

Filed 8/17/18 In re Raphael B. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Raphael B. et al., Persons
Coming Under the Juvenile Court
Law.

B283405
(Los Angeles County
Super. Ct. No. DK20258)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Appellant,

v.

JULIETTE G. et al.,

Defendants and Appellants.

APPEAL from order of the Superior Court of Los Angeles County, Joshua Wayser, Judge. Reversed and remanded.

Terence M. Chucas, under appointment by the Court of Appeal, for Defendant and Appellant Juliette G.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant Raphael B.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Peter Ferrera, Principal Deputy County Counsel, for Plaintiff and Appellant.

Raphael B. (father) appeals¹ from the court's order declaring his children Raphael B. (son) and A.B. (daughter) to be minors described by Welfare and Institutions Code section 300, subdivision (b).² Father contends the court violated his due process rights when it sustained an amended allegation without notice or an opportunity to defend. Father also contends the court erred in finding inapplicable the Indian Child Welfare Act (ICWA) (25 U.S.C.

¹ Juliette G. (mother) also filed a notice of appeal, but her appointed counsel submitted a brief to this court indicating that a review of the record did not reveal any arguable issues. We directed mother's counsel to provide mother with the record and a copy of the brief, and gave mother the opportunity to raise any grounds for appeal or arguments for the court to consider. Because mother has not identified any claim of error or other defect, her appeal is dismissed as abandoned. (*In re Phoenix H.* (2009) 47 Cal.4th 835, 838; *In re Sade C.* (1996) 13 Cal.4th 952, 994.)

² All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

§ 1901 et seq.).

The Los Angeles County Department of Children and Family Services (Department) filed a cross-appeal, contending the court erred in dismissing all the counts alleged under subdivisions (a), (b), and (j) of section 300.

We find the court violated father's due process rights when it sustained a new count materially different from the counts initially alleged in the Department's petition. The court also acted outside of its authority when it dismissed the counts from the Department's original petition. We reverse the jurisdictional finding and vacate the dismissal order, and we remand the matter for the court to determine whether the Department proved the counts alleged in the original petition under section 300, subdivisions (a), (b), and (j). We also direct the court to conduct further inquiry into father's claim of potential Indian heritage.

FACTUAL AND PROCEDURAL BACKGROUND

Divorce and custody arrangements

Mother and father were married in 2002. Their son was born in May 2003 and their daughter in January 2010. Mother and father separated permanently in June 2013 and began divorce proceedings in April 2014. The son went to live with father in September 2015 after mother was injured in an accident. He returned to mother's home at the end of the school year. By June 2016, mother and father agreed to

a custody arrangement where mother had primary physical custody of the children and father had the children on alternate weekends. The court entered a final dissolution judgment on October 24, 2016.

Prior dependency referrals

The family had a protracted history of child welfare referrals. In January 2004, the Department investigated and substantiated an allegation of emotional abuse by father. Between 2012 and 2016, the Department found either inconclusive or unfounded four different referrals, based on mother leaving the children at home unattended, or hitting the children as a form of discipline.

Fall 2016 - Department investigates possible physical abuse

On October 26, 2016, the Department investigated a new report of physical and emotional abuse by mother. The son told an investigating social worker he was unhappy and felt unsafe at mother's home because the smallest things triggered her anger. He reported mother had punched, kicked, and slapped him and his sister in the past. The daughter also confirmed that mother had hit her, slapped her, and pulled her hair when she talked back to mother or did not follow directions. Both children reported mother cursing at them, and the son played a recording for the social worker where mother told her six-year-old daughter, "Fuck

off, you're mean." When the girl responded by whimpering, "No, you're mean," mother replied, "Shut the fuck up."

Mother admitted to cursing at the children, telling them to "shut the fuck up" and to "stop acting like little bitches" when they refused to listen to her. She denied hitting them. Mother stated she felt that father had turned the children against her. She was fed up with the children's behavior, and felt harsh and offensive language was the only way to get through to them. Mother admitted to being angry, having no tolerance for the children's disrespect and disobedience, and verbally lashing out at them. Mother was teary and said she was frustrated with "everything that has been going on in her life and with her ex-husband over the past few years." The social worker discussed mother participating in an Up-Front Assessment and possible therapy, and mother was open to such services. Mother and son signed a safety plan acknowledging that son's behavior and lack of cooperation affected mother and warning mother that if she continued to berate the children, they would be removed from her care.

