Filed 9/11/19 In re Michael L. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re MICHAEL L., a Person Coming Under the Juvenile Court Law.	B296375 (Los Angeles County Super. Ct. No. CK70386C)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CHARLENE Q., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Sabina A. Helton, Judge. The order denying the petition for modification of court order is affirmed; the order terminating parental rights is conditionally affirmed and remanded with directions.

Gina Zaragoza, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine Miles, Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

Charlene Q., the mother of eight-year-old Michael L., appeals from the juvenile court's February 21, 2019 orders denying her petition for reinstatement of family reunification services under Welfare and Institutions Code section 388[1] and terminating her parental rights under section 366.26. Charlene contends the court erred in concluding additional reunification services were not in Michael's best interests and finding she had not established the parent-child-relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)). She also contends the juvenile court and the Los Angeles County Department of Children and Family Services (Department) failed to make the inquiries required under the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) and California law. We affirm the order denying Charlene's section 388 petition. We also affirm the finding that Charlene had failed to prove the parent-child-relationship exception applied in this case. However, because there is no evidence the juvenile court and the Department complied with ICWA, we remand the matter to allow the court and the Department to remedy that violation.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Dependency Petitions, Jurisdiction and Disposition*

In October 2014 the Department filed a section 300 petition alleging Charlene had failed to provide her then-17-year-old

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

daughter, Ariella D., with necessary medical treatment and prescribed medication to address Ariella's seizures and psychosis, placing both Ariella and then-three-year-old Michael at substantial risk of physical harm. The petition also alleged Michael's father, Robert L., had a history of alcohol abuse and was a current abuser of alcohol, and his alcohol abuse put Michael at substantial risk of physical harm.[2] Following a jurisdiction hearing the court sustained amended allegations as to both Charlene and Robert. At the disposition hearing in March 2015 the court declared the children dependents of the court, removed Ariella from Charlene's custody and released Michael to Charlene under the supervision of the Department. The court ordered family maintenance services for Charlene and family enhancement services for Robert.[3]

In September 2015 the Department filed a subsequent petition under section 342 alleging Charlene had a long history of using methamphetamine, was a current user and seller of methamphetamine and allowed individuals who she knew used or sold methamphetamine to have unlimited access to Michael. Michael was immediately detained from Charlene's custody. At the jurisdiction/disposition hearing the court sustained the new allegations and removed Michael from Charlene's custody. The

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[2] The petition contained no allegations concerning Ariella's father, Florentino D.

[3] Ariella and Michael were also the subjects of prior dependency proceedings: In September 2012 the juvenile court sustained allegations relating to Robert's alcohol abuse and domestic violence between Robert and Charlene in Michael's presence. Ariella, who is now an adult, is not a subject of this appeal.

court granted Charlene monitored visitation and ordered her to submit to weekly, on-demand drug testing and to participate in individual counseling and parenting classes.

2. *Review Hearings*

At the six-month review hearing on October 4, 2016 (§ 366.21, subd. (e)), the court found Charlene to be in partial compliance with her case plan and granted her additional family reunification services. However, by the time of the contested 12-month hearing on May 23, 2017 (§ 366.21, subd. (f)), Charlene had missed all her drug tests and had not visited with Michael. The court found neither Charlene nor Robert was in compliance with the case plan and no substantial probability existed that Michael could be returned safely to his parents' custody in six months. The court terminated family reunification services for both parents and set a selection and implementation hearing (§ 366.26) for September 19, 2017.

3. *Charlene's Section 388 Petition and the Selection and Implementation Hearing*

The September 2017 selection and implementation was taken off calendar and later reset for October 12, 2018.[4] On July 31, 2018, soon after the new selection and implementation hearing was scheduled, Charlene filed a section 388 petition

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[4] The court took the selection and implementation hearing off calendar after granting Robert's section 388 petition and reinstating reunification services for him. However, Robert assaulted Michael with a knife in April 2018, and the Department filed an amended section 342 petition relating to that incident. The court sustained the new allegations, terminated Robert's reunification services and set the selection and implementation hearing for October 12, 2018.

seeking reinstatement of her reunification services and unmonitored visitation. Charlene alleged she had completed parenting classes and an in-patient rehabilitation program for her substance abuse, was participating in Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) and visiting Michael consistently. The court ordered an evidentiary hearing on Charlene's petition for October 12, 2018, the same day as the selection and implementation hearing. Both hearings ultimately occurred on February 21, 2019.

