Filed 11/18/19 In re F.T. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 F.T. et al., Persons Coming Under the Juvenile Court Law.	B295778 (Los Angeles County Super. Ct. No. 17CCJP02243 A&B)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. D.T., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Kim L. Nguyen, Judge. Conditionally affirmed and remanded with directions.

Elizabeth Klippi, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Peter Ferrera, Principal Deputy County Counsel for Plaintiff and Respondent.

INTRODUCTION

D.T. appeals from the juvenile court's order terminating her parental rights under Welfare and Institutions Code section 366.26.[1] D.T. contends the juvenile court abused its discretion in denying her a contested hearing on the parent-child relationship exception to the termination of parental rights. D.T. also contends that the Los Angeles County Department of Children and Family Services failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) and that substantial evidence did not support the juvenile court's ruling ICWA did not apply.

We conclude that the juvenile court did not abuse its discretion in denying D.T. a contested hearing on the parent-child relationship exception, but that substantial evidence did not support the court's ruling ICWA did not apply. Therefore, we conditionally affirm the juvenile court's order terminating D.T.'s parental rights and remand for the court to ensure the Department complies with ICWA's inquiry and notice provisions.

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Petition and Detention*

On October 23, 2017 the Department received a referral stating that D.T.'s children, one-year-old F.T. and one-month-old J.T.,[2] suffered from neglect because of D.T.'s substance abuse. D.T. admitted she smoked methamphetamine during the last trimester of her pregnancy with J.T., and both D.T. and J.T. tested positive for amphetamine and methamphetamine. The Department learned D.T. and the children's father, David T., had a history of substance abuse and substance abuse-related arrests and convictions. The Department filed a petition under section 300, subdivision (b)(1), alleging the children were at risk of suffering emotional and physical harm in the custody of their parents. The juvenile court detained the children, removed them from D.T., and placed them with their maternal grandmother.

B. *Jurisdiction and Disposition*

For the jurisdiction and disposition hearing the Department submitted a report that included a summary of interviews with D.T and David. D.T. acknowledged that she had a history of substance abuse and that she used methamphetamine while she was pregnant with J.T. because she "was going through a lot of stress." D.T. stated that she had not completed any drug treatment programs but that she would submit to random drug testing. David admitted he had a history of using drugs, including methamphetamine and marijuana, but denied he was currently using any. The Department described

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[2] We will refer to D.T.'s second child by the child's middle initial to avoid confusion because the child's first name starts with the letter D.

the extensive criminal history of D.T. and David, which included David's arrest in June 2017 for driving under the influence. The Department also submitted a last minute information report stating D.T. tested positive for methamphetamine three weeks before the jurisdiction and disposition hearing.

On February 14, 2018 the juvenile court sustained the petition and declared the children dependents of the court under section 300, subdivision (b)(1). For the April 16, 2018 disposition hearing, the Department submitted a last minute information report stating that D.T. and David had not submitted to random drug testing and that they did not have permanent housing. The juvenile court removed the children from D.T. and David and ordered D.T. and David to participate in family reunification services. The juvenile court ordered the children remain placed with their maternal grandmother.

C. *The Six-month Review Hearing*

Six months after disposition, the Department submitted a status report stating D.T. had not complied with the court's disposition orders requiring her to refrain from using drugs, appear for drug tests, and provide proof of enrollment in the court-ordered substance abuse treatment and parenting programs. The Department reported that D.T.'s sister, Stephanie, told the police D.T. smoked a "meth pipe" whenever she came to their mother's home to visit the children. The Department stated David had not provided proof of enrollment in parenting and counseling programs. On October 15, 2018 the juvenile court terminated reunification services and set the case for a permanency planning hearing under section 366.26.

D. *The Section 366.26 Hearing*

On February 11, 2019 the juvenile court conducted a hearing to select a permanent plan for the children. D.T. and David requested a contested hearing to present evidence of the parent-child relationship exception under section 366.26, subdivision (c)(1)(B)(i). Counsel for D.T. argued, "The parents do visit with the children, . . . at least three times per week, for two hours each visit. Unfortunately, the report does not indicate the nature or quality of those visits, but mother represents that she would be able to testify about the nature of the relationship, as well as medical appointments that she does attend and information she does know about the children, given that they are with her mother."

