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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re SKYLAR B., a Person Coming  
Under the Juvenile Court Law.

B295557

(Los Angeles County  
Super. Ct. No. DK24371A)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent.

v.

SHONN B.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Stephen C. Marpet, Juvenile Court Referee. Reversed in part, affirmed in part, and remanded with directions.

Anne E. Fragasso, under appointment by the Court of Appeal, for Defendants and Appellants.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Veronica Randazzo, Deputy County Counsel for Plaintiff and Respondent.

Appellant Shonn B. (father), the alleged father of Skylar B. (born 2015), appeals from orders terminating his parental rights and denying his Welfare and Institutions Code section 388<sup>1</sup> petition to vacate jurisdictional and dispositional findings. Father contends the juvenile court abused its discretion in denying his section 388 petition because he had no notice of the jurisdiction and disposition hearing, in violation of his due process rights. Father further contends the order terminating parental rights must be reversed because the juvenile court failed to comply with the Indian Child Welfare Act (ICWA).

We conditionally reverse the order terminating parental rights and remand the matter for the limited purpose of directing the juvenile court to conduct a full inquiry and to provide proper notice under ICWA. We otherwise affirm the juvenile court's orders.

## **BACKGROUND**

### **Detention and section 300 petition**

The Los Angeles County Department of Children and Family Services (the Department) received a referral in July 2017 alleging that Skylar was a victim of general neglect. According to the reporting party, Skylar was in his crib crying while his mother, Donesha J. (mother)<sup>2</sup> was drunk and unconscious.

The Department made several unsuccessful attempts to contact mother and was subsequently notified that law enforcement officers had responded to mother's home on August

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Mother is not a party to this appeal.

4, 2017, for a child welfare check. The officers reported that although mother did not appear to be intoxicated, she exhibited mental health issues. Mother talked to herself, mumbled, and made random comments. She threatened to kill whoever had contacted the police and said she would blow the officers up. Because mother did not appear to be able to care for Skylar, the officers released the child to maternal uncle Bruce J., who lived in the same apartment building as mother.

After several failed attempts to meet with mother, the Department obtained an expedited removal order on August 10, 2017. The Department served mother with the removal order on August 11, 2017, and detained Skylar. Mother provided no information as to the identity of Skylar's father.

On August 16, 2017, the Department filed a section 300 petition alleging that mother's substance abuse and mental and emotional health problems placed Skylar at risk of harm. An Indian Child Inquiry Attachment to the petition indicated that mother had no known Indian ancestry.

Mother and maternal uncle Bruce J. appeared at the August 16, 2017 detention hearing. At the hearing, mother submitted two parentage questionnaire forms, one identifying father, and another identifying Dequin B. as Skylar's father. Mother also submitted an ICWA-020 form indicating that she may have Cherokee or Blackfoot ancestry.

When the juvenile court asked about mother's Indian heritage, mother said she believed she had Cherokee ancestry. The juvenile court asked whether family members were registered with any tribes, and the maternal uncle responded that the maternal grandmother had Black Creek Wolf Indian

heritage and lived in Blueberry Park, California, but that he did not know if she was registered with any tribe.

Skylar's counsel informed the court that mother and the maternal uncle had been subjects of a juvenile dependency case when they were minors, and that additional ICWA information might be available in the case file for the previous case. The juvenile court identified the case number for the previous dependency case and directed the Department to investigate the matter further. The court then found that it currently had no reason to know that Skylar was an Indian child but directed the Department to include in its reports any additional ICWA information it might obtain.

The juvenile court then inquired as to Skylar's paternity. Mother responded that father might be Skylar's biological father because the child resembled him. She said father had last seen Skylar six months ago but that father had never taken Skylar into his home or treated Skylar as his own child. Mother provided a telephone number for father and said that the number was current.