A social worker was called to investigate another incident on October 29, 2016. The son had called his father, who contacted law enforcement. The son reported mother had kicked him in the chest the prior week and had verbally threatened him. A recording showed mother telling son "You fucking bitch, I told you not to fuck with my stuff," then later, "I feel like punching your eye out," and later again, "I

will fuck you up in your sleep bitch for not listening and following my rules.”

Mother was aware that her son had a video of the incident, and explained that he had taken a \$200 hair dryer from her room without permission, and he was not allowed to use it. She said she would not actually harm the children, but yells at them to get them to listen. Mother had already made arrangements for father to take the children, saying she was tired of the children’s behavior and disrespect, and was sending them for an extended visit with their father. She would be taking time to focus on herself, and father could have the children as long as he took care of them.

The daughter confirmed mother would sometimes hit her and sometimes hit son with a belt. She reported that she cried when mother hit her, and mother told her she was annoying when she cried. The daughter said she told father that mother hit her, and father told her to tell her teacher and as many people as she could so she could be safe. The daughter said she always felt safe with father, and she felt safe with mother when mother did not hit her.

Mother later texted the social worker claiming the incident was part of a larger scheme. Mother acknowledged she yelled at son for taking her hair dryer, but then continued, “I became upset, I yelled at him, I made threats (empty ones as always but threats nonetheless) and he then recorded me with his phone for his dad, I’m over all of it, the manipulation and the disrespect on both him his sister and my exes [*sic*] behalf. I’m not going to keep playing this

game, it's too stressful. Both of the children are at their dad's however I know that in the long term this is not the best for them but there is very little I can do I have nothing left in me I can't go further without Financial support moral support add to it my ex-husband's psychological abuse and my children both becoming more and more disrespectful the older they get, I can't keep fighting an uphill battle."

Father told the social worker that mother had been physically abusive to the children, and he had instructed his son to record her when she yelled at him or became aggressive. He showed the social worker a text message from mother saying she did not want the children. Father claimed mother frequently assaulted him when they were together, with the last incident being when mother scratched father in the face in 2013. Father wanted something to be done. Although mother had agreed the children could stay with him while she got herself together, father was concerned mother did not understand why the children were not in her care, and there was nothing to prevent mother from coming over and taking the children back. Both children were happy to be at father's house and felt safe.

In early November 2016, the Department filed a petition alleging the children were at risk of harm under subdivisions (a), (b), and (j). The petition alleged that mother physically abused son and daughter on two different occasions in October 2016, that father knew of the abuse and failed to protect the children, and that mother's abuse and father's failure to protect placed the children at risk of

serious physical harm. The children remained in father's custody.

During a psychological assessment in November 2016, mother blamed her anger and frustration on father's emotional abuse. She claimed father frequently threatened to call the Department to claim she was abusive to the children. She said she had four restraining orders against father, but they expired and she could not afford to go to court to reinstate the most recent one. She worked at two part-time jobs and struggled financially, but had not received child support payments from father. Mother was suicidal when her relationship with father ended, but her mother came for an extended visit and helped her enormously. Mother acknowledged having anxiety and anger issues. She stated, "My anger can reach a level of rage with my kids. I can fucking explode like a teapot. I tell them, just shut the fuck up." She said she had anxiety when the children were in her care, but "[n]ow the anxiety is about the kids being with the dad. He's going to fuck up their future. But if they stay with me he's going to fuck up my future." Mother said she was not going to fight for custody of the children as she needed "rehabilitation" to "take care of [her]self and put [her]self first."

The Department's January 2017 jurisdiction and disposition report included summaries of recent interviews with son, daughter, father, and mother. Father acknowledged being arrested on two prior occasions for domestic violence in 2003 and for driving under the influence

in 2012. He agreed that mother was physically abusive of the children, but denied he failed to protect them. He said that once he learned of the abuse, he called the Department's hotline and told his son to make recordings and call the hotline as well. Responding to the petition allegations, mother admitted, "I've yelled at my kids; I am strict with them. The hitting is bullshit. They do get spanking and that's it. My kids are scared to go against their dad but they yell at me because they are not scared of me. There is no rule in their dad's home and he lets them do whatever they want."

