Filed 8/14/17 In re Anthony Q. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ANTHONY Q., a Person Coming Under the Juvenile Court Law.	B279360 (Los Angeles County Super. Ct. No. CK65790)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JONATHAN Q., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Conditionally affirmed and remanded.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

Jonathan Q., the presumed father of 11-year-old Anthony Q., appeals from the juvenile court's October 21, 2016 order pursuant to Welfare and Institutions Code section 366.26[1] terminating his parental rights and identifying adoption as the permanent plan for Anthony. Jonathan contends the juvenile court committed prejudicial error when it failed to transport him to court from the Los Angeles County Jail for the section 366.26 hearing as required by Penal Code section 2625, subdivision (d), and the court and the Los Angeles County Department of Children and Family Services (Department) failed to satisfy their affirmative duty of inquiry imposed by the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We agree there was not an adequate investigation of the possible Indian ancestry of Anthony's mother, Christina R., remand the matter to allow the Department and the juvenile court to remedy that violation of federal and state law and otherwise conditionally affirm the order.

---

[1] Statutory references are to this code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Dependency Proceedings Through the Disposition Order*

The juvenile court declared Anthony a dependent child of the court and removed him from Jonathan's care and custody on July 29, 2015 after it found there would be a substantial danger to Anthony's physical health, safety, protection or physical or emotional well-being if he were returned to Jonathan's home. We affirmed that disposition order last year. (*In re Anthony Q.* (2016) 5 Cal.App.5th 336.)

In our opinion we explained the current dependency proceeding is Anthony's third time in the system. In late 2006 the Department filed a petition alleging that Jonathan and Christina had a history of domestic violence and that neither of them was willing or able to supervise or care for Anthony due to each parent's mental and emotional limitations. Then nine-month-old Anthony was ordered suitably placed in January 2007 but was returned to Jonathan with a home-of-parent order in May 2008. On November 18, 2008 the juvenile court terminated its jurisdiction with a family law order granting sole legal and physical custody to Jonathan. (*In re Anthony Q.*, *supra*, 5 Cal.App.5th at p. 340.)

In October 2010 the Department filed a second section 300 petition, and the court exercised dependency jurisdiction based on Jonathan's severe mental health issues ("a diagnosis of bi-polar and borderline personality disorder, suicidal and homicidal ideation, and self mutilation behavior") and his failure to participate in mental health services, as well as Christina's failure to provide the child with the necessities of life. Anthony, then six years old, was removed from Jonathan, who received family reunification services through April 2012 when Anthony

was again returned to Jonathan by a home-of-parent order. The case was terminated in January 2013. (*In re Anthony Q.*, *supra*, 5 Cal.App.5th at p. 340.)

On December 5, 2014 the Department filed its third section 300 petition to protect Anthony. This proceeding was prompted by a June 2014 referral alleging emotional abuse of Anthony by Jonathan. At a team decision meeting in July 2014 Jonathan, who continued to have mental health issues and who admitted to using methamphetamine, but only "recreationally," stated he was willing to take the psychotropic medication that had been prescribed for him, something he would do only sporadically in the past, and to follow through with mental health services. Although Jonathan told the social workers he wanted Anthony to remain with him, Anthony began living in the home of his maternal stepgrandmother. Jonathan did not live in the home and saw Anthony only once or twice a week. (*In re Anthony Q.*, *supra*, 5 Cal.App.5th at pp. 340-341.) Jonathan stopped communicating with the social workers in August 2014. As reflected in its detention report dated December 5, 2014, the Department concluded it was necessary to detain Anthony due to the substantiated allegation of general neglect by Jonathan, Jonathan's failure to inform the Department of his plan to leave Anthony with his stepgrandmother and Jonathan's recent erratic behavior. (*Id.* at p. 341.)

The jurisdiction/disposition report filed January 8, 2015 disclosed that Jonathan was in custody at the Twin Towers Correctional Facility (he apparently had been arrested on December 20, 2014). In an interview on January 27, 2015 Jonathan expressed a desire to reunify with Anthony if he were

to be released from custody soon. (*In re Anthony Q.*, *supra*, 5 Cal.App.5th at p. 342.)