Charlene testified she had completed an in-patient drug and alcohol program and an after-care program and was residing in a sober living home. Charlene explained she had been sober for 18 months and regularly attended AA and NA meetings to reinforce her sobriety. She also testified she had visited consistently with Michael, but acknowledged she had missed some scheduled visits due to her work schedule.[5]

Charlene stated Michael was responsive and happy during her visits and cried when she left him. Charlene testified, "I know it's been a long time that my son hasn't been with me, but I'm ready for him. I've done everything I can, and I'm doing good. I'm doing really good, and I want my son because he's my baby. He's my son. It's been a long time, though."

The Department and Michael's counsel urged the court to deny Charlene's section 388 petition. They argued it was not in Michael's best interests to reinstate family reunification services for Charlene. Michael was thriving in his current placement, and

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[5] Charlene explained how difficult it was to see Michael—she took four buses each way—and she did not have full control over her work schedule. Despite this difficulty, Charlene insisted, she consistently visited with Michael at least twice a month.

his foster father had indicated a desire to adopt him; Charlene had not had custody of Michael for four years, more than half his life; and Charlene had declared her sobriety before, only to relapse. The social worker reported that, while Charlene was scheduled for weekly visits with Michael, she frequently had to cancel because of work, upsetting Michael.

The court denied Charlene's section 388 petition. Although the court found changed circumstances—Charlene's sobriety—it found reinstatement of Charlene's reunification services would undermine Michael's pressing need for permanency and stability. Turning to the section 366.26 hearing, the court found it likely that Michael would be adopted and no exceptions to termination of parental rights applied. The court terminated Charlene's and Robert's parental rights and transferred the care, custody and control of Michael to the Department for adoptive planning and placement.

4. *The ICWA Inquiry*

At the initial October 2014 dependency hearing Charlene submitted Judicial Council Forms, form ICWA-020, Parental Notification of Indian Status, affirmatively stating she had no Indian ancestry. Robert did not appear at that hearing, and his whereabouts at that time were unknown. Notwithstanding Robert's absence, the court stated, "The court previously found that the Indian Child Welfare Act does not apply to this case and [Florentino D. and Robert L.] were both presumed and biological fathers. I will make those findings today." The court did not indicate when the "prior finding" as to ICWA had been made, and

the record does not include any findings or ICWA-related material concerning Robert.[6]

Robert appeared at the December 11, 2014 jurisdiction/disposition hearing, his first appearance in this case. The record does not include an ICWA-020 form completed by Robert at that time, and the minute order from that hearing does not indicate an ICWA finding was made concerning Robert's potential Indian ancestry.

The minute order for the September 4, 2015 jurisdiction hearing on the subsequent section 342 petition states the court found it "does not have a reason to know that [Michael] is an Indian Child" and that a form ICWA-020 "is signed and filed." However, the reporter's transcript of that hearing does not reflect any mention of ICWA, let alone indicate a specific finding was made. The appellate record does not contain a form ICWA-020 signed by Robert at any time, and the only ICWA inquiry/finding mentioned in the Department's reports is the finding made in October 2014 before Robert appeared. Neither the minute order

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[6] The Department's October 15, 2014 non-detention report states at page 3, "The Indian Child Welfare Act does not apply." No support is provided for this conclusion. However, seven pages later the report indicates three additional documents are attached: "Sustained Petition from previous Court Case"; "Last Minute order from previous Court Case"; "ICWA." The version of the non-detention report included in the record on appeal contains no attachments. In response to our inquiry, appellate counsel for the Department reported that neither the juvenile court's official file nor county counsel's office file included any attachments with the October 15, 2014 report. Accordingly, it is impossible for us to evaluate what, if anything, may have been before the court when it made its ICWA finding in this case.

of the section 366.26 hearing nor the transcript of those proceedings indicates any ICWA inquiry was made at that hearing.

