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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re K.C. et al., Persons Coming Under the
Juvenile Court Law.

H036896
(Santa Cruz County
Super. Ct. Nos. DP002363 &
DP002364)

SANTA CRUZ HUMAN RESOURCES
AGENCY,

Plaintiff and Respondent,

v.

T.C. et al.,

Defendant and Appellant.

The Santa Cruz County Human Services Department (Department) filed a petition to declare two-year old Z.J. (Zachary) and his four-year old sister K.C. (Kirsten) to be persons within the jurisdiction of the juvenile court, based upon evidence that Zachary had suffered severe non-accidental brain injuries while in the care of his mother or her cohabitant boyfriend.¹ The court sustained the petition in its entirety, placing Kirsten

¹ To protect anonymity without creating an indigestible alphabet soup, we have given the children the fictional names Zachary and Kirsten. We will sometimes refer to appellant T.C. as Mother, appellant J.P. as Father, and Mother's cohabitant as Companion.

with the children's father and Zachary with their paternal grandmother. Both parents have appealed, contending among other things that (1) the evidence is insufficient to sustain the juvenile court's jurisdictional findings; (2) the Department did not make sufficient efforts to prevent removal of Zachary from the home of his father; and (3) the record does not show compliance with the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA), and California law implementing it. We hold that (1) the record does not support jurisdiction under Welfare and Institutions Code section 300, subdivision (e) (§300(e)), because it does not contain substantial evidence that Mother should have known, prior to the discovery of Zachary's injuries, that he was being physically abused; (2) the record does support jurisdiction under Welfare and Institutions Code section 300, subdivision (c) (§300(c)), because it contains substantial evidence that Zachary had suffered serious physical injury while under Mother's supervision and control, and that he was exposed to a risk of recurrence by her present and continuing refusal to acknowledge the probable non-accidental cause of the injury; (3) the record fails to show that the Department complied with ICWA by providing all reasonably available information concerning possible Indian ancestry to all tribes in which the children may be members or eligible for membership. Accordingly we will set aside the true finding under section 300(e) and order a limited reversal for ICWA compliance.

BACKGROUND

Mother and Father were never married, but lived together for about eight years before separating in January 2010. They had no formal custody order, but Mother told a social worker they "shar[ed] 50/50 custody" of the two children. At the commencement of the events giving rise to this matter, Mother lived with Companion (see fn. 1, *ante*), her two children, and sometimes Companion's three children.

Around mid-September, 2010, "while changing [Zachary's]'s diaper," Father noticed what he later described as "a partial handprint bruise on [Zachary's]'s pubic area.

[He] reported that the fingers were pointing upward toward [Zachary's] navel. [Father] talked to [Mother] about this and she told him she did not know anything about it and did not want him to tell anyone about it for fear their children would be taken away.”²

Mother admitted that the conversation with Father occurred, but viewed it differently. In a written declaration she said that Father had showed her a bruise near Zachary's hip while making a gesture to convey that Zachary had been struck there. She interpreted the suggestion as “ridiculous,” stating, “It was barely 4 tips of the fingerprints up by his hip that matched my own, like for when I lift him up playing around like we do all the time. [Zachary] is very fair and bruises; scratches, and marks show up easily on his skin. It didn't look painful, and it definitely didn't look sexual or like any type of abuse. I told [Father] what I thought the bruises were from. [Father] said that he was going to go get a second opinion. I said that's ridiculous, that if he did, he was just asking for trouble.”

According to Department reports, Father reported the bruise to day care workers, who promised that they would “keep an eye on [Zachary] and pay special attention to him.” One teacher reported that she “asked every staff member if they had noticed any bruises on [Zachary's] pubic area.” All responded negatively, and there was apparently no relevant entry in the preschool's “diaper log.” The teacher opined that “the father was trying to make trouble,” that he “often searched for something to complain about,” and that his “report of the bruise did not make sense to her.” Nonetheless, the staff had continued to “monitor” Zachary for “suspicious bruising.”

The children were in Father's care over the weekend of October 8-10, 2010. Around 1:30 p.m. on Monday, October 11, Father dropped Zachary off at his preschool.

² Father did not testify concerning this critical incident, but the trial court expressly relied on his account as paraphrased in the Department's jurisdictional report. That account was admissible over Mother's hearsay objection because Father was available for cross-examination. (Welf. & Inst. Code, § 355, subd. (c)(1)(D).)

He later reported that Zachary appeared “fine” at this time; he was “walking and playing” and did not appear sick or weak. Preschool staff members also reported that he was “fine,” “acting like himself,” and “acting and behaving as he normally does.” Mother picked him up around 3:30 p.m. She later described him as seeming tired and not showing much appetite, but this could be attributed to his not having had his usual nap that day. He went to bed around 5:30 that evening.

On the morning of Tuesday, October 12, Companion got the children ready for school. Mother reported that Zachary threw up his breakfast after a coughing fit, but this had happened before. He did not otherwise appear to be in discomfort or to exhibit any difficulty with balance. Mother saw nothing that alarmed her.

Companion took Zachary to preschool around 8:40 a.m. on Tuesday morning. A preschool teacher told an officer that Zachary “played a little with some toys,” but later she saw him lying on the picnic table bench. He seemed “very tired” and “lethargic,” but not feverish. He slept in her arms for about half an hour. “His breathing was normal, but his eyes at times were open.” Around noon she put him on his sleeping mat and let him sleep. He got up on his own around 3:00 p.m., but refused to eat his lunch, taking only a small amount of yogurt. He “put his head down on the table like he wanted to go back to sleep.” Soon thereafter Companion arrived to pick him up. Logs show him signing Zachary out at 3:30 p.m. that afternoon.

Mother later told a social worker that Companion picked up Zachary, drove him home, and put him to bed. When he checked on him later, Zachary had vomited. He also had diarrhea, so Companion gave him a bath, after which he vomited again. Around 5:15 p.m. Companion called Mother and told her she had better come home because Zachary was having trouble breathing and he thought he should go to the emergency room.

Mother testified that when she arrived home from work around 5:30 p.m., she was alarmed to observe a marked difference in Zachary's behavior. Mother testified that Zachary was clutching his stomach, his face was scrunched up, and he was clearly in discomfort. She immediately took him to the emergency room at Dominican Hospital. His blood sugar was found to be high and he was apparently diagnosed as suffering from dehydration and a tummy virus. He was also reportedly unable to hold up his head, just wanting to sleep. No x-rays were taken. Mother and son were discharged around midnight with instructions to follow up the next day with his regular doctor.

Mother took Zachary to see his regular physician, Dr. Cortez, in the early afternoon of Wednesday, October 13. A chest x-ray was taken at Dominican Hospital. Cortez told Mother that it showed "very bad pneumonia" and that Zachary should be taken to Stanford Hospital, presumably meaning Lucille Packard Children's Hospital (Packard). She arrived there around 8:00 p.m.

In the Packard emergency room Zachary "[r]espond[d] only to maximal stimulation" and "refus[ed] to open his eyes to painful stimuli." A CT scan disclosed bleeding in the brain. Further testing and examination disclosed bleeding in both retinas. He had also sustained a skull fracture.

These findings raised a suspicion of "nonaccidental injury," which was reported to the Department on October 14, 2010. A social worker questioned Mother, whose only explanation for Zachary's condition was that at preschool some three or four weeks earlier, he had fallen off a picnic table and hit his head.³ She denied that Father was

³ The table top measured about 20 inches high; the bench was about a foot off the ground. The Department's medical expert, Dr. Gilgoff, testified that the bleeding on Zachary's brain was not consistent with an injury more than a week old, and that the amount of bleeding as well as the retinal bleeding observed in him were not consistent with a fall.

Mother attributed the skull fracture to an even earlier incident in which Zachary's head had been slammed in a van door. This possibility could not be medically ruled out;

violent, although she reported—and he acknowledged—that he had been imprisoned in his late teens for assaulting his mother’s abusive boyfriend. She said that he did not hit or abuse their children. Asked if she thought Companion might have injured Zachary, she replied that he was a great father and she had not seen any behavior that concerned her.

On October 18, 2010, the Department filed petitions as to both Zachary and Kirsten alleging that each was a person described in Welfare and Institutions Code section 300.⁴ As ultimately amended, the Zachary petition alleged that he came within section 300, subdivision (b) (§ 300(b)) (failure to protect) as to both parents, and came within section 300(e) (severe physical abuse) as to Mother. The Kirsten petition alleged that she came within section 300(b) on account of Mother’s supposed substance abuse, and came within section 300, subdivision (j) (abuse or injurious neglect of sibling) on account of physical abuse of Zachary

On December 21, 2010, after nearly two months of inpatient rehabilitation, Zachary was placed with his paternal grandparents. At the time of the jurisdictional hearing he walked with a brace on his right leg and lacked full motion in his right arm, including the ability to grip a banister or break a fall. He walked with a limp and could not use stairs without help. Father testified that Zachary also suffered “blindness in his right eye due to bleeding behind the optic nerve.” An initial facial droop had disappeared, and he was progressing in his ability to use language. However his cognitive prognosis remained unclear.

For the first five months after Zachary’s injury was discovered, the Department viewed both parents as potentially responsible for it. As a result, the Department and

Dr. Gilgoff testified that due to the manner in which skull fractures heal, it was impossible to “time or date” the fracture.

⁴ Except as otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

medical personnel restricted the access of both parents to the children as well as to information regarding Zachary's medical status. On March 22, 2010, the Department received a report from pediatrician Rachel Gilgoff, who concluded, largely from the statements of witnesses, that the injury was probably inflicted "on the afternoon of 10/11/10 or the morning of 10/12/10." This rendered it unlikely that Zachary had been injured while in Father's care. The Department thereafter amended the petition to attribute responsibility for the injury only to Mother.

The court commenced a contested jurisdictional and dispositional hearing on April 4, 2011. At its conclusion, the court sustained all allegations of both petitions, as amended to conform to proof. The court ordered Kirsten removed from the physical custody of Mother and placed in that of Father. As to Zachary, the court ordered custody removed from mother and continued out-of-home placement with his paternal grandmother. The court ordered reunification services for both parents as to Zachary. As to Kirsten the court ordered family maintenance services.

Both parents filed timely notices of appeal from the orders affecting both children.