On March 12, 2015, appearing in custody and represented by counsel, Jonathan waived his rights to a contested hearing and pleaded no contest to the December 5, 2014 petition. As sustained the petition alleged in amended count b-1, "'The child Anthony Q[.]'s father, Jonathan Q[.,] has an unresolved history of mental and emotional issues including a diagnosis of Bi-Polar Disorder and self-mutilation, which if left untreated, renders the father incapable of providing the child with adequate care and supervision. The father has failed to take the father's prescribed psychotropic medication in a consistent manner. On prior occasions, the father was involuntarily hospitalized for evaluation and treatment of the father's mental health issues. The father's unresolved mental and emotional issues place the child at substantial risk of harm.'" Sustained count b-2 alleged, "'The child, Anthony Q[.]'s father, Jonathan Q[.] has a history of substance use. Father last used drugs in May of 2014. Father's recent drug use places the child at substantial risk of harm.'" (*In re Anthony Q.*, *supra*, 5 Cal.App.5th at p. 341.)

At the May 7, 2015 disposition hearing the court ordered Anthony removed from the custody of his parents and placed under the supervision of the Department. The court ordered family reunification services for Jonathan, including participation in a full drug and alcohol program with random and on-demand testing, as well as for Christina, who had first appeared in the proceedings at the date initially set for the disposition hearing. Both parents' visits were to be monitored (Christina's in a therapeutic setting) with discretion in the Department to liberalize visitation. Anthony, who had previously

been placed with his paternal aunt, remained placed with her. (*In re Anthony Q.*, *supra*, 5 Cal.App.5th at pp. 342-343.)

2. *The Six-month and 12-month Review Hearings*

In a report filed September 9, 2015 the Department stated Jonathan had recently been released from incarceration and was looking for stable housing and employment. He was not taking psychotropic medication notwithstanding his diagnosis of bipolar disorder and was not enrolled in any drug treatment programs or drug testing. Jonathan told the Department he wanted custody of his son, and Anthony said he wanted to return to the care of his father "when he is ready." The paternal aunt was no longer willing to care for the child.

In its report for the six-month review hearing (§ 366.21, subd. (e)), the Department stated Jonathan was noncompliant with the court-ordered drug and alcohol program with aftercare and individual counseling. His monitored visitation with Jonathan was inconsistent. Nonetheless, the Department recommended another six months of family reunification services. By the time of the review hearing on January 27, 2016, Jonathan had enrolled in some of the court-ordered programs. Jonathan appeared at the hearing with counsel. The court ordered Anthony to remain in foster care and continued reunification services.

The 12-month review hearing (§ 366.21, subd. (f)), originally scheduled for February 16, 2016, was continued to March 11, 2016 for a contest and to address ICWA issues. Jonathan was present with counsel on February 16, 2016, but not on March 11, 2016. The matter was continued again to March 29, 2016. In an information report filed on the continued hearing date, the Department advised the court that Jonathan

had been arrested on a felony charge in mid-March and was at Twin Towers Correctional Facility. In a telephone call Jonathan told the Department's social worker he wanted to be present at the next court hearing. The matter was continued to April 22, 2016.

Jonathan appeared with counsel at the contested 12-month review hearing, which was conducted over three days, April 20, 21 and 22, 2016. Anthony's counsel asked the court to terminate reunification services, emphasizing that the child had been detained from Jonathan three separate times, Jonathan was not making any progress in resolving his problems despite the provision of reunification services and there was no likelihood the situation would improve. The court agreed, terminated reunification services and set the case for a selection and implementation hearing on August 4, 2016 pursuant to section 366.26. Jonathan was personally served with the required notice for that hearing.

3. *The Selection and Implementation Hearing and Termination of Parental Rights*

Jonathan was once again taken into custody in June 2016. An order was prepared for him to be transported to court for the August 4, 2016 hearing. Jonathan appeared on that date, in custody, with counsel. However, because proper notice had not been given, the matter was continued to October 21, 2016. In response to the court's question, Jonathan's counsel stated, "[f]or the time being he is local, your honor." The court issued a new local jail removal order for Jonathan to be transported to the next court hearing (referred to in dependency patois as an "in-and-out").