DISCUSSION

1. *The Court Did Not Err in Denying Charlene's Section 388 Petition*

a. *Governing law and standard of review*

Section 388 provides for modification of juvenile court orders when the moving party (1) presents new evidence or a change of circumstance and (2) demonstrates modification of the previous order is in the child's best interest. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Y.M.* (2012) 207 Cal.App.4th 892, 919; see Cal. Rules of Court, rule 5.570(e); see also *In re Zacharia D.* (1993) 6 Cal.4th 435, 455 ["'[s]ection 388 provides the "escape mechanism" that . . . must be built into the process to allow the court to consider new information'"].)

When, as here, a section 388 petition is filed after family reunification services have been terminated, the juvenile court's overriding concern is the child's best interest. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) The parent's interests in the care, custody and companionship of the child are no longer paramount; and the focus shifts to the needs of the child for permanency and stability. (*Ibid.*; *In re C.W.* (2019) 33 Cal.App.5th 835, 839; *In re Vincent M.* (2008) 161 Cal.App.4th 943, 960.) "[B]est interests is a complex idea" that requires consideration of a variety of factors. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531; see *In re Jacob P.* (2007) 157 Cal.App.4th 819, 832-833.) In determining whether a section 388 petitioner has made the requisite showing, the

juvenile court may consider the entire factual and procedural history of the case, including factors such as "the seriousness of the reason leading to the child's removal, the reason the problem was not resolved, the passage of time since the child's removal, the relative strength of the bonds with the child, the nature of the change of circumstance, and the reason the change was not made sooner." (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616; *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

We review the court's finding for abuse of discretion and may disturb the exercise of that discretion only in the rare case when the court has made an arbitrary or irrational determination. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.) We do not inquire whether substantial evidence would have supported a different order, nor do we reweigh the evidence and substitute our judgment for that of the juvenile court. (*Ibid.*) We ask only whether the juvenile court abused its discretion with respect to the order it actually made. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

b. *The court did not abuse its discretion in concluding reinstatement of Charlene's reunification services was not in Michael's best interests*

There is no question that Charlene demonstrated a change of circumstances, plainly satisfying the first prong of the section 388 inquiry. Charlene had achieved sobriety for more than a year and was regularly attending AA and NA meetings to reinforce that sobriety. However, the court found reinstatement of Charlene's reunification services was not in Michael's best interests: Charlene's sobriety, while commendable, was tenuous. She was still living in a structured environment and had not

demonstrated sobriety outside of that environment. Charlene also had a history of relapsing into substance abuse. Michael, who had spent more than half his life outside of Charlene's custody, was thriving in his current placement; and his foster father had expressed his desire to adopt him. Michael's counsel argued, and the court agreed, Michael's need for permanency and stability would not be served by reinstating Charlene's reunification services. Charlene has not demonstrated that ruling was arbitrary or irrational so as to constitute an abuse of the court's discretion.

2. *The Court Did Not Err in Terminating Charlene's Parental Rights*

a. *Governing law and standard of review*

The express purpose of a section 366.26 hearing is "to provide stable, permanent homes" for dependent children. (§ 366.26, subd. (b).) Once the court has decided to end reunification services, the legislative preference is for adoption. (§ 366.26, subd. (b)(1)); *In re S.B.* (2009) 46 Cal.4th 529, 532 ["[i]f adoption is likely, the court is required to terminate parental rights, unless specified circumstances compel a finding that termination would be detrimental to the child"]; *In re Celine R.* (2003) 31 Cal.4th 45, 53 ["[I]f the child is adoptable . . . adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child"]; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [once reunification efforts have been found unsuccessful, the state has a "compelling" interest in "providing stable, permanent homes for children who have been removed from parental custody," and the court then must "concentrate its efforts . . . on the child's

placement and well-being, rather than on a parent's challenge to a custody order"]; see also *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1299-1300; *In re G.B.* (2014) 227 Cal.App.4th 1147, 1163.)