DISCUSSION

I. MOTHER'S APPEAL

A. Standard of Review

Both parents challenge the sufficiency of the evidence to support the jurisdictional findings. The principles governing such a challenge are familiar. In the trial court, child welfare authorities have the duty to establish the jurisdictional facts by a preponderance of the evidence. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1014.) On appeal, however, "we must uphold the [trial] court's [jurisdictional] findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial

evidence to support the findings. [Citation.]’ ” (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.)

“To be sufficient to sustain a juvenile dependency petition the evidence must be ‘ “reasonable, credible, and of solid value” ’ such that the court reasonably could find the child to be a dependent of the court [Citation.]” (*In re R.M.* (2009) 175 Cal.App.4th 986, 988.) Moreover, “[s]ubstantial evidence . . . is not synonymous with any evidence. [Citation.] ‘A decision supported by a mere scintilla of evidence need not be affirmed on appeal.’ [Citation.] Although substantial evidence may consist of inferences, those inferences must be products of logic and reason and must be based on the evidence. Inferences that are the result of mere speculation or conjecture cannot support a finding. The ultimate test is whether a reasonable trier of fact would make the challenged ruling considering the whole record. [Citations.]” (*In re James R., Jr.* (2009) 176 Cal.App.4th 129, 135.)

B. Section 300(e)

1. Mootness

Mother contends that the evidence before the trial court was insufficient to support the imposition of jurisdiction under section 300(e). Respondent suggests that we need not reach this question if the evidence is sufficient to support jurisdiction under section 300(b). Respondent quotes *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451, where the court wrote, “When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court’s jurisdiction, a reviewing court can affirm the juvenile court’s finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.”

Certainly the rule just stated is consistent with general principles of appellate review. Thus the common practice is to refrain from addressing questions that are unnecessary to the appellate decision. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 342, p. 392.) Similarly, appellate courts do not generally concern themselves with the *reasons* given by the trial court for a judgment or order under review. (*Id.*, § 346, p. 397.) But blind adherence to these principles in an ongoing matter, such as a dependency proceeding, may lead to an irremediable miscarriage of justice if an erroneous but unreviewed finding or reason comes back at a later time to inflict adverse consequences on the appellant. A finding under section 300(e), in particular, imputes a high degree of blameworthiness to the parent, furnishing a ground to “bypass” family reunification, which in turn may furnish a presumptive ground to terminate parental rights. (See *In re K.C.* (2011) 52 Cal.4th 231, 235, 236, 237; *In re Christina A.* (1989) 213 Cal.App.3d 1073, 1076; §§ 361.5, subd. (b)(5), 366.26, subd. (c)(1).) This means that where section 300(e) is successfully invoked, parental rights may be terminated without any effort by child welfare authorities to preserve the existing family. Although the juvenile court elected in this case not to bypass reunification services, it did so as an act of discretion when, if the 300(e) finding is not sustainable, Mother was entitled to reunification services as a matter of right. This court has recently rejected a claim of mootness, substantially identical to the Department’s, in similar circumstances. (*In re D.C.*, *supra*, 195 Cal.App.4th 1010, 1015.) We follow that approach here.

2. Merits

Section 300(e) authorizes the juvenile court to exercise jurisdiction with respect to a child if “[t]he child is under the age of five years and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child.” By its terms this statute applies where the parent has personally inflicted severe physical abuse (“direct

infliction,” see *In re D.C.*, *supra*, 195 Cal.App.4th at p. 1015), or where a person known to the parent has done so at a time when the parent had actual or constructive knowledge (scienter) that such person was inflicting physical abuse (“indirect infliction,” see *ibid.*). It must appear in all cases that the child has suffered “severe physical abuse,” which is defined to include at least one instance of abuse inflicting potentially disabling or life-threatening injuries.⁵ But in cases of indirect infliction—where the parent is not the abuser—the statute also requires physical abuse of which the parent “knew or reasonably should have known.” (§ 300(e).) This abuse need not be “severe.” (*In re Joshua H.* (1993) 13 Cal.App.4th 1718, 1729.) However there must be substantial evidence that it took place and that the parent knew, actually or constructively, of its infliction.

Here the finding of severe physical abuse rested on a single act that inflicted disabling injuries on Zachary. As one doctor wrote, Zachary’s injuries were “most consistent with a severe impact injury to the occiput, with the head accelerated through an arc before the impact, as when the head is slammed down against a firm surface.” When perpetrated by a parent, a single such act is sufficient to establish jurisdiction under section 300(e). But the court below did not find that the severe physical abuse—or any physical abuse—was inflicted by a parent. The court said that while Father “originally had been part of the suspicion by the investigators, . . . the evidence basically has taken Father out of consideration as being a possible actor that may have caused the traumatic injury to [Zachary].” Accordingly, the court had “focused [its] inquiry more on Mother

⁵ “For the purposes of this subdivision, ‘severe physical abuse’ means any of the following: any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; any single act of sexual abuse which causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness; or the willful, prolonged failure to provide adequate food.” (§ 300(e).)

and her partner.” The court said that it was “unable to exclude [Mother] as one of the possible perpetrators,” but was “more inclined to look at” her boyfriend, Companion, “as the possible perpetrator as the person responsible for [Zachary’s] injury.” The court acknowledged that “we don’t know who” actually inflicted the injury, but found that “the evidence and the indicators point more towards” Companion.

Having expressly declined to find that either parent inflicted severe physical abuse, the court was required to determine whether Mother possessed the requisite scienter. The court did not suggest, and indeed there was no evidence, that she actually knew of the single instance of severe physical abuse that led to Zachary’s brain injury before that injury was discovered by doctors. The question then is whether she “should have known” of that or any other physical abuse inflicted on him prior to that time.

To find that Mother “should have known” that Zachary was being abused, it would first have to appear that he was in fact being abused. There was little evidence of any abuse prior to the abuse producing the brain injury. A skeletal scan revealed no “suspicious injuries.” An examination record of October 17 reports “[n]o hematomas, abrasions, [or] lacerations” on examination of the head, and “[n]o rashes, no abrasions, [and] no ecchymoses” on examination of the skin. Another medical examiner noted a scattering of bruises and marks, but the Department made no attempt to show that these were more than the normal hurts sustained by a two-year old—especially one described by the social worker as a “very, very active kid” and by his Mother as bruising and scratching easily.

The only concrete suggestion of any antecedent physical abuse was the single bruise on Zachary’s body to which Father drew Mother’s attention about a month before the brain injury was discovered. But the evidence that this was the result of abuse was exceptionally weak. Father’s account was before the court only as restated in the social workers’ reports, which described the mark as “a partial handprint bruise on [Zachary’s]

pubic area,” with “the fingers . . . pointing upward toward Zane’s navel.” This description left considerable uncertainty about the precise nature, shape, and location of the bruise. The only further information came from Mother, who declared that the bruise consisted of “barely 4 tips of the fingertips up near his hip,” and that the marks matched her own fingers “like for when I lift him up playing around like we do all the time.” The Department made no attempt to show what kind of abuse might have inflicted the bruise or that it resembled the kind of abuse that could have produced the brain injury. The only evidence of Father’s interpretation of the etiology of the bruise is Mother’s report that he “showed me the bruise and made a gesture like he was hitting [Zachary] by the hip in a brushing motion with the tips of his fingers.” She characterized the implied hypothesis as “ridiculous,” and it is indeed difficult to picture. Essentially, all the record shows is that Zachary had a bruise that Father considered suspicious and Mother did not. This did not furnish substantial evidence that abuse was taking place, let alone that Mother should have known it was taking place. The former hypothesis gains credibility only in hindsight, because of the injuries subsequently inflicted on Zachary. But of course that cannot furnish a basis for charging Mother retrospectively with constructive knowledge.

The only other evidence even suggesting antecedent abuse was a report by Father that on one occasion when he was handing Zachary over to Companion, Zachary “gasp[ed] and held on to [Father] for dear life and did not want him to leave.” As both the Department and the trial court acknowledged, however, there was no evidence that this incident was ever reported to Mother. It could therefore have no tendency to impart notice to her. Moreover it seems extremely weak evidence, if evidence at all, that Zachary was being abused by Companion. As Mother observed in her declaration, a two-year old child may often experience anxiety over separation from a family member, or

even from a temporary caregiver.⁶ As for the child’s reported “gasp,” we note that the trial court either read this word, or the court reporter heard it, as “grasp”—an act that can more plausibly be attributed to a two-year old, and one rendering the whole account far less sinister.⁷

Even if the bruise and the posited aversion to Companion were sufficient to sustain a finding of antecedent abuse—which we seriously doubt—they fall far short of the kind of evidence reviewing courts have found sufficient to establish that a parent should have known of such abuse. The trial court cited *In re Joshua H.*, *supra*, 13 Cal.App.4th 1718, apparently in response to Mother’s argument that she could not know of Zachary’s brain injuries because they were only detectable by x-ray. But the case does not meet that argument. The mother in *Joshua H.* actually knew her boyfriend had physically abused her child on multiple occasions. She argued, as relevant here, that she had no reason to know that the abuse was *severe* until doctors determined the nature of the injuries. The reviewing court rejected this argument on the ground that the statute

⁶ A teacher at the preschool reportedly told an officer that when Zachary first arrived and was placed apart from his sister, he “would have trouble separating himself from [her].” On another recent occasion he “didn’t want to go home with [Mother] and hid.” The teacher attributed this to his “ ‘stage/age’ because they don’t want to leave.” This teacher also reportedly said that Zachary “didn’t like to separate from [Father] or [Kirsten]” and that she did not recall him having any trouble separating from Companion. However when the director of the preschool was asked whether she observed any differences in Zachary’s behavior between being dropped off by Companion or by Father, she “couldn’t think of anything unusual.” The teacher with primary responsibility for Zachary answered the same question similarly.

⁷ Indeed Father reported that when he dropped Zachary off at preschool on October 11, Zachary did not want Father to leave and “ ‘staff had to pry him off me.’ ” The chief difference between this incident and the one recounted in the text appears to be Father’s *interpretation* of Zachary’s *motive* in the latter instance. Yet if that interpretation constitutes evidence, then the October 11 incident was evidence that *preschool staff* had been abusing Zachary

requires scienter only with respect to the fact that the child is being physically abused; the parent need not know that the abuse is of the type classified by the statute as “severe.” Here the question is whether the parent should have known that the child was being abused at all. *Joshua H.* contributes nothing to that question.