On September 9, 2016 Jonathan reported he had been sentenced to 16-17 months in state prison, but as of that date remained in local custody at the Los Angeles County Jail. Jonathan did not appear at the October 21, 2016 hearing.

The Department's reports stated Anthony was physically healthy, developmentally normal and doing well in school. He was receiving excellent care in his current foster home. The foster parent with whom Anthony had been living since March 2016 was interested in providing permanent care for Anthony through adoption or by becoming his legal guardian. According to the social worker, Anthony had adjusted well to this placement and enjoyed living there.

Jonathan visited Anthony once in April and again in May, but did not see him in June or July because of his incarceration. Jonathan made numerous telephone calls to the supervising social worker regarding Anthony's welfare and had written his son several times.

Christina had been present at the August 4, 2016 hearing, but, like Jonathan, was not present on October 21, 2016. At the outset of the hearing the court asked if anyone wanted to be heard. Christina's counsel stated, "On behalf of the mother I don't have direction from her for today. The last direction I have from the mother was that she did want to be reunited with the child. For the record, I will object to the termination of parental rights."

Jonathan's counsel then stated, "At this time, your honor, on behalf of the father, I , too, would object to the termination of his parental rights." No grounds were stated.

The court overruled the objections and found by clear and convincing evidence that Anthony was adoptable, that it would be

detrimental for him to be returned to the custody of his parents and that no exception to adoption applied. The court terminated parental rights and designated Anthony's foster parent as the prospective adoptive parent. The court then asked, "[I]s there anything else on this matter at this time?" Anthony's counsel commended him on his excellent work at school. Neither Jonathan's nor Christina's counsel made any further comments.

4. *Investigation of Christina's Possible Indian Ancestry*

As discussed, Christina made her first appearance in these dependency proceedings, and counsel was appointed for her, on April 14, 2015, the date initially scheduled for the disposition hearing. (*In re Anthony Q.*, *supra*, 5 Cal.App.5th at p. 342.) As of that date Christina had not seen Anthony for five or six years. (*Ibid.*)

With her initial appearance Christina filed the Parental Notification of Indian Status form (ICWA-020), stating, "I may have Indian ancestry"; she provided the name and a telephone number for Anthony's maternal grandfather, Francisco R., as a source for further information. The disposition hearing was continued to May 7, 2015 to permit the Department to prepare a supplemental report concerning Christina and to investigate her possible Indian ancestry.

Although the Department's report for the May 7, 2015 hearing summarized the social worker's interview with Christina, no information was included concerning her (and Anthony's) possible Indian ancestry. The disposition hearing was again continued. In a last minute information report for the next hearing date, June 9, 2015, the Department described a conversation with Christina in which she stated she was unaware of what Indian ancestry her father may have and that "to her

knowledge, only the MGF knows which tribe they may be associated with." Christina also told the social worker "MGF is not registered with any tribe at this time." According to the report, Christina agreed to contact the maternal grandfather and follow-up with the Department "should she obtain any additional information pertaining to the maternal grandfather's Indian ancestry."

The next series of reports from the Department, through the six-month review hearing on January 27, 2016, stated ICWA did not apply to Anthony without any indication that anything more had been done to investigate the issue. On February 16, 2016, the date originally scheduled for the 12-month review hearing, Christina was present and reiterated that the Department would need to contact her father, Francisco R., to obtain information about Anthony's possible Indian ancestry. Christina indicated it was her deceased grandfather Joseph (Francisco R.'s father) who she believed was Indian. When the court asked, "What tribe are we talking about," Christina responded, "It's out in Texas. He told me the name a long time ago, but to be honest with you, I don't remember." When the court asked if Christina's grandfather had lived on a reservation, Christina answered, "To be honest with you, I don't think so, no." The court then asked, "Was he a member of the tribe," and Christina said, "I can't answer that question. I don't know." Christina again said her father would have the necessary information. As discussed, the hearing was continued for a contest by Anthony and Christina regarding continued reunification services. The court ordered a supplemental report on ICWA.