The children were attending therapy and reported being happy living with their father. They had monitored visits and phone calls with mother, but stated they did not want to visit or have phone contact with her.

The Department's report noted that mother lacked both insight into her anger problem and parenting skills. Despite admitting she had anger and rage towards the children, and admitting that she yelled at them and threatened them, she blamed the children for her anger. Mother was happy the children were not with her because she had a chance to catch up with her personal life. Father was protective of the children and tried to alert authorities of mother's abusive behavior. Father appeared committed to providing a suitable and loving environment for the children.

The Department recommended sustaining the allegations, but striking father from the counts. It also

recommended the court terminate jurisdiction and issue a custody order granting father sole physical custody.

Jurisdiction hearing – mother’s testimony

At the jurisdiction hearing, the dependency court admitted the Department’s reports into evidence and heard mother’s testimony. Mother testified about a section of the Department’s report stating that mother had full custody of the children since 2007 but agreed to allow son to live with father in September 2015. Mother had been injured in an accident and agreed to allow the son to live with father while she recovered, and daughter remained with mother. Mother wanted her son to return home at the end of the semester, because he had missed school and was not going to the orthodontist. She contacted the custody mediator, who advised her to just pick her son up from his school and to bring a copy of the custody order. Mother did not have the order with her when she arrived at school to pick son up, so the school called father to confirm the arrangement. Father came to the school and called the police, who told mother she needed a copy of the custody order. Mother obtained a copy and left with her son. Later at a drive-through restaurant, the son called father, who told him to leave the car. Father arrived and mother called the police, who told her the custody order she had did not have a required seal. Mother later obtained a copy of the order with the seal, but son finished the school year living with father and then returned

to mother's custody, in late May 2016, according to a mediated custody agreement. Part of mother's concern about son continuing to live with father was that father's girlfriend had children and one of her sons offered marijuana to mother's son.

Mother testified about her disciplinary methods, admitting she used profanity, but also stating she disciplined her son by taking away electronics, and her daughter by taking away sweets. She described an incident where she disciplined her son by taking away his cell phone. The son reported to law enforcement mother had kicked him on the leg and punched him in the stomach with a closed fist. Mother denied punching or kicking him, but testified they had a "tug-of-war" with the phone, and she ultimately got on top of him and snatched the phone from him. She acknowledged spanking her son when he was younger, but said he was too old now.

The court admitted into evidence police officers' business cards with writing on the back describing various incidents. Mother testified the cards showed all the calls to police made by father or son, including one where the officer told her son that police calls are for emergencies only and reprimanded son for defying his mother. After growing frustrated with father's repeated calls to the Department, mother enrolled both children in therapy, in part to help her respond if father called the Department.

Mother testified that after the first October 2016 incident, she agreed with the Department to begin joint

family therapy. Before therapy began, father called the police again, and mother told the social worker she was done with this drama and father could have the kids. "I was just giving up. I was at my wit's end with all of it." She described herself as feeling exhausted and not getting any support from father. When asked how she was feeling now, mother said she was not as stressed and wanted the children back. She felt she was the best parent for the children, but "[t]he problem is having them in their [*sic*] care a lot makes me a target for his bullshit."

Mother testified she had completed a parenting class and was currently enrolled in therapy. She felt she needed a better support system and someone to enforce her rules when her children defy her. She could not count on father.

Addressing concerns raised by the Department about mother's statements during phone calls with the children, mother explained father became upset because she had been asking about her daughter's sniffles. Referring to a text message about abuse, mother testified she did not want her daughter to have a victim mentality. "I raised her to be confident and proud of herself. What he's doing to her is trying to make her think she's an abused kid, and I don't like that. Yeah, my responses were just showing her what real abuse looked like. I sent her some YouTube videos and I watched them first. I said, this is abuse, [daughter]. You're not abused."

On cross-examination, county counsel asked mother whether anything going on with mother contributed to the

case being brought. Mother said her stress levels, but denied that yelling at her children had traumatized them. She testified that when the children were taken, she was burnt out and exhausted. She worked four nights a week, from 9 p.m. to 2 a.m. Mother acknowledged telling a social worker she believed that if the children stayed with father, it would “fuck up their future,” but if they stay with her, he would “fuck up” mother’s future.