Section 366.26 requires the juvenile court to conduct a two-part inquiry at the selection and implementation hearing. First, it determines whether there is clear and convincing evidence the child is likely to be adopted within a reasonable time. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250; *In re D.M.* (2012) 205 Cal.App.4th 283, 290.) Then, if the court finds by clear and convincing evidence the child is likely to be adopted, the statute mandates judicial termination of parental rights unless the parent opposing termination can demonstrate one of the enumerated statutory exceptions applies. (§ 366.26, subd. (c)(1)(A) & (B); see *Cynthia D.,* at pp. 250, 259 [when a child is adoptable and declining to apply one of the statutory exceptions would not cause detriment to the child, the decision to terminate parental rights is relatively automatic].)

One of the statutory exceptions to termination is contained in section 366.26, subdivision (c)(1)(B)(i), which permits the court to order some other permanent plan if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." For this exception to apply, in addition to establishing there has been regular visitation with the child, the parent must prove his or her relationship with the child """promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents."""" (*In re A.S.* (2018) 28 Cal.App.5th 131, 153; accord, *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643; see *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 ["the court balances the strength and

quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer"].)

A showing the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption. (See *In re Marcelo B., supra,* 209 Cal.App.4th at p. 643 ["'[a] biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent"']; *In re Angel B.* (2002) 97 Cal.App.4th 454, 466 [same].) No matter how loving and frequent the contact, and notwithstanding the existence of an "'emotional bond'" with the child, "'the parents must show that they occupy "a parental role" in the child's life.'" (*In re K.P.* (2012) 203 Cal.App.4th 614, 621; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) Factors to consider include """[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs."'" (*In re Marcelo B.,* at p. 643.) Moreover, "[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that the preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D., supra,* 78 Cal.App.4th at p. 1350.)

The parent has the burden of proving the statutory exception applies. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 646 (*Breanna S.*); *In re I.W., supra,* 180 Cal.App.4th at p. 1527.) Once a court has found regular visitation occurred, the court's decision a parent has not satisfied his or her burden may be

based on either or both of two component determinations—whether a beneficial parental relationship exists and whether the existence of that relationship constitutes "a compelling reason for determining that termination would be detrimental to the child." (§ 366.26, subd. (c)(1)(B); see *In re K.P., supra,* 203 Cal.App.4th at p. 622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)[7] When the juvenile court finds the parent has not established the existence of the requisite beneficial relationship, our review is limited to determining whether the evidence compels a finding in favor of the parent on this issue as a matter of law. (*Breanna S.,* at p. 647*; In re I.W.,* at pp. 1527-1528.) When the juvenile court concludes the benefit to the child derived from preserving parental rights is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption, we review that determination for abuse of discretion. (*In re K.P.,* at pp. 621-622; *In re Bailey J.,* at pp. 1314-1315.)

b. *Charlene failed to establish the (c)(1)(B)(i) exception to termination of parental rights*

Charlene contends she established the existence of a beneficial relationship with Michael within the meaning of section 366.26, subdivision (c)(1)(B)(i). Specifically, Charlene contends she met the threshold requirements of establishing both

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[7] The Supreme Court recently granted review in *In re Caden C.*, review granted July 24, 2019, S255839, and asked the parties to brief and argue the following issues: "(1) what standard governs appellate review of the beneficial parental relationship exception to adoption; and (2) whether a showing that a parent has made progress in addressing the issues that led to dependency is necessary to meet the beneficial parental relationship exception."

regular visitation and the existence of a parental bond. However, the undisputed evidence demonstrated, and the court found, that Charlene's visits were not as frequent as they could have been: Charlene regularly cancelled visits, reducing what would have been weekly visits to, on balance, bimonthly visitation. Moreover, while Charlene demonstrated Michael enjoyed his visits with her and was sad when she left, that is far from the parental bond required to satisfy the threshold requirements of section 366.26, subdivision (c)(1)(B)(i).