The juvenile court denied the request for a hearing. The court ruled: "Today the court is guided by *In re Tamika T.* [(2002)] 97 Cal.App.4th 1114. . . . [A]t the [section 366].26 hearing, when permanency is critical for the children, in order for the parents to provide a sufficient offer of proof to obtain a contested [section 366].26 hearing, the offer of proof must be specific enough so as to provide a basis for contested hearing. Generally, visits would not be enough and overall contact with the children would not be enough, but rather the offer of proof must be specific enough to indicate that the parents have such a parental role to the children, such that termination of parental rights could be detrimental to the children. And here, . . . nothing in the offers of proof today demonstrate[s] to the court the specificity necessary for a contested hearing on whether the parental bond exception would apply. . . ."

The juvenile court found that the children were adoptable, that "it would be detrimental to the children to be returned to the parents," and that "no exception to adoption applies in this case."

The court terminated the parental rights of D.T. and David. D.T. timely appealed.

DISCUSSION

A. *The Juvenile Court Did Not Abuse Its Discretion in Denying D.T. a Contested Hearing*

D.T. argues the juvenile court abused its discretion in denying her request for a contested hearing because her offer of proof stated with sufficient specificity the evidence she would introduce at the hearing and because the Department's report failed to describe the nature of her visits with the children. D.T.'s arguments lack merit. D.T.'s offer of proof was not sufficiently specific to require a hearing, and the Department's failure to detail the nature and quality of D.T.'s visitation did not excuse D.T. from having to make a sufficient proffer.

1. *Applicable Law and Standard of Review*

"The section 366.26 hearing is a critical late stage in a dependency proceeding. The child has been under juvenile court jurisdiction for an extended period following the dispositional order, and the court has held one or more review hearings to consider a return to parental custody. [Citation.] At the section 366.26 hearing, the focus shifts away from family reunification and toward the selection and implementation of a permanent plan for the child. [Citation.] . . . If 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 S.B.* (2009) 46 Cal.4th 529, 532; see *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1299 ["'Whenever the court finds "that it is likely the child will be adopted, the

court shall terminate parental rights and order the child placed for adoption.'"'].)

"One exception to adoption is the beneficial parental relationship exception. This exception is set forth in section 366.26, subdivision (c)(1)(B)(i) which states: '[T]he court shall terminate parental rights unless either of the following applies: . . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.'" (*In re Noah G.*, *supra*, 247 Cal.App.4th at p. 1300.) "Application of the beneficial parent-child relationship exception consists of a two-prong analysis. [Citation.] The first prong inquires whether there has been regular visitation and contact between the parent and child. [Citation.] The second asks whether there is a sufficiently strong bond between the parent and child that the child would suffer detriment from its termination. [Citation.] [¶] The first prong is quantitative and relatively straightforward, asking whether visitation occurred regularly and often. [Citation.] [¶] In contrast, the second prong involves a qualitative, more nuanced analysis, and cannot be assessed by merely looking at whether an event, i.e. visitation, occurred. Rather, the second prong requires a parent to prove that the bond between the parent and child is sufficiently strong that the child would suffer detriment from its termination. [Citation.] In applying this exception, the court must take into account numerous variables, including but not limited to (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the '"positive"' or '"negative"' effect of interaction between parent and child, and (4) the child's unique needs." (*In re Grace P.* (2017) 8 Cal.App.5th 605, 612-613.)

"The [parent] has the burden of proving [his or] her relationship with the children would outweigh the well-being they would gain in a permanent home with an adoptive parent. [Citations.] Evidence of frequent and loving contact is not enough to establish a beneficial parental relationship. [Citations.] The [parent] also must show [he or] she occupies a parental role in the children's lives." (*In re Noah G.*, *supra*, 247 Cal.App.4th at p. 1300; see *In re K.P.* (2012) 203 Cal.App.4th 614, 621 ["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 C.F.* (2011) 193 Cal.App.4th 549, 556 ["'Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.'"]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 577 [severing the relationship between the parent and the child was not "detrimental to [the child] because the relationship was one of friends, not of parent and child"].)