Mother acknowledged getting enraged and yelling and cursing at the children, but when county counsel asked whether her demeanor might make the kids want to leave the room or the house, she responded “I don’t know about that. I mean, my kids talk to me that way. That I can’t agree to, because they talk to me really harshly and I lash out too.” Mother complained about father exposing the children to bad people, bad behaviors, and bad language.

On redirect, mother testified about the incident when son recorded her yelling at him for taking her hair dryer. She explained that he had not cleaned his room, and she burned her leg on a hot clothes iron he left on. From mother’s perspective, son was trying to provoke her and record her reaction, like a prank video.

On recross, county counsel asked mother what she did not like about who her son socialized with when he was living with father. Mother responded that she had video of father’s girlfriend’s son drunk in the living room as well as a photo of her own son smoking weed in father’s backyard.

Closing arguments

During closing arguments, mother's counsel pointed out that when mother and father entered into a mediated custody arrangement in June 2016 giving mother primary custody and father alternating weekends, there was no discussion in family court about mother's abuse of the children. The dependency court asked whether mother was aware whether there were transcripts of the family law proceeding, and stated the court might ask for the family law file. The court advised the parties that it was considering taking the matter under submission and stated ". . . I am considering potential amendments potentially to proof. So I have to see what that is, and I'm happy to discuss that further, but I do think it's fair to say that the parents definitely don't get along, whether that's jurisdictional or not, is something I would need to consider." The court stated it wanted to provide notice, and if any party needed additional opportunity to consider and respond, it would provide that opportunity. Mother's counsel continued, arguing that there was insufficient evidence of physical abuse because the children had given inconsistent information and any spanking fell within the definition of appropriate discipline. The court asked about the practical reality that the children were saying they did not want to return to mother. The Department pointed out that the question of who the children should live with related more to disposition.

Father asked the court to strike him from the petition allegations and to find him non-offending. Father's counsel pointed to the Department's report, which made the same recommendation, as well as the evidence showing that father did everything he could to protect the children.

Minor's counsel argued that the petition should be amended to conform to proof based on evidence supporting a finding that mother engaged in inappropriate physical and verbal discipline that placed the children at risk. The Department's argument, which was intermittently interrupted by questions from the court, focused on the fact that the family law case had not resolved the conflict between the parents, but that there was evidence of mother's rage towards the children, and evidence that father was concerned about the children. The Department agreed with minor's counsel that the petition should be amended to conform to proof, and asked the court to sustain the petition. The court took the matter under submission.

Court's written order

On March 17, 2017, the judge issued a three-page written opinion, which began by pointing out that the court had notified the parties "that it might amend the petition to conform to proof and discussed the nature of the potential amendment. The Court advised that any party could as a result of the potential amendment seek a continuance but no party requested one." A brief summary of the original six

counts alleged in the Department's petition stated that three related to mother's physical abuse of daughter, and three to mother's physical abuse of son, and all related to father's failure to protect. After noting that the allegations of physical abuse were "difficult to weigh," the court determined that "[w]hether the actual physical abuse happened need not be decided" in light of its findings that parents had a stormy relationship and ongoing disputes about custody and child-rearing, and that father had called in several referrals to the Department, none of which were substantiated. The findings continued: "As a result, and also because of her own issues, Mother has been emotionally inappropriate with the children and has threatened them with physical violence. Father has also emotionally involved the minors in his disputes with Mother and used the minors as pawns in that dispute, as has Mother." Stating once again that "the issue of whether the actual physical abuse happened need not be decided," the court described the case as a "family law matter gone in the wrong direction, with the minors being used in an ongoing battle between both parents."

Acknowledging that the facts did not fall under section 300, subdivision (c), because there was insufficient evidence of serious emotional harm, the court sustained an allegation under subdivision (b) as follows: "[Mother and father] have been engaged in an ongoing custody dispute and have used their children . . . as pawns in that dispute. Both parents have acted inappropriately towards each other and their

children. Mother has threatened the children with serious physical harm and acted with inappropriate anger and rage towards them. As a result, there is a substantial risk that the children will suffer serious physical harm because of their parents' conduct." The juvenile court dismissed the counts alleged in the Department's original section 300 petition and continued the matter for disposition.