In a March 11, 2016 interim review report a Department social worker stated she had been unsuccessful in two attempts to contact Francisco R. at the telephone number provided by Christina. She reported, "As of the writing of this report, PGF [*sic*] has not contacted this CSW. Therefore, at this time the family has not [been] able to provide additional information as to ICWA." Subsequent reports are silent as to any further effort by the Department to contact Francisco R., other maternal relatives or anyone else who might have knowledge of Anthony's Indian ancestry.

On the final day of the contested 12-month review hearing on April 22, 2016, after the court terminated reunification services for both Jonathan and Christina and set the selection and implementation hearing, the court asked, "Did we resolve all issues regarding ICWA?"' Anthony's attorney responded, "On November 20, 2006, when the case was first here, in Department 413, with Referee Sobel, who was the ICWA expert, on that date the minute order finds that this is not an ICWA case. So I don't think there's been any new information since then, unless the father has something, but I think that order should be reiterated." Based on counsel's statement the court took judicial notice of "the court's prior determinations regarding this family, that ICWA is not applicable in this case." The April 22, 2016 minute order contains an ICWA finding: "The Court does not have a reason to know that this is an Indian Child, as defined under ICWA, and does not order notice to any tribe or the BIA."

DISCUSSION

1. *Jonathan's Claim of Error Under Penal Code Section 2625, Subdivision (d), Has Been Forfeited*

Penal Code section 2625, subdivision (d), prohibits terminating parental rights under Welfare and Institutions Code section 366.26 without the physical presence of an incarcerated parent unless the parent has knowingly waived his or her right to appear: "Upon receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner's production before the court. No proceeding under . . . Section 366.26 of the Welfare and Institutions Code . . . may be adjudicated without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden, superintendent, or other person in charge of the institution, or his or her designated representative stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding."[2]

---

[2] Penal Code section 2625, subdivision (b), provides, in part, "In any proceeding brought under . . . Section 366.26 of the Welfare and Institutions Code, where the proceeding seeks to terminate the parental rights of any prisoner, . . . the superior court of the county in which the proceeding is pending, or a judge thereof, shall order notice of any court proceeding regarding the proceeding transmitted to the prisoner." There is no issue of notice in this case. Jonathan was brought to court for the initial hearing date under section 366.26 and received notice at that time of the continued hearing on October 21, 2016.

The Supreme Court in *In re Jesusa V.* (2004) 32 Cal.4th 588, 622, confirmed that the reference in the statute to the "physical presence of '"the prisoner *or* the prisoner's attorney"'" did not mean only the presence of the incarcerated parent's lawyer was required. Analyzing the legislative history of the provision, the Supreme Court held the word "or" in this phrase is properly given a "conjunctive meaning": "These materials reveal a strong legislative interest in enabling the prisoner to attend the hearing, an interest that would be undermined by interpreting the statute to make the attorney's presence sufficient in every case." (*Id.* at p. 623.)[3]

Jonathan appeared, in custody, at the section 366.26 selection and implementation hearing held on August 4, 2016. The court continued the matter to October 21, 2016 and issued an in-and-out order for Jonathan to be transported to court on that date, as well. However, Jonathan was not present, and nothing in the record suggested he had signed a waiver indicating he did not wish to appear. The court erred in proceeding without Jonathan being present. (*In re Jesusa V.*, *supra*, 32 Cal.4th at pp. 623-624; *In re M.M.* (2015) 236 Cal.App.4th 955, 962-963.)

The *Jesusa V.* Court held violation of Penal Code section 2625, subdivision (d), was not jurisdictional and, therefore, not reversible per se. The Court explained, "[W]e have regularly applied a harmless-error analysis when a defendant has been involuntarily absent from a criminal trial. [Citations.]

---

[3] The *Jesusa V.* Court held an incarcerated parent has no due process right, independent of Penal Code section 2625, to attend a dependency hearing at which his or her lawyer was present. (*In re Jesusa V., supra*, 32 Cal.4th at pp. 625-626.)