Nor do we find support for the ruling here in *In re Kenneth M.* (2004) 123 Cal.App.4th 16, which the trial court also cited. That case was concerned with the “bypass” provisions of section 361.5, subdivision (b). (See *In re K.C.*, *supra*, 52 Cal.4th 231, 235, 236.) The court was called upon to apply a statutory proviso that services may be bypassed as to a parent if “[t]he child was brought within the jurisdiction of the court under subdivision (e) of Section 300 *because of the conduct of that parent . . .*” (§ 361.5, subd. (b)(5), italics added.) The court found this criterion satisfied even though there was apparently no evidence on which to attribute *any* relevant conduct to the affected parent. The court explained its conclusion with the statement, “ ‘[C]onduct’ as it is used in section 361.5, subdivision (b)(5) refers to the parent in the household who knew or should have known of the abuse, whether or not that parent was the actual abuser.’ ” (*Kenneth M.*, *supra*, 123 Cal.App.4th at p. 21.) This statement leaves considerable uncertainty as to the actual rule of the decision, to say nothing of its rationale. Those questions are academic here, however, for the court was interpreting language not at issue here, and the case did not acknowledge, let alone address, any question of the sufficiency of the evidence to establish that the parent should have known of the abuse.

Nor do we find support for the trial court’s finding in *In re E.H.* (2003) 108 Cal.App.4th 659 (*E.H.*). The child there had suffered a horrific series of injuries over a period of many weeks. Many if not all of the injuries were attributed by medical testimony to “nonaccidental” twisting, pulling, squeezing, striking, or shaking. (*Id.* at p. 664.) At least some of them required a large amount of force. (*Ibid.*) The trial court

found that the injuries were intentionally inflicted, but that “there was no evidence that anyone knew that anything was happening to E.” (*Id.* at p. 667.) The reviewing court reversed, adopting what it described as “a ‘res ipsa loquitur’ type of argument,” i.e., “the child was never out of her parents’ custody and remained with a family member at all times; therefore, [the parents] inflicted the abuse or reasonably should have known someone else was inflicting abuse on their child.” (*Id.* at pp. 669-670, fn. omitted.) We question whether this approach can be squared with the statutory scheme.⁸ However we have no occasion to address the question in depth because again the case is factually inapposite. The “‘res ipsa loquitur’ type of argument” adopted by the court rested on evidence that the child had been subjected to a *sustained course* of violent mistreatment by someone in a home the parents shared with other family members.⁹ Here there is no

⁸ The Legislature has authorized juvenile courts to rely on a presumption resembling the tort doctrine of *res ipsa loquitur* when child abuse is cited as the ground for jurisdiction under certain subdivisions of section 300. (§ 355.1, subd. (a).) The Legislature did not extend the presumption, however, to allegations under section 300(e). (*Id.*; see § 361.5, subd. (b)(5).) One of the parents’ arguments in *E.H.* was that the child welfare agency’s position amounted to an invocation of the statutory presumption in contravention of the manifest intent of the Legislature. (*E.H.*, *supra*, 108 Cal.App.4th at p. 666.) The court concluded that an inference of scienter could be drawn there “without resorting to the presumption of section 355.1.” (*Id.* at p. 670, fn. omitted) Yet the “‘res ipsa loquitur’ type of argument” on which the court relied (*id.* at p. 669) seems functionally identical to, if not indeed broader than, the statutory presumption the court professed to eschew.

⁹ The court also observed that “where there is no identifiable perpetrator, only a cast of suspects, jurisdiction under subdivision (e) is not automatically ruled out.” (*E.H.*, *supra*, 108 Cal.App.4th at p. 670.) Of course to say that jurisdiction is “not automatically ruled out” is to beg the question whether jurisdiction has in fact been established. Insofar as the court meant to suggest that jurisdiction can be predicated on some sort of vicarious or collective responsibility, we beg to differ. If the Legislature had meant to predicate jurisdiction under section 300(e) on the infliction of abuse by members of a parent’s household, without regard to scienter, it was perfectly capable of saying so. In the absence of such a directive, we would not sustain a finding of jurisdiction under section 300(e) based on some sort of “usual suspects” rationale.

evidence of recurring abuse, only a single bruise—one which even now cannot be reliably attributed to abuse. The notion that Mother should have known her son was being abused, based upon this one item of evidence, cannot be sustained.

Of the decisions we have examined applying section 300(e), the most apposite is *L. Z. v. Superior Court* (2010) 188 Cal.App.4th 1285 (*L.Z.*). The mother there had taken her daughter to a doctor after noting that she was not using one arm. (*Id.* at p. 1287.) This led to discovery of an arm fracture of a type that “would typically result if someone had twisted her arm.” (*Id.* at p. 1289, fn. omitted.) Doctors also found nine broken ribs, apparently the result of earlier abuse. (*Id.* at p. 1287.) After learning of these injuries the mother suggested that the arm injury had probably been inflicted by the father on a particular occasion. (*Id.* at p. 1289.) The father “said he could not remember how the baby was injured, and attributed his inability to remember to his drinking.” (*Id.* at p. 1290.) Relying in part on the failure of either parent to “ ‘assume[] responsibility for their actions,’ ” the trial court denied reunification services to both parents. (*Id.* at p. 1291.) The mother contended that this was error as to her because the evidence “did not prove that she knew or reasonably should have known her baby was injured by abuse.” (*Id.* at p. 1292.) The reviewing court agreed and reversed, finding “no substantial evidence that [she] knew or should have known that [the child] was physically abused prior to the diagnosis of the baby’s injuries.” (*Id.* at p. 1287.) The parties stipulated that the rib injuries would not have been visible; an observer “ ‘would just see a fussy, crying baby.’ ”¹⁰ (*Id.* at p. 1292.) No evidence was offered concerning “what

¹⁰ Here, similarly, the Department’s pediatric expert reported that “people who were not present” when Zachary’s injury was inflicted “would not be expected to know that [he had] sustained significant traumatic brain injury. From the moment that [he] sustained his injuries, [Zachary] would not be a happy, playful normal self. But people unaware of what caused his injuries would not necessarily know why he was not acting himself.”

Mother should have known due to the baby's impaired ability to use her left arm.” (*Id.* at p. 1293.) The premise that she “knew or should have known her baby was abused” was belied by her conduct in reporting the injury to a doctor, her plausible and uncontradicted explanations for not doing so sooner, and the invisibility of the injury, i.e., “she had previously brought the baby to doctors” only to have them say “there was nothing wrong with her.” (*Id.* at pp. 1293, 1288).

As with all of the cases cited by the court here, *L.Z.* differs from the present case in that the evidence there unequivocally established the *fact* of antecedent abuse. But it also involved, as does this case, a complete lack of evidence that the mother should have known of the child’s invisible injuries or was otherwise put on notice that someone in the home was inflicting physical abuse. Despite its citation by the court below, that decision strongly militates against the finding that Mother possessed the mental state required by section 300(e) in cases of indirect infliction.

Respondent quotes the trial court’s remarks that “[t]he case law does not require that the Court solve the mystery of who did it” and “[w]e’re not in a criminal court.” Both statements are accurate as far as they go, but they do not address the issue of scienter. No doubt jurisdiction may be found under section 300(e) where the court finds on substantial evidence that a child was physically abused either by a parent or by a person known to the parent. The court need not choose between those hypotheses so long as it finds that one or the other must be true. But uncertainty as between these possibilities does not excuse the court from finding the requisite scienter. If the court predicates jurisdiction under section 300(e) on such an either-or hypothesis, it must find that the parent, if not the abuser, should have known of its abuse. This record does not contain substantial evidence in support of such a finding. The trial court therefore erred by sustaining the allegation of jurisdiction under section 300(e).

C. Section 300(b)

1. Introduction

Mother contends that the evidence was also insufficient to sustain the assertion of jurisdiction under section 300(b), which as pertinent here confers jurisdiction on the juvenile court when “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by [*sic*] the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s mental illness, developmental disability, or substance abuse.”

The second amended petition concerning Zachary alleges three different kinds of conduct by Mother as grounds for jurisdiction under section 300(b). Paragraph b-1 asserts a past failure to protect, i.e., that Zachary had suffered and was at risk of suffering serious physical harm as a result of Mother’s failure or inability to adequately protect and supervise him, in that she should have known there was a substantial risk of harm based upon the bruise shown to her by Father, but “failed to take appropriate action to prevent further harm from being inflicted upon her son.” Paragraph b-2, which also appears in the petition concerning Kirsten, asserts a failure or inability to protect “due to [Mother’s] substance abuse,” in that she “drinks alcohol almost on a daily basis,” and her boyfriend “drinks two 24 ounce cans of beer every night,” “grows and smokes marijuana,” and “blows marijuana into [Mother’s] mouth when he kisses her.” Paragraph b-4 asserts a *current* failure or inability to protect against a threat of *future* harm, in that Mother “*knows or reasonably should know* that [Zachary] was physically abused,” and “the child is at significant risk of serious physical harm in the mother’s care, as she *continues in a daily relationship* with [Companion].” (Italics added.)

We address each of these grounds.

2. Past Failure to Protect

“[T]hree elements must exist for a jurisdictional finding under section 300, subdivision (b): ‘(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) “serious physical harm or illness” to the minor, or a “substantial risk” of such harm or illness.’ [Citation.]” (*In re J.O.* (2009) 178 Cal.App.4th 139, 152.) Mother argues in essence that the first element, neglectful conduct, was not shown. More specifically, she challenges the trial court’s finding that she “knew or should have known” Zachary was the victim of abuse. In the previous part we sustained a similar contention in connection with the court’s finding of jurisdiction under section 300(e). However, section 300(b) does not require, and the petition here does not allege, actual or constructive knowledge of abuse on the part of the parent. The statute requires *neglectful conduct* that causes *either* “physical harm or illness” *or* a “substantial risk” of such harm or illness. The petition alleges that Mother should have known her son was “at risk,” based on the bruise pointed out by Father, and should have acted to address that risk.