Mother's visits

A last minute information report dated March 24, 2017 informed the court that father was not cooperating with mother's visits. Mother informed the Department that father was refusing to set up visits and not answering her phone calls, even though mother is supposed to have daily telephone contact with the children and in-person visits monitored by a maternal aunt. Mother also advised the Department that father had not taken the children to the dentist and did not take daughter to the doctor when she had bronchitis. The Department reached father by text, and he texted he was traveling for work, and that the son had reservations about in-person visits monitored by aunt.

Disposition hearing

At the March 24, 2017 disposition hearing, father's counsel objected to the amended allegation in the court's written opinion, arguing it did not qualify as a subdivision

(b) count. The court expressed its view of the evidence, ending with “the dynamic between the parents has led to a substantial risk of harm and I think the father has a role in it and has a cause in it. That was the basis of my ruling.” The Department, joined by minor’s counsel and father’s counsel, recommended terminating jurisdiction with a family law custody order granting father physical custody and mother supervised visitation. Mother’s attorney objected, expressing concern about problems with mother’s visits. The court stated it was not inclined to close the case and might ask the Department to consider filing a supplemental petition.³

Father and mother⁴ filed separate notices of appeal, and the Department filed a notice of cross-appeal.

DISCUSSION

Father’s Due Process Claim

Father challenges the court’s jurisdictional finding, arguing the court deprived him of due process when it sustained an amended count rather than ruling on the

³ In a statement that causes some concern to this reviewing court, the court also said, “And I want to make everyone clear, this continues, kids are going to foster care, because I will find a C. count in a heartbeat.”

⁴ We have dismissed mother’s appeal. (*Ante*, fn. 1.)

counts alleged in the original petition. Because its jurisdiction report recommended striking the allegations against father, the Department does not oppose father's appeal of the jurisdictional finding.

We are persuaded by father's argument that the court violated his due process rights when it sustained a new count under subdivision (b) of section 300, finding the children at risk of harm based on conflict and inappropriateness between mother and father. (See *In re Wilford J.* (2005) 131 Cal.App.4th 742, 751 (*Wilford J.*) [discussing parent's due process right to be informed of the allegations upon which dependency is predicated].) "A juvenile court may amend a dependency petition to conform to the evidence received at the jurisdiction hearing to remedy immaterial variances between the petition and proof. (§ 348; Code Civ. Proc., § 470.) However, material amendments that mislead a party to his or her prejudice are not allowed. (Code Civ. Proc., §§ 469–470; *In re Andrew L.* (2011) 192 Cal.App.4th 683, 689.)" (*In re Andrew S.* (2016) 2 Cal.App.5th 536, 544, fn. 4 (*Andrew S.*)). In *Andrew S.*, the Department filed a section 300 petition based on mother's physical abuse of her children. (*Id.* at p. 539.) When the Department learned father's identity and that he was incarcerated, it filed an amended petition adding a separate count under subdivision (b) that father had failed to provide the children with the necessities of life, such as food, shelter, and clothing. (*Id.* at pp. 539–540.) Father's counsel sought to have the allegation against father dismissed, arguing the

children had not lacked any necessities while living with mother, and they were currently being provided for by maternal grandmother. The court sustained the count against father, possibly interpreting it as alleging a failure to *protect* the children from mother's abuse, rather than a failure to *provide*. (*Id.* at p. 544.) The appellate court reversed the jurisdictional finding, reasoning: "To the extent the juvenile court interpreted the petition to charge that [father] had failed to protect the children from [mother's] physical abuse, the Department never made any such allegation; and [father] had no notice or opportunity to defend against it. (See [] *Wilford J.* [*supra*,] 131 Cal.App.4th [at p.] 751 ['a parent whose child may be found subject to the dependency jurisdiction of the court enjoys a due process right to be informed of the nature of the hearing, as well as the allegations upon which the deprivation of custody is predicated, in order that he or she may make an informed decision whether to appear and contest the allegations']; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188 ['[d]ue process requires that a parent is entitled to notice that is reasonably calculated to apprise him or her of the dependency proceedings and afford him or her an opportunity to object']; see generally *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 117–118 [juvenile court safeguarded parent's rights to procedural and substantive due process by providing him notice and an opportunity to be heard, including the right to present evidence and to confront

witnesses].)” (*Andrew S.*, *supra*, 2 Cal.App.5th at p. 544, fn. omitted.)