Even if Charlene had demonstrated both regular visitation and the existence of a parental bond to carry her burden as a matter of law, however, the court found whatever bond existed was not sufficiently compelling to outweigh Michael's need for permanency and stability. The court emphasized Michael had been in dependency proceedings a number of years and outside of Charlene's custody for more than half his young life. Michael was thriving in his foster placement, and his foster father had stated he wanted to adopt him. Michael, too, stated he wanted to remain with his foster father, and Michael's counsel urged the court to terminate parental rights so that Michael could obtain the stability and permanency he deserved. The court agreed; that decision, neither arbitrary nor irrational, was well within the court's discretion. (See *Breanna S., supra,* 8 Cal.App.5th at p. 648 [evidence that children enjoyed mother's monitored visits fell "far short of demonstrating a substantial emotional attachment that would cause the children to suffer great harm if severed"]; *In re K.P., supra,* 203 Cal.App.4th at p. 623 [even if mother and child had a solid parental bond, the court did not abuse its discretion in finding mother had failed to satisfy the (c)(1)(B)(i) exception; "[w]e cannot say that the juvenile court

abused its discretion when it concluded that any detrimental impact from severance" of that relationship was outweighed by the benefits that would come from adoption].)

3. *Remand Is Required To Address ICWA Error*

a. *Governing law and standard of review*

"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. [Citations.] For purposes of ICWA, an 'Indian child' is an unmarried individual under age 18 who is either a member of a federally recognized Indian tribe or is eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe." (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 783 (*Elizabeth M.*); see *In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8 (*Isaiah W.*).)

As the California Supreme Court explained in *Isaiah W.,* notice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to determine whether a child who is the subject of a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. (*Isaiah W., supra,* 1 Cal.5th at p. 8; accord, *Elizabeth M., supra,* 19 Cal.App.5th at p. 784.) Notice to the parent or Indian custodian and the Indian child's tribe is required by ICWA in state court proceedings "where the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a).) Similarly, California law requires notice to the parent, legal guardian or Indian custodian and the Indian child's tribe in accordance with section 224.3, subdivision (a), if the Department or court "knows or has reason to know that an Indian child is

involved" in the proceedings. (§ 224.3, subd. (d); 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 section 300]; cf. *Isaiah W.,* at p. 8 [if court has reason to know an Indian child may be involved in the pending dependency proceedings but the identity of the child's tribe cannot be determined, ICWA requires notice be given to the Bureau of Indian Affairs (BIA)].)[8]

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[8] Although ICWA itself does not define "reason to know," federal regulations implementing ICWA, effective December 12, 2016, specify the court has "reason to know" a child is an Indian child when, among other things, the child's extended family or any participant in the proceeding, including an officer of the court, an Indian organization or state agency, informs the court the child is an Indian child. (25 C.F.R. § 23.107(c)(1)-(6).) At the time dependency proceedings began in this case, California law (former section 224.3, subdivision (b)) defined the circumstances that may establish a reason to know a child is an Indian child to include, without limitation, when a person having an interest in the child or 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." (Stats. 2006, ch. 838, § 32, pp. 6567-6568.) In 2018 the California Legislature repealed former section 224.3 and adopted, among other new ICWA-related provisions, a definition of "reason to know a child is an Indian child" that closely tracks the 2016 federal regulations. (See § 224.2, subd. (d)(1)-(6); Stats. 2018, ch. 833, §§ 4,5.) California Rules of Court, rule 5.481(a)(5)(A) still provides "information suggesting the child is an Indian child" offered by a person having an

The form ICWA-020, which the juvenile court must order a parent to complete at his or her first appearance in the dependency proceeding (Cal. Rules of Court, rule 5.481(a)(2)), often provides the court and the child protective agency with the first information the child involved in the proceeding is or may be an Indian child. But the burden of developing that information does not rest primarily with the parents or other members of the child's family. Both the federal regulations governing ICWA and California statutory provisions adopting and incorporating ICWA impose on the court and the child protective agency an affirmative duty to inquire at every proceeding that may culminate in the placement of a child in foster care or in the termination of parental rights whether the child involved in the proceedings is or may be an Indian child. (See § 224.2, subd. (a) [imposing affirmative and continuing duty of inquiry]; 25 C.F.R. §§ 23.2, 23.107(a); see also *Isaiah W., supra,* 1 Cal.5th at pp. 9, 10-11; *Elizabeth M., supra,* 19 Cal.App.5th at p. 785.) Once the agency or its social worker has reason to believe an Indian child is involved, 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. (§ 224.2, subd. (e); see *Elizabeth M.* at p. 785 ["'[t]he 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 notice to the Indian tribes'"].)