It is possible that Mother’s inaction in response to the bruise pointed out by Father could be found to constitute neglectful conduct even if, as we have concluded, the bruise by itself was insufficient to put her on notice that Zachary was being abused. Certainly there will be cases where a parent turns a blind eye to evidence that would have led a more prudent parent to investigate *and thereby discover* that his or her child is being subjected to abuse. Willful ignorance can itself be a species of neglect. We are unable to find substantial evidence in this record, however, to support such a finding. If Mother’s own account is credited, she believed the bruise was the result of her own dandling of her son. Nothing in the record makes this belief appear unreasonable. There is no suggestion that she had any reason to attribute the bruise to anything else. The trial court may have been entitled to disbelieve her account, but there is no indication that it did so. Nor is there any evidence from which the court could find that an inquiry by her would or could

have revealed the fact of abuse. As noted above, apart from this single bruise there was no evidence that any other abuse was ever inflicted on Zachary or on any of the other four children in the house. Therefore, even if it can be said that Mother should have done something more than dismiss Father's concerns out of hand, the record fails to show that anything she might have done would have led to the discovery of any ongoing pattern or threat of abuse. A parent cannot be charged with failure to protect from a danger that they could not have discovered. The record therefore fails to bear out the allegation that Mother "failed to take appropriate action to prevent further harm," and the true finding as to paragraph b-1 cannot be sustained.

3. Present Failure to Protect

The gist of paragraph b-4 is that *after* doctors discovered Zachary's injuries and attributed them to physical abuse, Mother refused to credit those opinions and continued to live with Companion who, as the trial court found, must have perpetrated the abuse if she did not. Paragraph b-4 neither asserted nor depended on any *past* failure to protect; instead it rested on a *current and continuing* refusal to *acknowledge any need* to protect Zachary from what the trial court found was an *ongoing threat* of abuse, i.e., the presence of a probable child abuser in the family home.

Mother's brief is largely addressed to the sufficiency of the evidence that she should have known Zachary was being abused, or even that he had been injured, before doctors told her so. But the focus of paragraph b-4 is what she knew, believed, did, and proposed to do *at the time of the hearing, after* doctors had told her so. As the court said in explaining its decision, "[I]t has been a quandary . . . as to why Mother refuses to consider that her partner who she continues in a relationship with . . . would be responsible, when, in fact, the evidence is that it was either her or him. ¶ . . . [I]t is unlikely that she brought about the trauma, which means that it's likely that [Companion] did. ¶ Mother has refused to consider that possibility. In fact, she has gone in an

opposite direction and has worked very hard to try to bring about evidence or bring about an explanation of any other cause other than at his hand. And to see the level of denial when she was on the stand, the level of denial in her writings and submissions to the Court, the blame to CPS and all the doctors and everybody else without ever considering the blame on the perpetrator, and complete efforts on her part to basically exonerate [Companion] . . . is disturbing. When a mother wants to believe that it was a hypoglycemic incident that brought about this traumatic brain injury which crippled her son without considering that it was the hand of someone that she cares about and possibly loves is unrealistic.”¹¹

In other words, Mother was unable to protect the children, and this placed them at risk of serious injury, because she had either inflicted the injuries herself—which the court found unlikely—or she was unable to believe the only plausible alternative, which was that her boyfriend had done so.

The only argument in Mother’s brief that tends to address this reasoning is the assertion that the evidence was insufficient to rule out alternative explanations for Zachary’s injuries. She discusses at great length the various medical opinions found in the record, pointing out what she deems conflicts or inconsistencies. The short answer to such an argument is that the trial court was entitled, and indeed obliged, to resolve all such differences, and has done so in favor of the Department.

Dr. Gilgoff, testified that in view of the nature of the injuries and the observations of witnesses, Zachary’s injuries had probably been inflicted “on the afternoon of 10/11/10 or the morning of 10/12/10,” i.e., “after preschool on Monday and before . . . people at preschool noticed that he was not himself” on the following day. On its face

¹¹ Mother suggested in her declaration that Zachary’s injuries may have been the product of conditions associated with his premature birth, i.e., “high blood sugar, high blood pressure etc.”

this opinion is itself substantial evidence that the injury was sustained in Mother's home. Mother sets it off against the comments of Stanford child abuse specialist John Stirling when interviewed by a social worker on November 8, 2010. He gave an affirmative response to the question whether the injury "could have happened on the morning of October 11, 2010 while [Zachary] was still in the care of his father." He explained, however, that the most important datum would be "how [Zachary] was doing in childcare that afternoon." He noted that Zachary "would have been symptomatic right away," exhibiting "irritability, slurred speech, [and] unstead[iness] on [his] feet"; that the injury's manifestations would present obvious cause for alarm in an adult; but that in a two-year old, they might lead a caregiver "to the conclusion that the child needs a nap." He added that "[i]f [Zachary] just came into daycare and took a nap right away, the provider may not have known he was symptomatic."

Mother repeatedly juxtaposes this evidence, and particularly the last observation, with the suggestion in the Department's original report that Zachary had been napping for all but 20 minutes of his time at the preschool on Monday. This suggestion was based on a recounted conversation with a preschool teacher, Ms. Perkey, who "reported that *the children* in the two to three year old group get ready for nap time at 12:30 P.M. and *they typically* sleep from 1 to 3 P.M. When [Zachary] arrived at day care *it was nap time*, and *since he was sleeping* it would be difficult for the staff to observe any symptoms. On that day, the mother picked [Zachary] up at 3:20 P.M. As such, [Zachary] was only observed for a twenty minute period of time outside of nap time." (Italics added.)

The wording of this account, and particularly the language we have emphasized, strongly suggests that the critical assertion—"he was sleeping"—rests not on personal observation but on an inference drawn from a generalization about Zachary's having arrived during "nap time." The record contains ample evidence from which the trial court could reasonably infer that Zachary did *not* in fact take a nap on Monday, and that

preschool teachers thus had ample opportunity to observe his condition and note any unusual symptoms.¹² Preschool workers told police investigators that when Zachary arrived at the preschool on Monday, he appeared fine, not lethargic, active, and moving without difficulty. The teacher responsible for Zachary's age group told a detective that Zachary "appeared fine and acted like himself" on Monday. The preschool director told a detective that on October 11, "all was status quo with" Zachary. According to the police report, which was attached to the jurisdictional report, another teacher also described Zachary as "acting and behaving as he normally does" on October 11. A fourth teacher said he "seemed his normal self."

Mother herself believed that Zachary had not had a nap when he came home on Monday October 11. She testified that she was told as much by Father, and that she "asked the teacher and she said she didn't see [Zachary] take a nap." She further testified that "[i]t was after nap time that [Zachary] arrived at school." Some tension may be detected between this assertion and the statement by the preschool director that children in Zachary's age group "typically sleep from 1 to 3 P.M." However Dr. Gilgoff reported that when she spoke to two preschool workers, both acknowledged that while they could no longer remember details, "since [Zachary] arrived late that day he might not have taken a nap that day." This suggests that a child who arrived after the nap period had begun might or might not take a nap. Since all other indications are that Zachary did not do so, the trial court was entitled to so find.

Mother's own observations on Monday evening suggest none of the neurological symptoms noted by Dr. Stirling beyond the ambiguous fact that Zachary was extremely

¹² The critical question is not whether Zachary took a nap but whether preschool staff had a sufficient opportunity to observe the signs of a brain injury. Even if he took a nap, staff members would have had at least 20 minutes to observe him. We see no rational basis to assume, as Mother's argument does, that symptoms such as Dr. Stirling described could or would have gone unnoticed during that time.

tired—a fact readily attributed to the absence of a nap. She also said that he ate very little that night, but there is no suggestion that this was unusual for him. She acknowledged in testimony that while his tiredness and lack of appetite worried her, she was not alarmed. In contrast, she was “clearly alarmed” when she saw him in the evening of Tuesday October 12. In a conversation with the preschool director shortly after the injury was discovered, she “acknowledged that she noticed a substantial difference in [Zachary] on Tuesday 10/12/2010.”

Mother also attempts to impeach Dr. Gilgoff’s testimony by asserting that her “opinion regarding the timeline for [Zachary]’s injuries varied markedly” as between her written report and her testimony, and “was also internally inconsistent in both the report and testimony.” We will not address each of the supposed discrepancies; we have examined them all and find any inconsistencies to be either illusory or trivial. To take one example, Mother seizes upon Dr. Gilgoff’s written observation that “[n]euroimaging suggests [Zachary]’s injury occurred within a week of [i.e., the week preceding] the 10/14/10 MRI.” Mother contrasts this with the statement that “[s]ymptoms reported by family and preschool staff suggest the injury happened sometime on 10/11/10 or early 10/12/10.” But these statements coexist in perfect harmony. The first refers to an inference drawn from “neuroimaging” data *standing alone*, while the second refers to observed symptoms consistent with a brain injury. The first operated only to set an *outer limit* on the time frame, i.e., to establish the earliest date on which an injury consistent with the images might have been sustained. The trial court was entitled to find any claimed inconsistency between these two statements wholly illusory.

The trial court was entitled to find, as it did, that Zachary’s injuries were inflicted after he left preschool on Monday afternoon and while he was in the care of Mother, Companion, or both. Mother not only refused to believe this, but refused to accept that Zachary’s injuries were the result of abuse. If a child has been injured by an open pit in a

parent's yard and the parent refuses to acknowledge that this has occurred or that the condition must be corrected before the child can safely reside there, the welfare of the child cries out for intervention whether or not the parent had anything to do with creating the pit, or even knew of its existence. The relevant facts are that an injurious condition exists in the home and the parent appears unwilling or unable to guard against the resulting danger. Such facts satisfy both the letter and the spirit of section 300(b). Likewise, jurisdiction may be asserted under that subdivision where the child has been injured by a *person* in the home and the parent refuses to acknowledge that fact and take appropriate steps to avert further abuse. (See *In re A.S.* (2011) 202 Cal.App.4th 237, 246 [where none of child's four adult caretakers had any explanation for brain injury, evidence supported "a reasonable inference that one of the caretakers injured her, and concomitantly, . . . that [she] was at substantial risk of serious physical harm, even life-threatening harm, in the parents' home as a result of their failure or inability to adequately protect her".].)

Here the medical testimony established that Zachary had suffered intentional and severe abuse. No one but Mother questions that fact. Substantial evidence supported the trial court's finding that the injuries were inflicted either by her or by her boyfriend. Since the court found it improbable that she had inflicted the injuries, it was perfectly logical to infer that the boyfriend had. Mother's refusal to credit that possibility meant that she could not be relied upon to protect her children from the danger it portended. The trial court therefore did not err in sustaining jurisdiction under paragraph b-4 of the petition as amended.