Although the court here did alert the parties to the possibility it would be amending petition allegations to conform to proof, its written order sustained a count that went beyond the original petition allegations in a way that was material and prejudiced father. The original petition counts alleged only that father failed to protect the children from mother’s physical abuse. The Department’s petition contained no reference to the parents’ custody dispute or their conduct towards each other. Mother’s testimony that father called the Department and repeatedly accused her of neglecting and abusing the children tends to undermine—not support—the validity of the failure to protect allegation. Father’s counsel argued that there was no evidence father had failed to protect and urged the court to strike father from the allegations. The court instead sustained a newly drafted count alleging that mother and father were engaged in an ongoing custody dispute, acting inappropriately towards each other and the children, and using the children as pawns in the dispute. The material difference between the counts alleged by the Department and the count sustained by the court misled the father to his prejudice, depriving him of his due process right to notice and an opportunity to defend against the basis for dependency jurisdiction.

Father's other arguments for reversing the jurisdictional finding

Father also argues the amended count was facially insufficient to support jurisdiction, and there was not substantial evidence to support it. We need not address these arguments, because we are already reversing the amended jurisdictional finding on due process grounds.

Department's cross-appeal

In its cross-appeal, the Department argues it was prejudicial error for the dependency court to dismiss the original petition allegations without a determination that the Department had failed to meet its burden of proof. Mother filed a respondents' brief,⁵ arguing that the Department forfeited any challenge to the court's order dismissing all the counts alleged in the original petition. Mother alternatively argues that the court's dismissal order

⁵ Mother's brief expressly addresses the counts alleged under subdivision (a), but there is no reason to believe the argument is any different with respect to the subdivision (b) or (j) counts. The Department made the same two allegations—one concerning son, the other concerning daughter—under subdivisions (a), (b), and (j). The Department's cross-appeal does not distinguish between the three subdivisions, and mother's brief offers no explanation for why her argument is limited to the counts under subdivision (a).

implicitly determined the Department had not proven the original counts by a preponderance of the evidence because mother's actions fell within the scope of permitted physical discipline. We decline to apply the doctrine of forfeiture and conclude the court erred in dismissing all the counts in the Department's petition without making certain statutory findings.

In most situations, the doctrine of forfeiture would prevent the Department from challenging the dismissal on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 [purpose of forfeiture rule "is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected"].) "But application of the forfeiture rule is not automatic." (*Ibid.*) The reviewing court retains discretion to consider questions of constitutional import, even where the parties have forfeited their right to raise the issue on appeal. (*In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323.) Here, we have already concluded that the court violated father's due process rights when it sustained a count materially different than those contained in the original petition.

The Department did not object to the court's order dismissing the original counts and sustaining a new one, focusing instead on recommending that for disposition, the court should terminate the case with a family law custody order that would keep the children in the father's home, with monitored visits for mother. Such an order would permit a family law judge to work with mother and father on custody arrangements and other ongoing disputes. Even though the

Department's cross-appeal does not directly raise constitutional questions, given the consequences of our ruling on the constitutional issue raised by father, we consider the propriety of the court's order dismissing the original petition in its entirety to be important enough to warrant consideration, regardless of whether the Department may have forfeited the issue at trial. (See *In re Carl H.* (2017) 7 Cal.App.5th 1019, 1036–1037 (*Carl H.*) [declining to deem validity of dismissal order forfeited].)⁶

⁶ Our review of the record also leads us to conclude that any objection by the Department would have been futile. (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1001 [a general exception to the forfeiture rule exists for instances when an objection would have been futile].) When father's counsel raised a concern that the court's new language did not qualify as a section 300, subdivision (b) count, the court responded "Let me be clear. I thought the mother really hit the nail on the head when she said, I can't win either way. I either have a problem with the dad or I have a problem with my children. [¶] And what I expressly, if it isn't clear, found and believed, that the father encourages conflict, which then leads the mother to have potential rage, as she admitted, toward the children. [¶] And the father actively encourages conflict such that it riles up the mother. Knowing what the potential consequences may be. [¶] This is a family law case, and I recognize that physical harm is required. But here we have allegations of physical harm, whether they're substantiated or not. Nonetheless, the dynamic between the parents has led to a substantial risk of harm and I think the father has a role in it and has a cause in it. That was the

Here, “an appellate determination on the validity of the dismissal . . . bear[s] upon whether this child and family get the supervision, support and stability offered by our dependency system.” (*Id.* at p. 1037.)