"Parents can request a contested hearing . . . to present evidence supporting their claim that an exception to termination of parental rights exists." (*In re Grace P.*, *supra*, 8 Cal.App.5th at p. 611.) "A parent has a right to due process at a section 366.26 hearing resulting in the termination of parental rights, which includes a meaningful opportunity to be heard, present evidence, and confront witnesses. However, these procedural rights are subject to evidentiary principles. . . . Since due process does not authorize a parent 'to introduce irrelevant evidence, due process does not require a court to hold a contested hearing if it is not convinced the parent will present relevant evidence on the issue he or she seeks to contest.' . . . The parent's offer of proof 'must be specific, setting forth the actual evidence to be produced, not

merely the facts or issues to be addressed and argued.'" (*Id.* at pp. 611-612; see *In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1120 [the "due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court," italics omitted].) We review the juvenile court's denial of a contested hearing for abuse of discretion. (*In re A.B.* (2014) 230 Cal.App.4th 1420, 1434; *Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 758-759.)

2. *The Juvenile Court Did Not Abuse Its Discretion in Denying a Contested Hearing*

D.T. contends her offer of proof was sufficiently specific because it stated "she would testify about the nature and quality of her relationship, and she would also discuss the various medical appointments she attended," as well as "other information she knew about the minors." The specificity in D.T.'s offer of proof, however, was limited to the "'issues to be addressed'" (i.e., the nature and quality of her relationship); it did not include "'the actual evidence to be produced.'" (*In re Grace P.*, *supra*, 8 Cal.App.5th at p. 612.) For example, D.T.'s offer of proof did not state she would seek to introduce evidence on the strength of her bond with her children, the kind of role she assumed in her children's lives (as a parent, friend, or otherwise), whether her children considered her their mother, or how or even whether her children would suffer if the court terminated her parental rights. Counsel for D.T.'s vague and general reference to "medical appointments [D.T.] attended" gave no information about her responsibilities for or involvement in the children's health care. The same is true for D.T.'s offer that she would testify about "other information" about the children. (See *In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1124 ["[t]he offer of proof must be specific, setting forth the actual evidence to be

produced"]; cf. *In re Grace P.*, at p. 614 [father's offer of proof was sufficient where he represented that he would testify "about the positive quality of his visitation, how he parented all three children during visits," and how "the children considered him to be a father figure" and that his daughter would testify "regarding how she enjoyed visits with [him], saw [him] as a parent, and would be sad if visitation with [him] ended"].)

D.T. also contends the juvenile court should have granted her request for a contested hearing because the Department's report for the section 366.26 hearing did not provide information about the nature of her visits with the children. But the Department's failure, if any, to provide information about those visits did not relieve D.T., who had the burden of proving the parent-child relationship exception applied, of her obligation to state with specificity the evidence she would produce in a contested hearing. (See *In re Grace P.*, *supra*, 8 Cal.App.5th at p. 611 ["[i]f the parents have failed to reunify and the court has found the child likely to be adopted, the burden shifts to the parents to show exceptional circumstances exist such that termination would be detrimental to the child"]; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 646 ["[t]he parent has the burden of proving the statutory exception applies"]; *In re K.P.*, *supra*, 203 Cal.App.4th at p. 621 [same]; see also *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373 ["[u]nder [section 366.26] there is no requirement that an absence of benefit from continuing the [parent-child] relationship be proved as an element of termination"].)

B. *Substantial Evidence Does Not Support the Juvenile Court's Finding ICWA Did Not Apply*

1. *Applicable Law and Standard of Review*

"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 the 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, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a); see *In re Isaiah W.* (2016) 1 Cal.5th 1, 5.)[3] ICWA "establishes minimum federal standards a state court must follow before removing an Indian child from his or her family." (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 649.) "This notice requirement . . . enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the proceeding." (*In re Isaiah W.*, at p. 5; see *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165 ["[t]he determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement"].)