4. Substance Abuse

Section 300(b) also confers jurisdiction on the juvenile court when "there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of . . . the inability of the parent or guardian to provide regular care for the child due to

the parent's or guardian's . . . substance abuse." Paragraph b-2 of the petition asserted that Mother was unable to properly care for the children "due to her substance abuse," in that she "drinks alcohol almost on a daily basis," and her boyfriend "drinks two 24 ounce cans of beer every night," "grows and smokes marijuana," and "blows marijuana into [Mother's] mouth when he kisses her."

Substantial evidence does not support the finding of substance abuse contributing to a failure or inability by Mother to protect the children. The allegation that Companion blew marijuana smoke into Mother's mouth, while lurid, scarcely establishes Mother as a marijuana *user*, let alone as an *abuser* of that substance. The allegation that she "drinks alcohol almost on a daily basis" apparently originated in an early interview in which a detective asked her whether her boyfriend was "controlling." Her reported reply was, " 'He tries to push alcohol on me. I've been drinking alcohol lately more than I have in my entire life.' " But without evidence that she was drinking considerably in the past, this hardly established excessive consumption. Asked how often she was now drinking, she replied, "Almost daily." But again this hardly established, standing alone, that she *abused* alcohol. The critical questions were how much of the substance she consumed, whether she was dependent on it, and how—if at all—it affected her ability to care for the children. The only evidence we find on the first question is her own report that when she drank, she consumed "one to two malt beverages or just one tall (beverage)." Nor is there any evidence contradicting her reports that "she never got drunk," " 'probably could have been legal to drive at just about any point,' " " 'never woke up with a hangover,' " "always [woke] up along with the kids," always went to work, didn't drink before dinnertime, had " 'never been abusive to any type of substance in [her] life,' " and had " 'never experienced a withdrawal.' "

As against this evidence respondent offers only a notation in the medical reports that on the night of October 11, 2010, Mother had "slept deeply (aided by alcohol and

marijuana).” This presumably reflects something Mother told a doctor or nurse, but it hardly establishes that she had engaged in “substance abuse.” Respondent appears to assume that these substances can only produce a soporific effect when ingested in excessive quantities. Nothing in the record substantiates this assumption.

Even if the evidence supported a finding of past substance abuse, there was no evidence that it posed any “specific, defined risk of harm” to the children. (*In re David M.* (2005) 134 Cal.App.4th 822, 830.) “Certainly, it is possible to identify many possible harms that *could* come to pass. But without more evidence than was presented in this case, such harms are merely speculative. (See generally *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346 [evidence was insufficient to support finding that the mother’s use of marijuana on one occasion created substantial risk of detriment to the children's physical or emotional well-being where there was no evidence of clinical substance abuse, no testimony from a medical professional, no testimony of a clinical evaluation, and no testimony linking the mother's marijuana and alcohol use to her parenting skills or judgment].)” (*Ibid.*)

Further, this court and most others have consistently held that past neglect, past injury, or past risk will not by itself sustain a jurisdictional finding under section 300(b) unless the evidence supports an inference that the child is *currently* at risk. (*In re J.N.*, *supra*, 181 Cal.App.4th 1010, 1023-1025, and cases cited.) The present record is devoid of evidence that Mother is *currently using* intoxicants of any kind, let alone abusing them. She reported without contradiction that she “ ‘ha[d]n’t had a single alcoholic beverage since the night before [Zachary] went to Dominican.’ ” i.e., October 12, 2010. As for marijuana, the social worker acknowledged that Mother had complied with the Department’s request that she “test randomly,” that all tests had been negative, and that as of the jurisdictional hearing she was no longer being asked to test. The fact that she had discontinued both of the identified substances without apparent complications, and

the absence of any evidence of excessive consumption, chemical dependency or even vulnerability to such dependency, precluded a finding under the “substance abuse” clause of section 300(c). (*Ibid.*; see *In re James R., Jr., supra*, 176 Cal.App.4th 129, 137 [“mere possibility of alcohol abuse,” given lack of causal link with past or present neglect, was “insufficient to support a finding” under substance abuse clause].)

II. FATHER’S APPEAL

A. Jurisdiction

1. Justiciability of Father’s Arguments

Father contends that the record does not contain substantial evidence to support the Department’s allegations insofar as they pertain to him.¹³ He concedes that this argument cannot result in dismissal of the petition so long as any of the jurisdictional allegations pertaining to Mother are sustained. This court has said that “a finding against one parent is a finding against both in terms of the child being adjudged a dependent.” (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1135.) “ ‘More accurately, the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. [Citation.] This accords with the purpose of a dependency proceeding, which is to protect the child, rather than prosecute the parent. [Citation.]’ ” (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 16, quoting *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.)

The First District recently concluded, in a similar context, that a father’s appeal challenging only the jurisdictional allegations pertaining to him, and not those pertaining to the mother, was vulnerable to dismissal under the rubric of justiciability. (*In re I.A.* (2011) 201 Cal.App.4th 1484 (*I.A.*)). That doctrine generally counsels against deciding

¹³ In the opening sentence of his written argument Father also states that he “challenges the sufficiency of the pleading” insofar as it alleged jurisdictional facts pertaining to him. He does not, however, present any argument on that point.

an appeal unless it involves “a present, concrete, and genuine dispute as to which the court can grant effective relief.” (*Id.* at p. 1489.) The court held that the only relief it could grant the father would be to vacate the trial court’s “implicit finding regarding [his] conduct.” (*Id.* at p. 1493.) This would make the father a “nonoffending” parent for purposes of a provision limiting the court’s power to “take[.]” a child “from the physical custody” of a parent. (§ 361, subd. (c)(1), (c).) The father would be unable to take advantage of that provision, however, because the child had “never resided with [him].” (*I.A.*, *supra*, at p. 1494, citing *In re Miguel C.* (2011) 198 Cal.App.4th 965, 970.) Nor did it appear that a successful appeal would have any other “legal [or] practical consequence.” (*Id.* at p. 1493.) The appeal was therefore dismissed.

This case differs from *I.A.* in that, so far as any party before us contends, Father shared physical custody with Mother and was thus entitled to the protection of the provision held inapplicable there. Elsewhere in his brief he asserts a right to that protection, contending that the record does support a finding, as to him, that “reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home.” (§ 361, subd. (d) (§ 361(d); see pt. II(B), *post.*) Father’s argument on this point necessarily assumes that Zachary was in his “physical custody” and “resided” with him for purposes of the relevant provisions. Respondent concedes this premise, stating in its brief that at the time of the petition, “the two parents apparently had an informal shared custody arrangement whereby [Zachary] resided with both households.”

These facts render *I.A.* inapplicable. We will therefore address on the merits Father’s challenge to the jurisdictional findings pertaining to him.

2. Sufficiency of Evidence

Insofar as the original petition identified any conduct by Father contributing to grounds for dependency jurisdiction, it alleged that in view of the handprint he observed on Zachary about a month before the discovery of his brain injury, *both* parents “knew or

reasonably should have known that [Zachary] was at risk of harm in [Companion's] care, and they failed to take appropriate action to prevent further harm from being inflicted upon their son.”¹⁴ This allegation was later amended to omit any reference to Father. However, as ultimately amended “according to proof,” the petition contained another paragraph, numbered b-3, alleging that Zachary was “at substantial risk of physical harm or illness due to the father . . . lacking sufficient insight and understanding of the child’s injuries Despite significant medical evidence which indicates that the child has a traumatic brain injury, with on-going medical needs, [Father] has failed to appreciate the need for treatment. [Father] has made comments, following the minor’s October 2010 injuries, that the minor is fully healed and does not need speech, physical or occupational therapy.” The trial court sustained this allegation by finding that “All of the allegations of the Petition are true.”

From the foregoing it appears that the sole jurisdictional finding pertaining to father was that his “lack[] [of] insight” created a “substantial risk of physical” harm to Zachary. But while the petition alleged that he had made “comments” (plural) betraying this lack of insight, the only supporting evidence concerned a single telephone conversation between the social worker and Father toward the end of February 2011. The social worker testified that Father had called her to “express some of his concerns” about “some issues” he had concerning “visitation at the Parent Center.” During that conversation, she testified, Father said that Zachary was “fine and doesn’t need the therapies that he’s going to.” Asked whether she had questioned him on this point, or had countered with her own view “that he really does need this intensive treatment,” she replied that she did not contest or seek clarification of his remarks because the tone of the

¹⁴ The petition concerning Kirsten, both in its original form and as ultimately amended, contained no allegations suggesting that Father could not adequately care for her. She was ultimately placed in his care/custody.

conversation “was more of letting him vent and just let it all out.” Asked what she thought he needed to vent about, she said, “His frustrations with the Parent Center and how those visits with going with [Kirsten]. About the case in general. And, you know, that he—he doesn’t feel like he did anything wrong, and that, you know, of course he doesn’t want [Zachary] removed from his care because he did not perpetrate any violence against him.” She described him as “frustrated, upset.”

Father testified that the social worker had misunderstood his remarks. He agreed that the remarks came while he was voicing complaints about the Parent Center’s involvement in his visits with Kirsten. According to him, “[T]he topic we were speaking of is [Kirsten]’s participation in the Parenting Center, and unfortunately when I was speaking to [the social worker] I didn’t use a full sentence, but since we were talking about the Parent Center I thought it was just understood. But when I said [Zachary] is fine, I meant that given his age and his ability to take commands and understand and speak, he would be fine missing—he would be fine to be overseen by the Parent Center, because he won’t be persuaded to say something. You know, he’s younger than my daughter. It would affect him in a different way. So actually I was saying he is fine to go there, but I felt that it was damaging to her because it was showing obvious signs of emotional distress and things like that.”¹⁵

The trial court was of course free to reject Father’s explanation for the cited comment and to conclude that he had in fact meant to deny or minimize the severity of

¹⁵ Although the genesis of Father’s concerns is unclear, we surmise that they were actuated, or at least typified, by a visit with Kirsten on February 3 in which a disagreement arose between Father and the Parent Center worker. At one point the worker said that Kirsten “had funny feeling[s],” to which Father replied, “She did not say that[;] you are putting words in her mouth.” In this context, Father’s testimony apparently meant that he intended only to tell the social worker that, in contrast to Kirsten, Zachary was “fine” under Parent Center supervision because his condition would not permit workers to “put[] words in [his] mouth.”