We do not believe the Legislature intended a different result in the analogous circumstance here, when a prisoner is involuntarily absent from a dependency proceeding." (*Jesusa V.*, *supra*, 32 Cal.4th at p. 625.) The Court concluded the familiar *Watson* harmless error standard should be applied—that is, reversal is not required unless it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Ibid.*; accord, *In re M.M.*, *supra*, 236 Cal.App.4th at pp. 963-964; see generally *In re Celine R.* (2003) 31 Cal.4th 45, 59-60 [harmless error doctrine applies in dependency cases; dependency court order should not be set aside unless it is reasonably probable the result would have been more favorable to the appealing party but for the error].) attached

Jonathan argues the failure to transport him to the selection and implementation hearing was not harmless here because, if he had been present, he could have produced compelling evidence that would have established the parent-child exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i). (See generally *In re Anthony B.* (2015) 239 Cal.App.4th 389*,* 396 [parent-child relationship exception requires parent to demonstrate "relationship remained so significant and compelling in [the child's] life that the benefit of preserving it outweighed the stability and benefits of adoption"]; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315 [juvenile court determines "the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption"]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 [exception applies only if the severance of the parent-child

relationship would "deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed"].)

Implicitly acknowledging the juvenile court erred when it failed to ensure Jonathan was transported to the section 366.26 hearing from jail, the Department argues Jonathan forfeited the claim by not raising it in the juvenile court and, in any event, any error was harmless because the record demonstrated Anthony's need for a secure, stable and long-term home with his prospective adoptive parent plainly outweighed any speculative bond Jonathan now asserts he could prove between Anthony and him.

Because his counsel did not object to proceeding with the hearing in Jonathan's absence or request a continuance to permit him to be transported from jail to the court, we agree with the Department any claim of error has been forfeited. (See *In re Gilberto M.* (1992) 6 Cal.App.4th 1194, 1200, fn. 7 [parent cannot claim on appeal a violation of rights under Penal Code section 2625 absent objection in the juvenile court].) As the Supreme Court explained in *In re S.B.* (2004) 32 Cal.4th 1287, 1293, dependency matters are not exempt from general rules of forfeiture. The purpose underlying the forfeiture rule—to encourage parties to bring errors to the attention of the juvenile court so that they may be corrected (see *In re Sheena K.* (2007) 40 Cal.4th 875, 881; *In re S.B.*, at p. 1293)—is particularly apt here. The juvenile court was well aware that Jonathan was in custody at various times during the dependency proceedings and consistently attempted to ensure appropriate orders were issued so he would be present at scheduled hearings during his intermittent periods of incarceration. Indeed, on at least one occasion the hearing was continued precisely because Jonathan had not been

transported to court, as ordered. Given the paramount importance of permanency and stability for Anthony at this phase of the dependency proceedings (see *In re S.B.*, at p. 1293), Jonathan's counsel's failure to object (or even mention Jonathan's absence), which deprived the court of the opportunity to reschedule the hearing and remedy the error without undue delay, forfeited the claim.

In addition, although Jonathan's counsel registered a one-sentence general objection to termination of parental rights, he did not at any time suggest Jonathan contended the parent-child exception to termination was applicable, let alone present any evidence or argument on that point. (See *In re E.A.* (2012) 209 Cal.App.4th 787, 790 ["General objections are insufficient to preserve issues for review. [Citation.] The objection must state the ground or grounds upon which the objection is based."].) The failure to raise a statutory exception to termination of parental rights at the section 366.26 hearing forfeits the issue for purpose of appeal. (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 292.) Accordingly, even without considering the vague and speculative nature of Jonathan's claim of prejudice, that issue is not properly before us.

2. *The Department Failed To Satisfy Its Inquiry Obligation Under ICWA and Parallel Provisions of State Law*

a. *ICWA and state law inquiry and notice requirements*

ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. (25 U.S.C. § 1902; see *In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8; *In re W.B.* (2012) 55 Cal.4th 30,

47.) For purposes of ICWA, an "Indian child" is a child who is either a member of an Indian tribe or is 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); see § 224.1, subd. (a) [adopting federal definitions].)