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interest in the child or a member of the child's extended family may provide reason to know the child is an Indian child.

Ordinarily, the juvenile court's ICWA inquiry and notice findings, express or implied, are reviewed for substantial evidence. (*In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 941-943.) However, when, as here, the facts are undisputed and the question is whether an inquiry was made at all, we review independently whether ICWA requirements have been satisfied. (See *In re Michael V.* (2016) 3 Cal.App.5th 225, 235, fn. 5; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254; cf. *In re N.G.* (2018) 27 Cal.App.5th 474, 484 ["in the absence of an appellate record affirmatively showing the court's and the agency's efforts to comply with ICWA's inquiry and notice requirements, we will not, as a general rule, conclude that substantial evidence supports the court's finding . . . that ICWA did not apply[;] [i]nstead, as a general rule, we will find the appellant's claims of ICWA error prejudicial and reversible"].)

b. *There is no affirmative evidence in the record the court satisfied the mandatory duty of inquiry under ICWA and California law*; *a limited remand is required*

The minute order for the September 2015 detention hearing on the section 342 petition states the appropriate ICWA-020 Parental Notification of Indian Status form was signed and filed and the court found it had no reason to know Michael is an Indian child. However, the reporter's transcript of that hearing does not reflect any inquiry was made at all; the clerk's record does not contain a form ICWA-020 for Robert; and the Department fails to point to any evidence in the record to support the statements in the October 2014 and September 2015 minute orders that the court inquired about ICWA as to Robert. Under these circumstances we decline to rely on the minute order as evidence the inquiry was made. (Cf. *People v. Harrison* (2005)

35 Cal.4th 208, 226 [absent indication that trial judge intended minute order to modify or correct his prior oral adoption of probation conditions, conflict between minute order and reporter's transcript is properly resolved in favor of court's oral pronouncements]; *People v. Smith* (1983) 33 Cal.3d 596, 599 [same]; *Arlena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 569 ["although the minute order reflects that the parents were warned in the required terms, the reporter's transcript does not include such an advisement[;] [i]n such a case, the reporter's transcript generally prevails as the official record of proceedings"].)

Acknowledging the absence of proof in the record before this court that the juvenile court fulfilled its duty of inquiry under ICWA and California law, the Department argues any error in failing to make the required ICWA inquiry of Robert is harmless under *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 (*Rebecca R.*). In *Rebecca R.* the father of a dependent child argued the order terminating parental rights should be reversed because neither the court nor the state child protective agency had inquired about his potential Indian ancestry, and he never provided any information or filled out a Judicial Council form responding to such an inquiry. The court held any error in failing to satisfy the duty of inquiry was harmless: Because the father did not suggest on appeal he may, in fact, have Indian ancestry, the father had failed to demonstrate the court's and the state agency's error, if one had occurred, resulted in a miscarriage of justice. (See *id.* at p. 1431 ["Father complains that he was not asked below whether the child had any Indian [ancestry]. Fair enough. But there can be no prejudice unless, *if* he had been asked, father would have indicated that the child did (or may)

have such ancestry. [¶] Father is here, now, before this court. There is nothing whatever which prevented him, in his briefing or otherwise, from removing any doubt or speculation. He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to offer some Indian connection sufficient to invoke ICWA. He did not. [¶] In the absence of such a representation, the matter amounts to nothing more than trifling with the courts"].)