Zachary's injuries and the need for continuing treatment. But this alone would not sustain a finding of jurisdiction under section 300(b)—which, again, required substantial evidence that Zachary was at “substantial risk” of suffering “serious physical harm or illness” as a result of Father's attitude. And again, a finding that such risk existed when the remark was made would not be enough; the risk had to exist “ ‘at the time of the hearing.’ ” (*In re J.N.*, *supra*, 181 Cal.App.4th 1010, 1022, quoting *In re Nicholas B.*, *supra*, 88 Cal.App.4th 1126, 1134.)

We have searched the record in vain for evidence that Father's views *at the time of the hearing* reflected any lack of insight, let alone posed a substantial risk of serious physical harm to Zachary. The social worker insisted that the “best situation” for Zachary “at this point” was to “remain in the paternal grandmother's care.” But she never articulated any basis on which to predicate a finding of a substantial, present risk.

At one point counsel for the Department asked the social worker to describe “the risk you[']r[e] concerned about if [Zachary] were to be placed back with his Father prematurely.” Her response was a sentence fragment alluding to, but not actually asserting, a lack of understanding of the severity of Zachary's injuries.¹⁶ Instead of seeking to clarify or elaborate on this incomplete assertion, counsel then elicited testimony about certain “safety hazards” the witness had observed at Father's home. This evidence had only the most tenuous connection, if any, to the allegations of the petition. Indeed, to the extent the testimony about these hazards touched on Father's understanding of Zachary's special needs, it tended to *refute* the allegation that Father failed to appreciate them. The social worker referred to an unfenced area bordering on a

¹⁶ This baffling exchange is transcribed as follows: “Q. And what is the risk you[']r[e] concerned about if [Zachary] were to be placed back with his Father prematurely? [¶] A. I think Father's lack of understanding of how severe [Zachary]'s injuries were and lack of—sorry. I'm sorry. [¶] Q. Well, let me follow up. You also did go to see his home”

creek, and a deck with a rather large step that created a fall risk. She noted that a fall could be particularly hazardous to Zachary because of his head injury. But there was no suggestion that Father dismissed the social worker's concerns on these matters. On the contrary, he testified that he had agreed to the modifications suggested by the worker, that they were "already over 50 percent complete," and that "in another day they could be complete with the fencing, stairing." The court raised the question, apparently on its own motion, whether a ramp might be safer for Zachary than steps. But the social worker testified that she had never suggested a ramp, and Father expressed the view that given Zachary's problems with vision and balance, a ramp might be more difficult than steps for him to negotiate. Nonetheless he said he would discuss the question with Zachary's therapist, presumably meaning his physical therapist. The social worker conceded that "if a specialist in assessing the home were to . . . come out and make additional recommendations for safety in the home," there was no reason to believe that Father "would not follow through with those recommendations."

Nor does anything else in the record support the allegation of a present lack of insight into the nature and extent of Zachary's needs. The social worker noted that on the same visit where she observed the above hazards, Father "was looking out for [Zachary], making sure that he was safe and, you know, wasn't going to fall or anything when we were outside playing during the visit. So he was very attentive in making sure that he was careful and he didn't hurt himself." She acknowledged that despite the cloud of suspicion under which he initially labored, Father had participated in parenting classes and counseling, and had fully cooperated with treatment providers "to the extent he was allowed." In conversations subsequent to the one that caused her concern, Father had expressed the intention to "continue to assist [Zachary] in attending the therapies," and to follow up in a home setting.

In response to questioning by the court concerning Father's efforts to educate himself on his son's needs, the social worker testified that he had "asked to get more involved and participate in the therapies," but that the therapist felt the presence of additional people would "hinder [Zachary's] progress." The court asked if Father had "reached out" to "the people that are treating or working in the therapies" or "tried to make himself more educated about what [Zachary] needs or how he can best fit into that overall treatment plan." The social worker did not know whether he had "contacted the doctors or therapists," but he had talked to his mother—the current caregiver—about the "sort of things that she does at home and, you know, doing therapy at home." Although the grandmother had been responsible for taking Zachary to his appointments up to that point, the social worker had no concerns about Father's availability to fulfill that role.

In Father's own testimony he acknowledged without apparent reservation that Zachary needed "continued medical treatment" and "continued therapies." Asked about the current need for medical treatment, he said, "My understanding is that he's going to therapy three times a week, taking occupational, physical and speech therapy. And it is also my understanding that the therapy [needs to] be executed throughout his daily routines, not just going to therapy and do the things they do in therapy [I]t's a lifestyle that we're going to have to hold onto most likely throughout his life." The court asked Father a number of questions about his past involvement in Zachary's treatment. The upshot of his answers was that while he had not personally communicated to a great extent with any of the doctors or therapists involved, he believed he had been able to remain abreast of relevant concerns through his mother, Zachary's current caregiver.

The social worker frankly acknowledged that Father "ha[d] a greater understanding" at the time of the hearing concerning his son's needs. When the Department's attorney asked her to reconcile this acknowledgment with her professed concerns about a lack of insight, she only alluded to the earlier "statements that he is

saying [Zachary] is fully healed.” The attorney asked why, since these statements were made in February, “is that still a concern today if you said that Father’s shown greater understanding of the injuries . . . ?” She replied, “I’m still worried about that statement because I think . . . it could hinder dad participating in those therapies and services that would benefit [Zachary] and help him to get more back on track developmentally.” The court then asked, “Do you mean minimize the need?” The social worker replied, “Yes.”

The critical question was not how to best put the social worker’s concern into words. It was to ascertain why she continued to express such a concern in light of the changed circumstances she freely acknowledged. We find no answer to that question anywhere in this record. She seemed wholly unable to articulate any present risk. The trial court appeared to be exploring the question of present risk through its questioning, but at most this disclosed that Father could have been more aggressive in seeking to communicate directly with Zachary’s physicians and therapists rather than relying upon his mother to do so, and that he had not yet ascertained whether a ramp, which no one had theretofore suggested, might be safer than steps.

None of this remotely suggests such a degree of neglectfulness as could be rationally found to create a substantial present risk of “serious physical harm or illness” so as to sustain jurisdiction under section 300(b). The only evidence of a lack of insight is a single remark two months before the hearing, while “venting,” that Zachary was “fine” and did not need further treatment. Accepting the trial court’s implied finding that this is really what Father said, and meant to say, the record supplies no reason to believe it was anything more than a momentary expression of what the social worker described as his “frustrated, upset” emotional state. She conceded without reservations that she had no present reason to believe that Father would fail “to assist Zachary reach his maximum potential speechwise, physically [and] cognitively.” This concession alone all but precluded a true finding on paragraph b-3.

The jurisdictional order must be amended to reflect that paragraph b-3 of the petition as amended was not proven.

B. *Dispositional Order*

1. Sufficiency of Efforts to Prevent Removal

As previously indicated, Father contends that the record does not contain sufficient evidence to sustain, as to him, a finding under section 361, subdivision (d) (§ 361(d)) that “reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home.” It is undisputed that the original need for removing Zachary from Father’s care, as perceived by the Department, was Father’s possible involvement in the infliction of Zachary’s injuries. As stated in the original jurisdictional report, “The Department [wa]s not considering placement with the father due to the fact that he is currently a suspect in [Zachary]’s injuries.” The Department concedes that at the time of the hearing, that need had ceased to exist. The gist of Father’s argument is that this finding was made unreasonably late—that the Department entertained, and engendered in others, an unreasonably high level of suspicion towards Father in the beginning, and then acted too slowly to ascertain whether that suspicion was justified. As a result Father’s access to Zachary, and to information concerning his medical condition and treatment, was needlessly delayed, with the result that any deficiencies in his “insight” were the product of the Department’s own failings.

We question Father’s logic, but we can see no reason to address this contention since, as we have already concluded, the record failed to establish any present deficiency in Father’s understanding of his son’s medical needs. The original “need for removal” has concededly been eliminated and the only other suggested “need for removal” is not borne out by this record. It follows that the record provides no substantial evidentiary basis for a finding under section 361(d) as to the removal of Zachary from Father’s custody.

Respondent identifies no specific evidence supporting such a finding. Instead it cites 24 pages of testimony by the social worker, plus all of “the social worker reports to the court,” as “abundant evidence of efforts to encourage [Father’s] involvement in [Zachary’s] treatment and maintain their relationship.” This hardly meets Father’s objection, which is not that the Department failed to encourage improvements in his parenting activities but that there was no deficiency in those abilities sufficient to constitute a “need” to remove Zachary from Father’s care.

In its dispositional order the juvenile court found, as relevant to Father, that “[c]ontinua[tion] in the home of the parent or guardian is contrary to the child’s welfare; an award of custody to a parent or guardian would be detrimental to the child, and the award of custody to a relative or non-relative caretaker is required to serve the best interests of the child”; that “[r]easonable efforts have been made to prevent or eliminate the need for the removal of the minor from the home of the child’s parent or guardian”; and, by clear and convincing evidence, that “[n]o non-offending parent has presented a plan acceptable to this Court demonstrating that he or she will be able to protect the child from future harm, and placement with the non-custodial parent could be detrimental to the safety, protection, or physical or emotional well being of the child at this time.” For the foregoing reasons, we find none of these findings to be supported by substantial evidence as applicable to Father.

2. Reasonable Reunification Services

Father contends that the dispositional order is defective because the court failed to order reasonable reunification services and the Department failed to make a good-faith effort to develop a suitable case plan.

Father first contends that the case plan actually approved by the court was untimely. The genesis of this assertion is that at the commencement of the hearing, counsel for the Department announced a “new recommendation” with respect to Father

and Kirsten: “We did enter into settlement discussion even after our settlement conference last Tuesday to kind of firm up what our agreement was. And as to [Kirsten], the Department is not objecting to Father’s request for placement of [Kirsten] with a plan of family maintenance services to the family, and primary placement with Father. The Department will be developing a new case plan.” At the conclusion of the hearing, after the court had announced its decision, counsel for the Department reported that the social worker had been unable to prepare a revised case plan due to technical difficulties. The court observed that it “need[ed] to see the case plan” in order to “deem it appropriate and necessary.” The court indicated that a revised plan could be submitted that afternoon. This in fact is what occurred, i.e., revised case plans were submitted later that day.