Federal regulations implementing ICWA provide that the notice "shall include," in addition to information about the child and his or her parents, "'[i]f known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct

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[3] "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) 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 *In re N.G.* (2018) 27 Cal.App.5th 474, 480.)

lineal ancestors of the child, such as grandparents." (25 C.F.R. §§ 23.11(a), 23.111(d)(1)-(3); see *In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 651, fn. 8.) "Section 224.2 codifies and elaborates on ICWA's requirements of notice to a child's parents or legal guardian, Indian custodian, and Indian tribe, and to the Bureau of Indian Affairs." (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 9.) Section 224.2, subdivision (a)(5)(C),[4] requires ICWA notices to include "[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known." (See *In re Breanna S.*, at p. 651.) "Notice given by [the child protective agency] pursuant to ICWA must contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership." (*In re S.E.* (2013) 217 Cal.App.4th 610, 615.)

"[S]ection 224.3, subdivision (a) . . . provides that courts and county welfare departments 'have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care.'" (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 9.) "This affirmative duty is triggered whenever the child protective

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[4] Effective January 1, 2019 the Legislature repealed sections 224.2 and 224.3 and enacted new versions of those statutes. (Stats. 2018, ch. 833, §§ 5, 7.) We quote the version of the statutes in effect in 2018, when the juvenile court ruled ICWA did not apply in this case. (See *In re H.B.* (2008) 161 Cal.App.4th 115, 121, fn. 5.)

agency or its social worker "'knows or has reason to know that an Indian child is or may be involved'" [citation], and obligates the social worker, as soon as practicable, to interview the child's parents, extended family members and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility." (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 652; see *In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 785; see § 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4).)[5]

Section 224.3, subdivision (e)(3), provides: "If proper and adequate notice has been provided pursuant to Section 224.2, and neither a tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that the Indian Child Welfare Act . . . does not apply to the proceedings." "Only after proper and adequate notice has been given and neither a tribe nor the BIA has provided a determinative response within 60 days does section 224.3(e)(3) authorize the court to determine that ICWA does not apply." (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 11; accord, *In re N.G.* (2018) 27 Cal.App.5th 474, 480.)

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[5] "ICWA itself does not expressly impose any duty to inquire as to American Indian ancestry; nor do the controlling federal regulations. [Citation.] But ICWA provides that states may provide 'a higher standard of protection to the rights of the parent . . . of an Indian child than the rights provided under [ICWA].'" (*In re H.B.* (2008) 161 Cal.App.4th 115, 120.) Section 224.3, subdivision (c), requires the social worker to conduct interviews "to gather the information required in paragraph (5) of subdivision (a) of Section 224.2." California Rules of Court, rule 5.481(a)(4) contains similar language.

2. *The Department's Inquiry and Notice to the Indian Tribes*

There was some evidence of Indian ancestry on both sides of the children's family. D.T. told the Department investigator, "My paternal great-grandmother, Muriel H.[,] indicated that there might be American Indian heritage with [the] Apache tribe but she passed away already." D.T. referred the investigator to her paternal grandmother Barbara O. The investigator interviewed Barbara, who stated her grandmother "was Cherokee Indian." The investigator "obtained [Barbara's] family history information to initiate ICWA notices" and mailed the notices on February 6, 2018. D.T. told the investigator she maintained contact with her father Michael T. (Barbara's son) through an online social media and social networking service, but there is no evidence in the record the investigator attempted to locate Michael to obtain any historical or biographical information about him or his family.

As for David, when the Department investigator asked him in an initial interview whether he had "American Indian heritage," David answered, "Yes, we do . . . . I have no idea, but my paternal grandmother, Sally T.[,] told me that we did. My family has never been enrolled with any tribe." David told the investigator he would provide the telephone number for Sally (the children's paternal great-grandmother). There is no evidence in the record, however, the investigator obtained Sally's number or attempted to call her. The investigator did attempt to contact David's mother, Theresa R., and left two messages.

