he last visited D. and Daniel in early May of 2011, and that he did not re-engage in services and was once again in prison. Mother no longer had contact with the agency.

The juvenile court, on the recommendation of the social worker, terminated services for father, found visits with the children would be detrimental and set a section 366.26 hearing. Father did not file a writ.

***October 20, 2011, Jurisdiction/Disposition Hearing (Nathan)***

Father waived his appearance at the jurisdiction/disposition hearing for Nathan on October 20, 2011, but was represented by counsel. The agency report prepared in anticipation of the hearing included an interview with father in which he reported that he introduced mother to drugs. The agency recommended that reunification services be denied.

The juvenile court sustained the petition and found that father was an alleged father to Nathan, that there was insufficient reason to believe that Nathan was an Indian child covered by the ICWA, and that visits with father would be detrimental to Nathan. The juvenile court denied reunification services and scheduled a section 366.26 hearing. Father did not file a writ.

***December 20, 2011, Section 366.26 Termination Hearing (D. and Daniel)***

The report filed in anticipation of the December 20, 2011, termination hearing on D. and Daniel, stated that all six children,<sup>5</sup> who were deemed adoptable as a sibling group, had been placed together as of November 4, 2011, in a proposed adoptive home. The proposed adoptive family had not yet made a firm commitment to adopt the sibling group. If the proposed adoptive home could not commit within a 60-day time period, the agency would seek another adoptive home. The social worker recommended that parental rights to D. and Daniel be terminated.

An addendum report filed January 12, 2012, stated that the children were still with the proposed adoptive family, but that the family had not yet made a firm commitment to adopt all six children. The social worker recommended that termination of parental rights would not be detrimental, but that the matter be continued for 180 days pursuant to section 366.26, subdivision (b)(4), to allow the agency to locate a permanent adoptive home.

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<sup>5</sup> D., Daniel, Nathan and the three older half siblings.

***January 19, 2012, Section 366.26 Contested Hearing (D. and Daniel)***

At the subsequent contested hearing on January 19, 2012, for D. and Daniel, father testified and argued that termination of parental rights would be detrimental because the beneficial relationship exception applied (§ 366.26, subd. (c)(1)(B)(i)) and that the agency had failed to provide reasonable services (§ 366.26, subd. (c)(2)). No mention was made of the Indian child exception (§ 366.26, subd. (c)(1)(B)(vi)).

The juvenile court found that father had not met his burden to show that either the beneficial relationship exception applied or that reasonable services had not been provided. It found that termination of parental rights would not be detrimental to D. and Daniel, but parental rights were not terminated to allow the agency to locate a permanent adoptive home (§ 366.26, subd. (b)(4)). A further section 366.26 hearing was set for June 29, 2012. This appeal followed.

***February 10, 2012, Section 366.26 Termination Hearing (Nathan)***

The report prepared in anticipation of the February 10, 2012, termination hearing for Nathan, stated that the six children were together in a proposed adoptive family home, a home which was still determining whether it could commit to all six children. If the proposed home could not commit, the agency would seek another adoptive home, as the goal was adoption as a sibling group. The social worker recommended that termination of parental rights would not be detrimental, but that the matter be continued for 180 days pursuant to section 366.26, subdivision (b)(4) to allow the agency to locate a permanent adoptive home.

The social worker's report stated that mother had called January 11, 2012, to say that she had found out she did have Native American ancestry and that she would call back with more information. No further call was received from mother. No notice was sent to the Cherokee Nation or any other tribe.

Father was present with counsel at the hearing. He stated that he had not, as yet, had an "opportunity to see Nathan" because he was incarcerated when Nathan was born

and remained incarcerated. Father requested visits with Nathan after he was released from prison on February 27, 2012.

The juvenile court found that termination of parental rights would not be detrimental, but did not terminate parental rights to allow the agency to pursue a permanent adoptive home (§ 366.26, subd. (b)(4)). A further section 366.26 hearing was set for June 29, 2012. The juvenile court continued to find that visits with father were detrimental to Nathan. This appeal followed.

## **DISCUSSION**

### **I. ICWA COMPLIANCE AS TO D. AND DANIEL**

For the first time, father makes various allegations of error under the ICWA. Father argues the juvenile court should have proceeded as if D. and Daniel were Indian because the Cherokee Nation reported that the children were eligible for tribal membership. He relies on California Rules of Court, rule 5.482(c) (rule 5.482(c)), which states:

“[i]f after notice has been provided as required by federal and state law a tribe responds indicating that the child is eligible for membership if certain steps are followed, the court must proceed as if the child is an Indian child and direct the appropriate individual or agency to provide active efforts under rule 5.484(c) to secure tribal membership for the child.”

He argues that the agency should have assisted the children in obtaining enrollment.

Father makes additional ICWA arguments that there was no stipulation by father to allow the qualified expert’s declaration in lieu of testimony; that the qualified expert’s declaration was not submitted to the tribe; that the juvenile court failed to make the dispositional findings required by the ICWA; that the placement preferences of the ICWA should have been followed; and that the juvenile court failed to make findings at the termination hearing consistent with the ICWA.

Because we agree with respondent that father has forfeited the ICWA application issue, we do not address respondent’s additional arguments.