Father contends that this mode of proceeding violated a requirement that the case plan be prepared and served prior to the hearing in which it is to be approved. (See § 16501.1, subd. (f)(14); Cal. Rules of Court, rule 5.690(c)(2).) He also asserts a denial of his right “to review the case plan.” (§ 16501.1, subd. (f)(12)(A).) These objections have not been preserved for appeal. A case plan was indeed prepared and included in the social worker’s report. Father does not suggest that he lacked an adequate opportunity to review that plan. His objection arises from the fact that changes to the plan, as it affected Father, were occasioned by a settlement agreement of some kind. If he wanted to see the revised plan before it was submitted for court approval, it was incumbent upon him to raise that concern when the Department proposed to submit it after the hearing. On timely objection the court could have fashioned an appropriate remedy—most obviously, that the plan be provided to Father, and that time be allowed for the lodging of comments or objections, before the court approved the plan. The most appropriate place to complain about a lack of due notice is generally the trial court, where if nothing else a continuance may be granted. We see no reason to think that Father should be excused

from the usual rule against entertaining objections, especially of a purely procedural and easily cured character, for the first time on appeal.

Father also objects that the plan failed to provide, and the court thus failed to order, reasonable family reunification services. His objections on this point seem to be twofold: (1) the case plan failed to call for parenting education services, despite the court's indications at the hearings that such services were warranted; and (2) the court failed to instruct the social worker, as Father requested, to notify medical providers that Father was no longer suspected as the possible source of Zachary's injuries.

While both of these omissions may support a future argument that reasonable reunification services were not in fact provided, we do not believe either of them compels a conclusion that the written case plan filed on April 7 did not represent a good faith effort to tailor a plan to Father's needs. (See *In re John B.* (1984) 159 Cal.App.3d 268, 273-274.) Nor does the omission of the two specified items from the written plan establish, in itself, that the Department has failed or will fail to provide reunification services satisfying statutory requirements. At most the record shows that the plan should have included those items. Their absence does not mean that the Department will not do everything thus suggested, e.g., place Father in the suggested parental education program and notify medical service providers as requested.

III. *Indian Child Welfare Act*

A. *Introduction*

Both parents contend that the trial court erred in finding that the Department had satisfied the requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA), and California statutes and rules implementing it. Although no objection was raised on this ground in the trial court, this court has held that objections to the adequacy of notice under ICWA may be raised for the first time on appeal. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) This rule rests on the premise that the right to notice “ ‘is

intended, in part, to protect the interests of Indian tribes,' ” and therefore cannot be waived by the parents. (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 706, quoting *In re Marinna J.* (2001) 90 Cal.App.4th 731, 733.)

B. Facts

Attached to the original petition for each child was an Indian Child Inquiry Attachment (see Cal. Rules of Court, rule 5.481(a)(1)) signed by both parents. It stated that the children’s paternal grandfather (i.e., Father’s father), whom it identified by name, was a member of the “Chikawah” tribe. It also stated as to Mother that “she believes she may have Indian ancestry but was not certain.” The document was undated, but had to have been prepared no later than October 18, 2010, when it was filed. The record contains another copy of this document with two slightly variant notations, of unknown date, on what we suppose to have been sticky notes. The notation pertaining to Mother says, “NM [i.e., natural mother]—‘descendant of Brave Heart.’ ” The one for Father says, “NF—[Zachary] [¶] from PGF [paternal grandfather] [¶] [grandfather’s name] [¶] Chikawah from SW Oklahoma.”

On October 19, Father filled out a “Parental Notification of Indian Status” (see Cal. Rules of Court, rule 5.481(1)(b)) in which he checked the section stating “I may have Indian ancestry.” He now named the “Chactow Tribe” in “Oklahoma USA.” Mother also filled out such a form, stating that she might have Indian ancestry, but in the space for naming the tribe wrote only “Tribe out California.” At some point prior to November 22, 2010, she “reported that she has ancestry with a Native California tribe from Clear Lake, CA.”

On October 19, 2010, the court found that “ICWA may apply” and ordered “proper notice to be given to the appropriate tribes.” On November 22, 2010, a person identifying herself as a “Court Officer” for the Department mailed a Notice of Child Custody Proceeding for Indian Child (see Cal. Rules of Court, rules 5.480-5.487 &

7.1015) to the “Choctaw Nation of Oklahoma,” the “Jena-Band Choctaw” of Jena, Louisiana, and the “Mississippi Band of Choctaw Indians,” as well as the Sacramento office of the Bureau of Indian Affairs, and the Secretary of the Interior.

The notice gave the names and dates and places of birth of the children and stated that they were or might be eligible for membership “in the following Indian tribes (list each): [¶] Choctaw.” In an area marked “Tribe or band, and location” was listed “Choctaw Southwest Oklahoma” for Father and “Unknown Tribe Clear Lake, CA” for Mother. The notice gave the name, birth date, and birthplace of Father’s *mother*, and listed “Choctaw, Bennington, Oklahoma” as *her* “Tribe or band, and location.” But for Father’s *father*—the ancestor he had identified on October 18 as connected with the “Chikawah” and on October 19 with the “Chactow”—only the name was given; his tribe was marked “None Reported,” and all other spaces for identifying information were marked “Unknown” or “Non Applicable.” No information was provided about any of Mother’s grandparents or three of Father’s grandparents. As to the fourth—one of his grandmothers—the name, date and place of birth, and place of death were given, along with the tribe “Choctaw, Oklahoma.” The notice also stated that the children’s “[p]aternal great great grandfather,” who was not named or further described, “[l]ived on [a] federal . . . reservation” identified as “Choctaw Reservation, Bennington, Oklahoma.”

In its original jurisdictional report dated December 14, 2010, the Department stated, “The Indian Child Welfare Act may apply. The father and mother were asked on 10/19/2010 if they had Indian Heritage, and they stated that they did. The father reported that he may have Chikawah ancestry from south west Oklahoma. The mother reported that her family are descendents of the ‘Brave Heart’ tribe. To clarify ICWA status, Social Worker Laura McLain noticed the Bureau of Indian Affairs.”¹⁷

¹⁷ The only elaboration in the record on this reference to a “ ‘Brave Heart’ tribe” is a passage in the investigative narrative stating that when asked whether she had Indian ancestry, Mother “replied she thought she did but could not recall the name of the tribe.

In an “ICWA Attachment” dated January 24, 2011, a social worker reported, “The minor’s mother reported that she has ancestry with a Native California tribe from Clear Lake, CA. The minor’s father indicated that he has ancestry with a Choctaw tribe from Oklahoma. Based on the information as provided by the family, the Department sent notice of today’s hearing to the BIA, the three Choctaw tribes, and both parents. (see attached).” Two of the noticed tribes had responded, stating “that the minors are not members and are not eligible for membership in their tribe.” As to a third noticed tribe, however, the Department had received neither a response nor a delivery confirmation. On January 25, 2011, the court found that “ICWA notice has been given in a timely manner to the BIA, the Mississippi Band of Choctaw Indians and the Choctaw Nation of Oklahoma as required by CRC 5.482(a)(1). The Jena Band of Choctaw Indians needs to be renoticed.”

On February 9, the Jena Band wrote to the Department that the children were not members or eligible for membership. On February 17, 2011, the court conducted an “ICWA Compliance” hearing, after which it found, “The tribes have responded that the minor is not a member and is not eligible for membership. Therefore, the Court finds the minor is not an Indian child and ICWA does not apply to the matter under [Cal. Rules of Court, rule] 5.482(d).”

C. Law

ICWA requires state courts in dependency proceedings to provide notice and an opportunity to intervene to affected Indian tribes whenever “the court knows or has

Late[r], while standing by [Zachary]’s hospital bed, [she] advised that [he] was a descendent of ‘Brave Heart’ and she hoped that would give him the strength to get through this.” From this account it is impossible to determine how the worker concluded that “Brave Heart” was a tribe and not an individual. For all the record shows, Mother was referring to William Wallace, the Scots noble who came to public attention as the subject of the 1995 film Braveheart.

reason to know that an Indian child is involved If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner” (25 U.S.C. § 1912(a).) “ ‘Indian child’ ” is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is [*sic*] eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” (25 U.S.C. § 1903(4).) Federal regulations elaborate upon the notice requirement, stating as relevant here that “[i]n order to establish tribal identity” where an Indian child’s tribe is unknown, “it is necessary to provide as much information as is known on the Indian child’s direct lineal ancestors.” (25 Code Fed. Regs., § 23.11(b).) The notice must include a copy of the relevant pleadings and also, at minimum, the child’s name, birthdate and birthplace (*id.*, § 23.11(d)(1)); the names of “Indian tribe(s) in which the child is enrolled or may be eligible for enrollment” (*id.*, § 23.11(d)(2)); and “[a]ll names known, and current and former addresses of the Indian child’s biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information” (*id.*, § 23.11(d)(3)).

The Legislature has declared that this state has its own “interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe” and that California is committed “to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and other applicable law, designed to prevent the child’s involuntary out-of-home placement.” (§ 224, subd. (a)(1).) California law thus imposes additional burdens on child welfare authorities with respect to notice to tribes, and where it does so the California requirements govern. (§ 224, subd. (d); *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1199.) Thus California law requires that an

ICWA notice include “[a] copy of the child’s birth certificate, if available.” (§ 224.2, subd. (a)(5)(E).) California law also imposes “an affirmative and continuing duty” on juvenile courts and county welfare departments “to inquire whether a child” in a juvenile dependency proceeding “is or may be an Indian child.” (§ 224.3, subd. (a).) If the court or a social worker “knows or has reason to know that an Indian child is involved,” the social worker is “required to make further inquiry regarding the possible Indian status of the child . . . by interviewing the parents, Indian custodian, and extended family members to gather the information required . . . , contacting the Bureau of Indian Affairs and the State Department of Social Services for assistance . . . and contacting the tribes and any other person that reasonably can be expected to have information regarding the child’s membership status or eligibility.” (*Id.*, subd. (c).) Among the circumstances that may give rise to a “reason to know the child is an Indian child” (*id.* subd. (b)) are that “a member of the child’s extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child’s biological parents, grandparents, or great-grandparents are or were a member of a tribe” (*id.*, subd. (b)(1)). A determination by the tribe or the Bureau of Indian Affairs regarding a child’s membership or eligibility for membership is declared to be, with stated exceptions, “conclusive.” (*Id.*, subs. (e)(1), (e)(2).) However, where the court or social worker “subsequently receives any information required under paragraph (5) of subdivision (a) of Section 224.2 that was not previously available or included in the notice issued under Section 224.2, the social worker or probation officer shall provide the additional information to any tribes entitled to notice under paragraph (3) of subdivision (a) of Section 224.2 and the Bureau of Indian Affairs.” (*Id.*, subd. (f).) If a tribe or the Bureau “subsequently confirms that the child is an Indian child,” the court “shall reverse its determination of the inapplicability of the Indian Child Welfare Act and apply the act prospectively.” (*Id.*, subd. (e)(3).)