A week after his initial interview with the social worker, David wrote on the Parental Notification of Indian Status (ICWA-020) form he did not have Indian ancestry "as far as [he] kn[ew]." At a hearing on January 23, 2018, the juvenile court stated, "I'll

note [David] notes no American Indian ancestry." The court's minute order stated, "The Court does not have a reason to know that ICWA applies as to [David]." On February 14, 2018 the Department submitted a report for the jurisdiction and disposition hearing that documented David's statement he believed he had American Indian ancestry and the source of his belief. Neither the Department nor the juvenile court ever inquired into the discrepancy between David's ICWA-020 form and David's initial statement to the investigator.

On February 22, 2018 the Department received a letter from the Department of Human Services Office of the Eastern Band of Cherokee Indians. The letter stated neither F.T. nor J.T. was an "'Indian Child' in relation to the Eastern Band of Cherokee Indians as defined in 25 U.S.C., Section 1903(4)." The letter concluded that "the Eastern Band of Cherokee Indians [was] not empowered to intervene in this matter." The letter, however, included the advisement: "This determination is based on the information exactly as provided by you. Any incorrect or omitted family documentation could invalidate this determination." On April 16, 2018 the juvenile court reviewed the letter from the Eastern Band of Cherokee Indians, confirmed with the Department that more than 60 days had passed since the Department mailed the notices to the tribes and the Department had not received any other responses, and found "no reason to know this case [was] governed by the Indian Child Welfare Act."

3. *The Department Did Not Comply with ICWA's Inquiry and Notice Requirements*

D.T. argues that the Department's inquiry did not comply with ICWA and that, as a result of the Department's inadequate investigation, the notices to the Indian tribes "were devoid of

important identifying biographical information for the family that likely impacted the tribes' conclusion [each] minor was not an Indian child." D.T. points to at least four ICWA violations: (1) the Department did not make any effort to contact D.T.'s father, Michael (the children's maternal grandfather), who was directly descended from a member of the Cherokee tribe; (2) the Department did not fully investigate David's Indian ancestry because the investigator only left two messages for David's mother, Theresa, and did not obtain any biographical information about Sally (the children's paternal great-grandmother); (3) the notices sent to the tribes did not contain (a) Barbara's former address or city of birth, (b) Michael's current address, former address, or complete birthdate, or (c) biographical information for William Y. (Michael's father and the children's maternal great-grandfather); and (4) the notices erroneously stated it was "[u]nknown" whether Barbara was deceased or had a tribal membership or enrollment number[6] and omitted known information, including the name of the children's maternal great-great grandmother, Muriel, and her possible Indian ancestry. We agree with D.T. the Department failed to carry out its obligations under ICWA to fully investigate the children's Indian ancestry and to provide proper notice to the relevant tribes.

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[6] D.T. contends the ICWA form stated it was "unknown" whether Barbara had tribal "ancestry," but the form actually stated "unknown" to the question whether Barbara had a tribal "membership or enrollment number."

a. *The Department Failed To Conduct an Adequate Inquiry into D.T.'s Indian Ancestry*

Although the Department investigator interviewed D.T., David, and Barbara, there is no evidence the Department interviewed the children's other "extended family members and any other person who can reasonably be expected to have information concerning the [children's] membership status or eligibility." (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 652.) In particular, there is no evidence the Department made any effort to locate D.T.'s father, Michael, who was the most direct link from D.T. to the Cherokee tribe, to obtain information from him. Nor is there any evidence the Department tried to locate Michael by, for example, asking D.T. (who told the social worker she kept in touch with Michael), D.T.'s sister (Stephanie) or Barbara where or how Michael could be found or contacted. (See *ibid.* [where the mother claimed Indian ancestry through the children's maternal great-grandmother, the social worker had a "duty to seek out . . . information" regarding the maternal grandfather and the maternal great-grandfather]; *In re Michael V.* (2016) 3 Cal.App.5th 225, 235 ["[t]he Department made no effort to locate the children's maternal grandmother to interview her even though it was she who reportedly had the direct link to a tribe"].)