As the Supreme Court explained in *In re Isaiah W.*, *supra*, 1 Cal.5th at pages 8 through 9, notice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. ICWA provides, "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe" of the pending proceedings and its right to intervene. (25 U.S.C. § 1912(a).) Similarly, California law requires notice to the Indian custodian and the Indian child's tribe in accordance with section 224.2, subdivision (a)(5), if the Department or court knows or has reason to know that an Indian child is involved in the proceedings. (§ 224.3, subd. (d); see Cal. Rules of Court, rule 5.481(b)(1) [notice is required "[i]f it is known or there is reason to know that an Indian child is involved in a proceeding listed in rule 5.480," which includes all dependency cases filed under Welfare and Institutions Code section 300].)[4]

---

[4] If the court has reason to know an Indian child may be involved in the pending dependency proceeding but the identity of the child's tribe cannot be determined, ICWA requires notice be given to the Secretary of the Interior, whose department

Importantly for our purposes, the burden of developing information to determine whether an Indian child may be involved and ICWA notice required in a dependency proceeding does not rest entirely—or even primarily—on the child and his or her family. (*In re Michael V.* (2016) 3 Cal.App.5th 225, 233.) Juvenile courts and child protective agencies have "an affirmative and continuing duty to inquire" whether a dependent child is or may be an Indian child. (§ 224.3, subd. (a); *In re Isaiah W., supra*, 1 Cal.5th at pp. 9, 10-11; see Cal. Rules of Court, rule 5.481(a); see also *In re W.B.*, *supra*, 55 Cal.4th at pp. 52-53.) This affirmative duty to inquire is triggered whenever the child protective agency or its social worker "knows or has reason to know that an Indian child is or may be involved . . . ." (Cal. Rules of Court, rule 5.481(a)(4).) At that point, the social worker is required, as soon as practicable, to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility. (§ 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4)(A); see *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1386; *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539.)

The circumstances that may provide reason to know the child is an Indian child include, without limitation, when a person having an interest in the child, including 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

---

includes the federal Bureau of Indian Affairs. (25 U.S.C. §§ 1903(11), 1912(a); see *In re Isaiah W.*, *supra*, 1 Cal.5th at p. 8.)

great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1); see *In re Isaiah W.*, *supra*, 1 Cal.5th at p. 15 ["section 224.3, subdivision (b) sets forth a nonexhaustive list of 'circumstances that may provide reason to know the child is an Indian child'"]; Cal. Rules of Court, rule 5.481(a)(5)(A) [containing language substantially identical to that in § 224.3, subd. (b)(1)]; see also *In re B.H.* (2015) 241 Cal.App.4th 603, 606-607 ["a person need not be a *registered* member of a tribe to be a member of a tribe—parents may be unsure or unknowledgeable of their own status as a member of a tribe"].)[5]

b. *The Department did not adequately investigate Anthony's possible Indian ancestry*

Christina provided information suggesting Anthony's maternal great-grandfather was a member of a tribe, one of the circumstances listed in section 224.3, subdivision (b)(1), that may provide reason to know a child is an Indian child. That

---

[5] Although section 224.3, subdivision (b)(1), and rule 5.481(a)(5)(A) of the California Rules of Court identify certain circumstances when there may be a reason to know the child is an Indian child, ICWA itself does not define "reason to know," nor did the implementing federal regulations in effect while this case was pending in the dependency court. (See former 25 C.F.R. § 23.11; *In re H.B.* (2008) 161 Cal.App.4th 115, 121, fn. 3; *In re S.B.* (2005) 130 Cal.App.4th 1148, 1158.) However, new regulations to implement ICWA, adopted as of December 12, 2016, now identify circumstances in which a court has "reason to know" the child is an Indian child, including if "[a]ny participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child." (25 C.F.R. § 23.107(c)(2).)

statement, which also suggested the maternal great-grandfather may have belonged to a tribe located in Texas, triggered the Department's affirmative duty of inquiry even though it was not enough, standing alone, to require ICWA notice. (See *In re Michael V.*, *supra*, 3 Cal.App.5th at p. 235; see also *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200 ["the duty to inquire is triggered by a lesser standard of certainty regarding the minor's Indian child status . . . than is the duty to send formal notices to the Indian tribes"].) Despite this, and notwithstanding the court's April 14, 2015 order that the Department investigate the child's possible Indian ancestry, the Department's response was simply to direct Christina to pursue the matter and provide any additional information she learned.