The Department’s cross-appeal rests on the premise that the dependency court dismissed the original petition counts because it erroneously believed that, having sustained a different count, it did not have an obligation to rule on the original allegations.⁷ Pointing to various statements in the court’s written opinion discussing the difficulty of weighing the evidence relating to physical abuse and the absence of any need to decide the issue in light of the count the court was sustaining, the Department argues, “Here, the court specifically declined to rule on allegations relating to the children’s alleged physical abuse and did not decide whether the Department met its burden.”

When the Department initiates a dependency proceeding by filing a petition under section 300, it is acting

basis of my ruling. [¶] Anyone else have anything before we get to disposition?”

⁷ Whether the dependency court had an obligation to rule on the original allegations also presents a question of law that is not subject to forfeiture. “An issue may be raised on appeal if “it raises only a question of law and can be decided based on undisputed facts.” [Citations.]’ [Citation.]” (*In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1313–1314.) For this additional reason, we exercise our discretion to consider the Department’s cross-appeal.

in an executive capacity and serves as the prosecuting arm of the state. It bears the burden of proving the petition allegations by a preponderance of the evidence. (*In re Ashley M.* (2003) 114 Cal.App.4th 1, 7, fn. 3; Cal. Rules of Court, rules 5.684(e), 5.684(g).)⁸ If the parent denies the petition's allegations, the court must hold a contested hearing to decide whether the allegations are true. (Rule 5.684(a).) The court must make certain findings described in the rule of court, and the findings must be "noted in the order of the court." (Rules 5.684(e), 5.684(g).) If the court determines the allegations have not been proved by a preponderance of the evidence, the order must include a finding that, "The allegations of the petition are not proved." (Rule 5.684(g)(3).) We interpret the rule's language as requiring an express finding that the Department has not proven the allegations before the court may dismiss them. Because the dependency court here dismissed all the counts alleged by the Department without making an express finding that the allegations were not proven, it did not comply with the requirements of rule 5.684(g)(3).

The dependency statutes provide two other methods for a court to dismiss a dependency petition, neither of which is applicable here. Under section 350, subdivision (c),⁹

⁸ All further rule references are to the California Rules of Court.

⁹ The full text of section 350, subdivision (c) states: "At any hearing in which the probation department bears the

authorizes a court to dismiss a petition after presentation of evidence by the Department and the minor if the allegations have not been proven. (*In re Roberto C.* (2012) 209 Cal.App.4th 1241, 1251-1253 [emphasizing that before dismissing under section 350, subdivision (c), court must weigh the evidence presented and find that the burden of proof has not been met].) Here, the court did not dismiss the petition under section 350, subdivision (c), because it considered evidence offered by mother.

Section 390 also permits a court to dismiss a petition if the court finds that the interests of justice and the welfare of the minor require the dismissal, and that the parent or guardian of the minor is not in need of treatment or rehabilitation. In *Carl H.*, the minor's younger sibling died of a methadone overdose, and the court sustained a jurisdictional finding as to minor under subdivision (f) based on mother's role in the sibling's death. (*Carl H.*, *supra*, 7

burden of proof, after the presentation of evidence on behalf of the probation department and the minor has been closed, the court, on motion of the minor, parent, or guardian, or on its own motion, shall order whatever action the law requires of it if the court, upon weighing all of the evidence then before it, finds that the burden of proof has not been met. That action includes, but is not limited to, the dismissal of the petition and release of the minor at a jurisdictional hearing, the return of the minor at an out-of-home review held prior to the permanency planning hearing, or the termination of jurisdiction at an in-home review. If the motion is not granted, the parent or guardian may offer evidence without first having reserved that right."

Cal.App.5th at p. 1031.) Finding father to be a non-offending parent, the court dismissed the petition with orders specifying that father would retain physical custody of minor. (*Id.* at pp. 1035–1036.) The Court of Appeal reversed, reasoning that because the court did not make the findings required under section 390, the court acted without statutory authority. Quoting from a dependency practice guide, the court pointed out that “[s]uch dismissals are rare and usually occur only when the goal of protecting the child has been achieved without court intervention.” [Citation.]” (*Id.* at p. 1038.) Like the trial court in *Carl H.*, the trial court here lacked authority to dismiss under section 390 without first finding “that the interests of justice and the welfare of the minor require the dismissal, and that the parent or guardian of the minor is not in need of treatment or rehabilitation.” Here, the court made no such findings, and so the dismissal is not valid under section 390.