The Department asserts, without citing any authority, that because the investigator had already interviewed Barbara, "its failure to interview a relative more distant from the heritage should not automatically constitute prejudicial error." But, as stated, federal regulations require an ICWA notice to the tribes to include biographical information for grandparents and other "direct lineal ancestors." (25 C.F.R. §§ 23.11(a), 23.111(d)(1)-(3).) And section 224.2, subdivision (a)(5)(C), requires ICWA notices to

include the known names of the child's parents, grandparents, and great-grandparents. In specifying the people for whom the Department must provide biographical information, the Legislature used the conjunctive, not the disjunctive. (See *In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 653 ["vigilance in ensuring strict compliance with federal ICWA notice requirements is necessary"]; *In re J.M.* (2012) 206 Cal.App.4th 375, 381 ["[t]horough compliance with ICWA is required"]; *In re A.G.* (2012) 204 Cal.App.4th 1390, 1397 ["[b]ecause of their critical importance, ICWA's notice requirements are strictly construed"]; Cal. Rules of Court, rule 5.481(a)(4)(A) [the social worker "must" interview "parents . . . and 'extended family members'" "to gather the information listed in . . . section 224.2(a)(5)"].)

The Department argues D.T. "failed to demonstrate that available significant information was omitted." We rejected a similar argument in *In re Breanna S.*, *supra*, 8 Cal.App.5th 636, explaining "it was the social worker's duty to seek out this information, not the obligation of family members to volunteer it." (*Id.* at p. 652; see *In re Michael V.*, *supra*, 3 Cal.App.5th at p. 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."].) Thus, the Department had the burden of conducting a full inquiry and investigation to ascertain the necessary biographical information, a responsibility the Department cannot avoid by arguing D.T. did not first show the information was ascertainable.

The Department also fell short of ICWA's notice requirements. The Department's notices to the tribes omitted several important pieces of information about the children's maternal grandfather, including Michael's current address, former address, and any tribal membership or enrollment

number, and about the children's maternal great-grandfather, including William's current address, former address, birthdate, and any tribal membership or enrollment number. These omissions violated federal and state law. (See 25 C.F.R. §§ 23.11(a), 23.111(d)(1)-(3); § 224.2, subd. (a)(5)(C).) The notices also failed to include the known name of the children's maternal great-great-grandmother, Muriel, a person who D.T. said had Indian ancestry. The notices also omitted biographical information about Barbara that the Department easily could have obtained (by calling Barbara), including her former address and any tribal membership or enrollment number. And the notices contained significant mistakes, including an error in J.T.'s birthdate and a notation it was "unknown" whether Barbara was deceased (when the Department knew she was alive because the investigator spoke to her).

The Department argues it did not have the obligation to provide information about ancestors more remote than great-grandparents. But "California courts have held that a child welfare agency is required to provide information pertaining to a minor's great-great grandparent in an ICWA notice if such information may be relevant in establishing the minor's American Indian heritage." (*In re E.H.* (2018) 26 Cal.App.5th 1058, 1069; see *In re S.E.*, *supra*, 217 Cal.App.4th at p. 615 [missing information about the child's great-great-grandfather "pertained directly to the ancestor [the mother] affirmatively claimed was Indian"]; *In re E.H.*, at p. 1074 ["[g]iven that [the maternal great-grandmother] stated that her family had [Indian] heritage on her paternal side, the [child protective agency's] failure to include accurate information about her father in its ICWA [n]otice may have altered the tribe's determination"].)

The Department also argues its failure to obtain information about Michael was harmless because Michael's name

was "included in the notice along with the paternal great-grandmother[ ] (Barbara's) information." But a name, without more, is not sufficient, which is why federal and state law require additional identifying information. (See *In re E.H.*, *supra*, 26 Cal.App.5th at p. 1069 ["'it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors,'" italics omitted].) Moreover, the Department provided only sparse biographical information about Michael's father, William, and incomplete information about Barbara and, as discussed, failed to mention Muriel at all. We cannot say the tribes would have made the same determination F.T. and J.T. were not Indian children had the Department fulfilled its obligations under ICWA and California law and mailed notices with more complete information. (See *In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 654 ["[w]e cannot say with any degree of confidence that additional information concerning . . . [the maternal great-grandmother], her husband[,] and her daughter would not have altered the tribe's evaluation"]; *In re A.G.*, *supra*, 204 Cal.App.4th at p. 1397 [error was "obvious" where the ICWA notices included the paternal grandmother's name and address, but omitted information about other relatives, including the paternal grandfather and maternal grandparents]; cf. *In re J.M.*, *supra*, 206 Cal.App.4th at p. 383 [omission of the name of a known great-great-grandparent from the ICWA notice "was harmless" because "[t]his is not a case where there are gaps in the family tree, frustrating the . . . tribe's ability to meaningfully investigate the children's eligibility for membership in the [tribe]"].)