Further elaboration is provided by the California Rules of Court, rules 5.480 through 5.487. As most relevant here these impose on the juvenile court and child welfare authorities “an affirmative and continuing duty to inquire whether a child is or may be an Indian child.” (Cal. Rules of Court, rule 5.481(a).) Where a petitioning agency “has reason to know that an Indian child is or may be involved,” the responsible social worker “must make further inquiry as soon as practicable.” (Cal. Rules of Court, rule 5.481(a)(4).) Prescribed avenues of inquiry include “[i]nterviewing the parents, Indian custodian, and ‘extended family members’ ” as defined in ICWA (*id.*, rule 5.481(a)(4)(A)); “[c]ontacting the Bureau of Indian Affairs and the California Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership” (*id.*, rule 5.481(a)(4)(B)); and “[c]ontacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility” (*id.*, rule 5.481(a)(4)(C).)

D. Contents of Notice

The parents contend that the notices sent by the Department were deficient in content. “[F]ederal and state law require that the notice . . . include ‘available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data.’ [Citations.] To fulfill its responsibility, the Agency has an affirmative and continuing duty to inquire about, and if possible obtain, this information. [Citations.] Thus, a social worker who knows or has reason to know the child is Indian ‘is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section

224.2’ ([Welf. & Inst. Code,] § 224.3, subd. (c).) That information ‘*shall* include’ ‘[a]ll names known of the Indian child’s biological parents, grandparents, and great-grandparents, or Indian custodians, 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.’ ([Welf. & Inst. Code,] § 224.2, subd.(a)(5)(C).) Because of their critical importance, ICWA’s notice requirements are strictly construed. [Citation.]” (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396-1397.)¹⁸

The notices here were woefully deficient in terms of what they actually contained and what they inexplicably omitted. Most glaringly, they failed to indicate that Father’s father had Indian ancestry, even though he is the *only* paternal ancestor identified anywhere else in the record as having such ancestry. The notice stated that Father’s *mother* had some association with a Choctaw tribe in or near Bennington, Oklahoma, but this is probably a mistake, since there is no other suggestion of such an association. If it was a mistake, then any attempt by a tribe to investigate further was doomed to fail. At the same time, the tribe was given no reason to investigate what the far more promising possibility that the children might claim tribal membership through their paternal grandfather. This omission alone defeated the purpose of the notices, which was to give the Choctaw tribe enough information to investigate any connection the children might have with it. Since the Department knew full well that such a connection had been asserted through the paternal grandfather, the notices’ failure to so indicate deprived the tribe of any real opportunity to determine whether the children belonged to it.

¹⁸ The oft-repeated statement that the notice requirements are “strictly construed” is a slight malapropism, as it implies that courts interpret them narrowly. What is meant is either that the requirements are *broadly* construed, or that they are strictly *enforced*—or perhaps both.

Moreover, even if the notice had properly identified the children's paternal grandfather as a possible Indian ancestor, it inexplicably failed to provide any identifying information beyond his name. The record suggests no explanation for this omission. There is no indication that Father was ignorant of his father's address, birthdate, or place of birth. Moreover the record provides no explanation for the Department's failure to obtain this information directly from the grandfather. According to the social worker's report of December 14, 2010, both he and Father's mother had come to California from their homes in Texas and Hawaii, respectively, "to assist the father with the children and the circumstances they currently face." Although the record does not clearly fix the father's arrival date, the report indicates that he was involved in a visitation plan prepared by the social worker as early as November 3, 2010, which was 19 days before the ICWA notices were mailed. He was certainly present in California by December 21, when Zachary was "placed with the paternal grandmother and grandfather." As in *In re A.G.*, *supra*, 204 Cal.App.4th 1390, 1397, this makes the omission of identifying data "all the more puzzling."

The present record affords no basis for a finding that the Department supplied all information reasonably available to it concerning the identity of suspected Indian ancestors.

E. Notice to Additional Tribe or Tribes

Mother contends that the Department also failed to satisfy the statutory requirement that an ICWA notice be "sent to all tribes of which the child may be a member or eligible for membership." (§ 224.2, subd. (a)(3).) This language "must be construed as requiring notice to *all* federally recognized tribes within the general umbrella identified by the child's parents or relatives." (*In re Alice M.*, *supra*, 161 Cal.App.4th 1189, 1202.) Thus, where the evidence suggests possible membership in an Apache tribe, "all recognized Apache tribes are 'tribes of which [the child] may be a

member,' even if the family's precise tribal affiliation, if any, has not been determined." (*Ibid.*)

Mother contends that, based upon her reference to a "Clear Lake" tribe, the Department should have given notice to a tribe found in the federal list of tribal agents, which she asserts "reveals only one federally registered California tribe with a Clear Lake, CA. address—the Elem Indian Colony, Wahlia Pearce, Family Resource Coordinator, P.O. Box 757 Clearlake Oaks, CA 95423." (See Designated Tribal Agents for Service of Notice under ICWA (May 19, 2010) 75 Fed. Reg. 28104, 28119 (Designated Agents).)

Mother's argument presupposes that the Department was obligated to search the federal list for tribes corresponding to her description. This court has previously acknowledged that searching the relevant state and federal databases is an appropriate way "to determine quickly the full list of specific tribes within a broad group . . . that must be contacted" and to determine the necessary "contact information." (*In re Alice M.*, *supra*, 161 Cal.App.4th 1189, 1200, fn. 6.) However, the parties have not specifically addressed the scope of the Department's duty, if any, in conducting such a search. (Cf. *In re K.P.* (2009) 175 Cal.App.4th 1, 5-6 [refusing to consider information from internet, not placed before trial court, offered to show that unregistered tribe might be affiliated with registered tribes].) Since the tribe has now been discovered and a new notice will have to be promulgated anyway, we will direct the trial court to require notice to this tribe. Indeed, a more thorough examination of the federal database together with consultation of a map discloses four additional registered tribes with contact addresses on or next to Clear Lake.¹⁹ We will also direct that notice be provided to these tribes.

¹⁹ These are the Big Valley Band of Pomo Indians, with an agent in Lakeport; Scotts Valley Band of Pomo Indians, also Lakeport; Habematolel Pomo of Upper Lake Rancheria, Upper Lake; and Robinson Rancheria, Nice. These tribes were identified by the simple procedure of searching the federal list for the Clear Lake area code (707) and

Mother also alludes to the evidence that when Father first described his Indian heritage, he referred to a “Chikawah” tribe. Although no specific argument is predicated on this fact, we are concerned that the record fails to explain the Department’s evident decision not to act on this information. It is possible that Father later denied any “Chikawah” ancestry in favor of the “Chactow” claim which the Department quite reasonably interpreted as “Choctaw.” If so, however, the record should reflect that fact. As it stands, the record appears to contain a claim of Indian ancestry as to which no action whatever has been taken. Just as “Chactow” may be readily understood as a slight misconstruction of “Choctaw,” “Chikawah” may be viewed as a conflation of “Chikasaw” and “Chippewa.” The federal list includes some 14 entities with “Chippewa” in their names, all with agents in the Great Lakes region, North Dakota, or Montana. The only federally recognized tribe with “Chickasaw” in its name is the “Chickasaw Nation, Oklahoma.” (Designated Agents, *supra*, 75 Fed. Reg. at p. 28113.) That tribe seems at least as likely to be the source of the family’s Indian heritage as two of the three Choctaw tribes to which notice was given here.²⁰ Accordingly, unless further investigation rules out Chickasaw or Chippewa ancestry, notice should be sent to those tribes as well.

checking the locations of the resulting addresses on an online map. Neither parent contends, and we do not hold, that the Department was required to take these steps. However child welfare authorities will seldom go wrong by examining readily available sources to ascertain whether the information in their possession points to one or more registered tribes to which a child may belong.

²⁰ The town of Bennington, Oklahoma, which is mentioned in the notice as an ancestral home, appears to be about 20 miles east of Durant, the address of the designated tribal agent for the Choctaw Nation of Oklahoma. (Indian Child Welfare Act; Designated Tribal Agents for Service of Notice (May 19, 2010) 75 Fed. Reg. 28104, 28113.) The agent for the Chickasaw tribe is located in Ada, which is about 80 miles northwest of Bennington but still in the southeast quadrant of the state. (*Ibid.*) Ada is certainly closer to Bennington than are Choctaw, Mississippi, and Jena, Louisiana, which are the locations of the two other agents to whom the Department sent notice.

DISPOSITION

The orders of April 7, 2011, are reversed and the matter is remanded with directions to revise and re-serve the ICWA notices in accordance with this opinion. If, after proper notice, the court finds that the children are Indian children, it shall proceed in conformity with ICWA. If, after proper notice, the court finds that they are not Indian children, the orders of April 7, 2011, will be reinstated with the following modifications:

The jurisdictional order in No. DP002364 will be modified by (1) striking the language at page 2, line 4, and replacing it with “6. The allegations of paragraph b(4) are true.”; and (2) striking the words “and (e)” at page 2, line 6.

The jurisdictional order in No. DP002363 will be modified by (1) striking the language at page 2, line 4, and replacing it with “6. The allegations of paragraph j(3) are true.”; and (2) striking the words “300(b) and (j)” at page 2, line 6, and replacing them with “300(j).”

The dispositional order in No. DP002364 will be modified in accordance with this opinion and to reflect circumstances as they appear at the time of hearing on remand. The dispositional order in No. DP002363 will be modified if and as necessary to reflect circumstances as they appear at the time of the hearing on remand.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.