### ***Procedural Background***

At the outset of these dependency proceedings, mother informed the juvenile court that she had an aunt who was living on a Cherokee reservation. The social worker investigated and proper notice under ICWA was provided. In November 2010, the Cherokee Nation wrote the agency that the children were eligible for enrollment with the Cherokee Nation because they could be traced in tribal records through extended family members, the children's great-great grandmother and great-great grandfather. The Cherokee Nation added it was not empowered to intervene in the dependency unless the children or eligible parent applied and received membership. It also enclosed a membership application for the children. A further disposition hearing was scheduled to address the applicability of the ICWA.

A report filed by the agency in anticipation of the December 10, 2010, continued ICWA hearing, included a December 9, 2010, "DECLARATION OF ICWA EXPERT" prepared by social worker, Sean Osborn, from another agency. According to Osborn, he spoke with the Cherokee Nation's tribal representative who confirmed that the tribe was able to trace Native American ancestry of the children through the maternal great-great grandparents, but that mother was not an enrolled member of the tribe. In Osborn's view, the ICWA did not currently apply according to section 224, subdivision (c) which he quoted as follows:

"A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings."

Osborn added that the children were not members of the tribe and, although they were eligible for membership, they were not the biological children of a person who was an enrolled member of the tribe.

Osborn discussed the legal requirements of “Active Efforts” under section 361.7 and “placement preferences” under section 361.31, if the ICWA did apply. He also stated that it was “not the responsibility of the social worker to facilitate enrollment of the children,” but that it was “extremely important” for mother to enroll herself or the children with the Cherokee Nation, before ICWA applied in this case.

At the December 10, 2010, hearing, father, who was at this point released from custody, was not ordered to appear, but was represented by counsel. The juvenile court noted that, based on the affidavit submitted by the social worker, it appeared that the ICWA did not apply and asked if any counsel wished to be heard. All counsel, including father’s replied “No.” The court then found that the ICWA did not apply. Father did not file an appeal.

### ***Forfeiture***

Father has forfeited his claim regarding the application issue. Father had the opportunity but did not wish to be heard on the issue when it was raised at the December 2010 disposition hearing for D. and Daniel. Nor did father object when, at the December 2010 dispositional hearing, the agency took the position the children were not the biological children of a member of any American Indian tribe and asked the court to find that the ICWA did not apply. Father had the opportunity to object in response to the agency’s motion and thereby bring this alleged error to the juvenile court’s attention so that it might be corrected. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) By remaining silent, father has forfeited his complaint. (*Ibid.*) Any other holding would permit father to play “fast and loose” with the administration of justice by deliberately standing by without objecting and permitting the proceedings to reach a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not. (*In re Riva M.* (1991) 235 Cal.App.3d 403, 412.)

In addition, father has also forfeited the issue by his failure to appeal from the juvenile court’s determination that there was insufficient reason to believe the children

were Indian children covered by the ICWA. The juvenile court's ICWA determination was part of its December 2010 dispositional findings and orders, which were appealable. (§ 395, subd. (a).) Father did not seek appellate review.

When the juvenile court later terminated reunification services and set the section 366.26 hearing, father still did not seek this court's review by way of extraordinary writ petition. Father's failure to do so precludes subsequent review on appeal from the termination orders. (§ 366.26, subd. (1)(2).) To permit father to raise an issue going to the validity of a final and earlier reviewable order would directly undermine dominant concerns of finality and reasonable expedition, including the predominant interest of the children. (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018.)

## II. ICWA NOTICE COMPLIANCE AS TO NATHAN

Father contends that the juvenile court failed to comply with the notice requirements of the ICWA as to Nathan. We find the agency's concession on the issue not well taken and find that father has forfeited this claim as well.

At the August 10, 2011, detention hearing, the court had before it information that mother, at the time of Nathan's birth, had told a social worker that she was Native American and trying to register with the Cherokee Nation. At the hearing, father, when asked if he had any reason to believe that Nathan was eligible for "any such membership," replied, "Not that I know of ...." The juvenile court (the same commissioner that had also presided over the detention of D. and Daniel) stated that, "Based on the report of the social worker as to information provided by the mother *and taking judicial notice of the entire case file*, the Court finds that there is insufficient reason to believe that ICWA is applicable in this matter...." Father did not object.

At the subsequent October 20, 2011, dispositional hearing for Nathan, the juvenile court found that there was insufficient reason to believe that Nathan was an Indian child covered by the ICWA. No notice was ever sent to the tribe.

The problem for father is that the court's October 2011 finding was part of an appealable order (§ 395, subd. (a); *In re Jesse W.* (2001) 93 Cal.App.4th 349, 355-356), which he did not appeal. Thus, the time to raise his ICWA compliance issues has passed. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 185.) In *In re Pedro N.*, this court held a parent who fails to timely challenge a juvenile court's action regarding ICWA is foreclosed from raising ICWA notice issues once the court's ruling is final in a subsequent appeal. In so ruling, we specifically held we were only addressing the rights of the parent, not those of a tribe. (*Ibid.*)

We therefore reject father's claim to the contrary.

#### **DISPOSITION**

The orders of the juvenile court are affirmed.