b. *The Department Failed To Conduct an Adequate Inquiry into David's Indian Ancestry*

For David's side of the family, the Department did not make any effort to interview David's paternal grandmother, Sally, beyond leaving two messages for David's mother, Theresa. The Department had an obligation to investigate David's statement to the social worker that, according to his grandmother, his family had Indian ancestry. Although David told the social worker he would provide Sally's contact information, there is no evidence the social worker ever obtained that information from David or attempted to find another way to contact Theresa other than leaving her two telephone messages, such as asking David for her mailing address. That David later made a contrary statement about his Indian ancestry on the ICWA-020 form did not relieve the Department of its obligation to make an inquiry to resolve the discrepancy. (See *In re Gabriel G.*, *supra*, 206 Cal.App.4th at p. 1167 ["the social worker had a duty of further inquiry" where the father stated on the ICWA-020 form he had Indian ancestry but in a later interview stated he did not].)

Moreover, the juvenile court did not make any inquiry into the matter. David's statement about his Indian ancestry appeared in a clearly marked ICWA section of the report the Department submitted for the jurisdiction and disposition hearing, and the juvenile court stated it had "read and considered the [Department's] report." Contrary to the Department's assertion, there was nothing "vague" about David's answer, "Yes we do," to the question whether he had American Indian ancestry. (See *In re Michael V.*, *supra*, 3 Cal.App.5th at p. 235 [the juvenile court "has an affirmative obligation 'to make further inquiry regarding the possible Indian status of the child'"]; cf. *In*

re O.K. (2003) 106 Cal.App.4th 152, 157 [the paternal grandmother's statement, "the boy . . . may have Indian in him," was "too vague and speculative to give the juvenile court any reason to believe the minors might be Indian children"].)

In addition, David provided the full name of his paternal grandmother to substantiate his belief he had Indian ancestry. The trial court, at a minimum, should have inquired why David later retracted his claim of Indian ancestry. (See *In re K.R.* (2018) 20 Cal.App.5th 701, 709 ["once there is sufficient information to believe that the children might be Indian children within the meaning of ICWA and the California statutes, 'responsibility for compliance' with those statutes 'falls squarely and affirmatively' on *both* the social services agency and the court"]; *In re L.S.* (2014) 230 Cal.App.4th 1183, 1197-1198 [where the mother made conflicting statements about her Indian ancestry in different proceedings, "the court had a duty either to require the [child protective a]gency to provide a report . . . or to have the individual responsible for notice to testify in court regarding the inquiry made"]; cf. *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1521 [juvenile court properly asked the father to clarify the discrepancy between his initial claim of Indian ancestry and his later retraction].)

The Department also asserts David's "initial statement [about his Indian ancestry] by itself was insufficient to require notice" because David "mentioned no specific tribal affiliation and was clear no one in his family had ever belonged to a tribe." ICWA, however, does not require the parent to identify or claim membership in a specific tribe to trigger the notice provision. (See *In re Elizabeth M.*, *supra*, 19 Cal.App.5th at p. 786 ["saying 'Indian' but providing no tribal name at all—does not, without more, relieve the child protective agency of its affirmative obligation to interview family members and others who could be

expected to have relevant information . . . or the court of its duty to ensure an appropriate inquiry has been conducted before concluding ICWA does not apply to the case"]; see also *In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 650 ["'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,'" italics omitted]; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254 ["a child may qualify as an Indian child within the meaning of the ICWA even if neither of the child's parents is enrolled in the tribe"].)