The Department maintained this unacceptable passive posture, while repeatedly reporting to the court that ICWA did not apply, until February 16, 2016 when the court again ordered the Department to investigate ICWA's possible applicability to the case. At this point the Department apparently twice called the telephone number Christina had provided for her father, Francisco R. (the son of the deceased maternal great-grandfather), failed to contact him and, from what is revealed in the record, made no attempt to pursue other possible ways of locating him. Nor did it try to interview other maternal relatives[6] or anyone else, including Jonathan or paternal relatives, who might have knowledge of Christina's and Anthony's possible Indian ancestry.

---

[6] According to the January 30, 2015 jurisdiction/disposition report, Christina has a brother and a maternal aunt who cared for her after her mother died.

The Department's minimal affirmative efforts failed to satisfy its obligation to investigate under ICWA and California law.[7] Other than making two telephone calls, the Department once again improperly sought to impose on relatives of a dependent child the burden of coming forward with information regarding Indian ancestry. As we explained in *In re Michael V.*, *supra*, 3 Cal.App.5th at page 236, "It was not the paternal great-aunt's obligation to speak up; it was the Department's obligation to inquire, an affirmative and continuing duty imposed by both ICWA and California law."

This defective ICWA investigation was not cured by the juvenile court's judicial notice of the 2006 finding that ICWA did not apply to Anthony's initial dependency case. Although we do not question the accuracy of Anthony's counsel's summary description of Referee Sobel's ruling, the basis for that ruling is nowhere to be found in the record. In particular, it is impossible to determine whether Christina informed the court in 2006 that she believed her grandfather and great-grandfather may be Indian and, if so, whether the Department interviewed either of them or any other maternal relative at that time.[8] Because the

---

[7] When the facts are undisputed, we review independently whether ICWA or corresponding state law requirements have been satisfied. (*In re Michael M.*, *supra*, 3 Cal.App.5th at p. 235, fn. 5; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254.)

[8] According to the background information in the 2015 jurisdiction/disposition report, in 2006 Christina was a young teenager (perhaps only 13 years old) with an infant child, the victim of domestic violence, and suffering from serious mental

Department and the court's duty to inquire whether a dependent child is or may be an Indian child is "affirmative and continuing" (see *In re Isaiah W.*, *supra*, 1 Cal.5th at pp. 9, 10-11), absent evidence that the 2006 ruling was made following a full investigation of the same information available in 2015 and 2016, judicial notice of the 2006 ruling does not satisfy the requirements of ICWA and state law.

In sum, although we reject Jonathan's request to reverse the October 21, 2016 order terminating parental rights based on the violation of Penal Code section 2625, subdivision (d), we remand the matter for the juvenile court to direct the Department to conduct a meaningful investigation into Christina's claim of Indian ancestry, including making genuine efforts to contact Anthony's maternal grandfather, Francisco R., and to locate other family members who might have information bearing on Anthony's possible Indian ancestry. If that investigation produces any additional information substantiating Christina's claim, notice must be provided to any tribe that is identified or, if the tribe cannot be determined, to the federal Bureau of Indian Affairs. The Department must thereafter notify the court of its actions and file certified mail return receipts for any ICWA notices that were sent, together with any responses received. The court is then to determine whether the ICWA inquiry and notice requirements have been satisfied and whether Anthony is an Indian child. If the court finds he is an Indian child, it must conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and related

---

and emotional problems. We doubt under those circumstances she was a reliable reporter of family history.

California law. If not, the court's original section 366.26 order remains in effect.

DISPOSITION

The juvenile court's October 21, 2016 section 366.26 order is conditionally affirmed. The matter is remanded to the juvenile court for full compliance with the inquiry and notice provisions of ICWA and related California law and for further proceedings not inconsistent with this opinion.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.