As we explained in *Breanna S., supra,* 8 Cal.App.5th at page 653, in evaluating a claim of harmless error in an ICWA case, "it is essential to distinguish between violation of requirements imposed by ICWA itself and the federal regulations implementing it, on the one hand, and violations of state standards for inquiry and notice that are higher than those mandated by ICWA, on the other hand. [Fn. omitted.] As to the former, 'ordinarily failure in the juvenile court to secure compliance with [ICWA]'s notice provisions is prejudicial error.' [Citations.] Any failure to comply with a higher state standard, however, 'must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of error.'" (Accord, *In re H.B.* (2008) 161 Cal.App.4th 115, 121-122 ["violation of ICWA notice requirements may be harmless error, particularly when, as here, the source of the duty to inquire is not ICWA itself but rather former rule 1439(d), a [California] rule of court"].)

The source of the duty to inquire that informed the harmless error analysis in *Rebecca R.* (and our decision in *In re H.B., supra,* 161 Cal.App.4th 115, adopting *Rebecca R.*'s analysis) was a California Rule of Court implementing California law, not ICWA itself. (See *In re H.B., supra,* 161 Cal.App.4th at

p. 120 ["ICWA itself does not expressly impose any duty to inquire as to American Indian ancestry; nor do the controlling federal regulations"].) However, federal regulations governing ICWA adopted after the decision in *Rebecca R.* now require an ICWA inquiry be made at the inception of dependency proceedings, as well as at all proceedings that "may culminate" in foster care placement or termination of parental rights. (25 C.F.R. § 23.2.) While those federal regulations, adopted in December 2016, were not in effect when these dependency proceedings began in October 2014 (25 C.F.R. § 23.143), they did apply to, and govern, the February 2019 section 366.26 hearing resulting in the termination of Charlene's and Robert's parental rights. (25 C.F.R. §§ 23.2, 23.143; *Elizabeth M., supra,* 19 Cal.App.5th at p. 785.) The failure to make the appropriate inquiry as to Robert's possible Indian ancestry at the February 2019 hearing terminating parental rights, accordingly, is federal error which, by its nature, is prejudicial. (See *In re N.G., supra,* 27 Cal.App.5th at p. 484; see also *Breanna S., supra,* 8 Cal.App.5th at p. 653 [violations of federal ICWA will ordinarily be prejudicial error]; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 746 [same].)

Even were we to analyze the issue under state law standards, as urged by the Department, we would find the inquiry violation prejudicial. In *Rebecca R.* it was the potential Indian ancestry of the parent appealing the termination order that was at issue; and the court found the father's failure to suggest the possibility of his own Indian ancestry on appeal rendered the inquiry error harmless. (See *Rebecca R., supra,* 143 Cal.App.4th at p. 1431.) Here, in contrast, it is Robert's possible Indian ancestry that is at issue, not Charlene's. Robert

is not before us and had no opportunity to make any suggestion or offer any insight about his possible Indian ancestry in an appellate brief. Under these circumstances we have little difficulty concluding the Department's and the court's violation of California's duty of inquiry concerning Robert's possible Indian ancestry resulted in a miscarriage of justice. (Cf. *In re Cristian I.* (2014) 224 Cal.App.4th 1088, 1098-1099; *In re N.G., supra,* 27 Cal.App.5th at p. 484.)

In sum, because there is no evidence to suggest the Department and the court satisfied the duty of inquiry under ICWA as to Robert at the section 366.26 hearing or the continuing duty of inquiry under California law at any point in these proceedings, we remand the matter for the juvenile court and the Department to correct that error and, if there is a suggestion Michael is an Indian child, to proceed with all further action that ICWA and California law require. If the inquiry results in a possibility Michael is an Indian child, notice must be provided to any tribe that is identified or, if the tribe cannot be determined, to the BIA. The court shall then determine whether ICWA inquiry and notice requirements have been satisfied and whether Michael is an Indian child. If the court finds Michael is an Indian child, the court shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and California law. If not, the court's original section 366.26 order remains in effect. (*Elizabeth M., supra,* 19 Cal.App.5th at p. 788.)

DISPOSITION

The order denying Charlene's section 388 petition is affirmed. The section 366.26 order of the juvenile court is conditionally affirmed. The matter is remanded to the juvenile court for full compliance with the duty of inquiry and, if applicable, notice provisions under ICWA and California law and for further proceedings not inconsistent with this opinion.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.