Aside from failing to comply with ICWA's inquiry requirement, the Department failed to include in the notice known information about David's family. In the section for listing biographical information about David's grandmother (the children's paternal great-grandmother), the Department wrote "Unknown" in all the boxes, including the box asking for "Name," even though the Department knew and stated in its jurisdiction and disposition report the name of David's grandmother, Sally, and her possible Indian ancestry. This omission violated federal and state law. (25 C.F.R. § 23.111(d)(3); § 224.2, subd. (a)(5)(C); see *In re E.H.*, *supra*, 26 Cal.App.5th at p. 1073 [child protective agency "*is* required to provide notice of the personal identifying information of all 'direct lineal ancestors' [citations] . . . if such notice is potentially relevant in determining whether a child is an Indian child"].) The Department's failure to provide this information was not harmless in light of David's claim of Sally's (and hence his) Indian ancestry. (See *In re N.G.*, *supra*, 27 Cal.App.5th at p. 485 ["we simply cannot know whether [the child protective agency] would have discovered information sufficient to enable any of the previously noticed tribes to determine whether [the minor] is an Indian child"]; *In re Breanna*, *supra*, 8 Cal.App.5th at p. 655 ["once ICWA notice is required, . . . we

would be extremely reluctant under most circumstances to foreclose the tribe's prerogative to evaluate a child's membership rights without it first being provided all available information mandated by ICWA"].)

4. *We Cannot Presume the Juvenile Court Complied with ICWA*

The Department argues we should apply the presumption in Evidence Code section 664 that the Department's "'official duty has been regularly performed'" and affirm the juvenile court's ICWA findings on the basis that D.T. has not presented a record "that affirmatively demonstrates error." The Department cannot satisfy its obligations so easily.

"[I]n general, an appellant has the burden of producing an adequate record that demonstrates reversible error. [Citation.] However, ICWA compliance presents a unique situation, in that, . . . although the parent has no burden to object to deficiencies in ICWA compliance in the juvenile court, the parent may nevertheless raise the issue on appeal. . . . The parent is in effect acting as a surrogate for the tribe in raising compliance issues on appeal." (*In re K.R.*, *supra*, 20 Cal.App.5th at p. 708.) A child protective agency "has the obligation to make a meaningful effort to locate and interview extended family members to obtain whatever information they may have as to the child's possible Indian status. [Citation.] The agency cannot omit from its reports any discussion of its efforts to locate and interview family members who might have pertinent information and then claim that the sufficiency of its efforts cannot be challenged on appeal because the record is silent." (*Id.* at p. 709.)

Child protective agencies satisfy their obligations under ICWA by conducting an investigation and mailing notices that comply with federal and state law, not by relying on evidentiary

presumptions. The Department cannot rely on an absence of evidence it complied with ICWA to show it did comply or to ask the court to presume it did. (See *In re K.R.*, *supra*, 20 Cal.App.5th at p. 709 [juvenile court cannot assume "that because *some* information was obtained and relayed to the relevant tribes, the social services agency necessarily complied fully with its obligations"].) Indeed, the Department kept meticulous records on some issues, such as documenting its attempts to locate D.T. and David so they would know to come to court, D.T.'s and David's missed drug tests, and D.T.'s and David's telephone calls and visits with a social worker the Department used to assess their ability to care for their children. The absence of ICWA compliance in the Department's records suggests the Department did not "regularly perform" the duties ICWA imposes on child protective agencies. (See *In re N.G.*, *supra*, 27 Cal.App.5th at p. 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 proper and adequate ICWA notices were given or that ICWA did not apply," but rather will conclude "the appellant's claims of ICWA error prejudicial and reversible"].)

DISPOSITION

The juvenile court's orders terminating the parental rights of D.T. and David over F.T. and J.T. are 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, including resolving David's conflicting claim of Indian ancestry, conducting further interviews with relatives of D.T. and David as warranted, and sending proper notices to the relevant tribe(s). The court is then to determine whether ICWA inquiry and notice requirements have been satisfied and whether F.T. and J.T. are Indian children. If the court finds they are Indian children, the court is to conduct new hearings in compliance with ICWA and related California law.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.