Because the court lacked authority under statute or rule of court to dismiss the petition filed by the Department, the dismissal order must be reversed.

Father’s challenge to court’s ICWA finding

Father challenges a minute order from the November 9, 2016 detention hearing ordering father to provide additional information about his Indian heritage to the Department within two weeks, but also finding ICWA inapplicable. The Department argues the court was not

obligated to conduct further ICWA inquiry because the children have remained with a parent through the entire proceeding. We conclude the court erred in finding ICWA inapplicable without further inquiry into father's claimed Indian ancestry.

The Department relies on *In re J.B.* (2009) 178 Cal.App.4th 751, but that case is distinguishable, because it examined whether a heightened finding was required under ICWA, not the duty to inquire into father's claim of Blackfoot or Cherokee heritage. In *In re J.B.*, the court rejected a mother's argument that ICWA required a heightened finding of harm before an Indian child could be removed from her custody, reasoning that because the children were being placed in father's custody and not being removed from parental custody, ICWA's heightened removal findings did not apply. (*Id.* at p. 755.) The question posed by father's appeal here is different. Does the court err in finding ICWA inapplicable without first ordering additional inquiry when one parent claims possible Indian ancestry?

Compliance with ICWA's notice and inquiry requirements may be raised on appeal from any order that makes an implicit ICWA finding, based on the court's continuing duty to inquire whether a child is an Indian child. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 6 (*Isaiah W.*); *In re Michael V.* (2016) 3 Cal.App.5th 225, 234.) The Department's reliance on *In re J.B.* focuses on ICWA's notice requirements under section 224.2; in contrast, here we are concerned with the court's "affirmative and continuing duty

in all dependency proceedings to inquire into a child's Indian status." (*Isaiah W.*, *supra*, at p. 14.) Section 224.3 imposes such a duty of inquiry on both the court and the Department "if the child is at risk of entering foster care or is in foster care." (§ 224.3, subd. (a).) The plain language of section 224.3 makes it clear that the focus is not whether the court has placed the children in foster care, but whether they are at risk of such a placement. That risk exists in almost any dependency case, unless the court promptly terminates jurisdiction with a family law custody order. (§ 361.2, subd. (b)(1).) Because the court chose not to do that in the case before us, both the court and the Department were under a continuing duty to inquire into the children's possible Indian ancestry.

Scope of remand

Because we are reversing the new jurisdictional count based on the court's violation of father's due process rights and reversing the court's order dismissing the counts alleged in the original petition, the court on remand must determine whether there is a basis for dependency jurisdiction. Because the family's situation may have changed in the interim, the scope of our remand includes the possibility that the Department may file a supplemental or amended petition, or that the parties may seek a hearing to present new evidence. No party has challenged the dispositional order placing the children with father, so we leave the

disposition in place while the court determines whether the Department has met its burden of proof. After entering a new order on the question of jurisdiction under section 300, the court may enter new dispositional orders if needed.

DISPOSITION

The court's jurisdictional finding and its order dismissing the allegations from the original petition are reversed, and the matter is remanded for further proceedings.

MOOR, J.

I concur:

KIN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BAKER, Acting P. J., Concurring in Part and Dissenting in Part

Raphael B. (Father) challenges the juvenile court's finding of dependency jurisdiction; Juliette G. (Mother) does not.

I agree the juvenile court violated Father's due process rights by finding dependency jurisdiction on a ground not alleged in the Department of Children and Family Services' petition giving rise to this case. The Department, however, did not object when the juvenile court dismissed all remaining counts pled in the dependency petition. To the contrary, the Department later stated it "agree[d] with the court that this appears to be a family law case [a]nd . . . does not need to be supervised by this court"

The forfeiture doctrine applies equally to all parties—not only to parents and children who fail to object when required, but to the Department too. (See, e.g., *In re A.S.* (2011) 202 Cal.App.4th 237, 243.) And it applies here, where the Department's failure to object cannot be excused for any of the various reasons proffered by the majority. I would vacate the jurisdiction finding against Father and affirm the

unchallenged jurisdiction finding against Mother. I would remand solely to permit the juvenile court to enter a new disposition order, which may well resemble the disposition order now before us.

BAKER, Acting P. J.