The juvenile court found father and Dequin B. both to be alleged fathers and ordered Skylar detained from the parents. The court ordered reunification services for mother, including weekly random drug and alcohol testing, drug and alcohol and parenting programs, and individual counseling, and granted her two-hour monitored visits two times a week. The juvenile court also granted monitored visits to the alleged fathers after they contacted the Department.

### **Jurisdiction and disposition**

The dependency investigator reported that she called father on August 23, 2017, using the telephone number mother had

provided at the detention hearing. A male answered the phone and the investigator asked to speak to father. When asked who was calling, the investigator identified herself and explained the history and status of the case. Father said that he knew a “Nesha” but that mother’s name, Donesha J., did not sound familiar to him. The investigator suggested that “Nesha” might be an abbreviation and said that mother had provided father’s telephone number. The investigator asked father about his relationship with mother, and father denied dating mother or being in a relationship with her. Father said he did not talk to mother at all but that she had reached out to him within the past two weeks.

When the investigator asked father how long he had known mother, he replied that they had not spoken in years. The investigator told father Skylar’s date of birth, and father denied that Skylar was his child. He said mother had once told him Skylar’s father could be any one of four or five people. The investigator explained that the juvenile court had found father to be Skylar’s alleged father and that there would be upcoming court hearings. The investigator asked father to provide an address to which she could send notices, the detention report, and the petition. Father said he lived in Indio and provided only an email address. After urging father to attend the next hearing and have an attorney assigned to represent him, the investigator emailed father the notice, the detention report, and the petition.

On September 6, 2017, the dependency investigator received a voicemail message from father and a call back number that was different than the telephone number the investigator had used to contact father previously. The investigator returned father’s call and left a voicemail message explaining that father

could also contact the social worker through the Department's main reception line.

Mother told the dependency investigator in September 2017 that although Dequin B.'s name was on Skylar's birth certificate, father, and not Dequin B., was Skylar's father. She said she knew father was Skylar's biological father because he was the only person with whom she had a physical relationship at the time. When the investigator told mother about the August 2017 telephone conversation with father, mother said father would not come forward because he did not want to pay child support.

In its October 2017 jurisdiction/disposition report, the Department stated that it was not confident as to the identity of Skylar's father. The Department recommended that the court order father to submit to a DNA test.

On October 16, 2017, the Department filed an amended petition adding allegations that mother had engaged in violent altercations with her male companions in Skylar's presence. Mother was present at the October 19, 2017 arraignment hearing on the amended petition. The juvenile court found that it had no reason to know Skylar was an Indian child under ICWA and continued the adjudication hearing to January 9, 2018. The court ordered monitored visitation for father and gave the Department discretion to liberalize the visits.

Father did not appear at the January 9, 2018 adjudication hearing at which the juvenile court declared Skylar a dependent child and ordered him removed from the parents' custody. The court ordered mother to participate in a substance abuse program with after care, weekly random drug testing, psychiatric counseling and individual counseling to address case issues. The

court denied father reunification services under section 361.5, subdivision (a) because of his status as an alleged father.

### **Six-month review proceedings**

In July 2018, the Department reported that Skylar was in the home of Ms. N., where he had been placed since August 2017. He was receiving speech therapy two times a week and appeared to be happy and bonding with his caregiver.

Mother had not participated in any services and had visited sporadically with Skylar. The Department recommended terminating mother's reunification services and setting a section 366.26 permanency planning hearing. The Department again recommended that the juvenile court order father to submit to a DNA test to verify his paternity.

On July 9, 2018, father telephoned the supervising social worker. Father said he had received mail from the social worker and wanted to inquire about a pending court date. The supervisor explained that a six-month review hearing was scheduled for the following day and that the Department was recommending terminating mother's reunification services and setting a permanency planning hearing. The supervisor explained the consequences of the Department's recommendation and father acknowledged that he understood. Father told the supervisor that he was at the hospital when Skylar was born and had carried the child, but that he had not maintained a relationship with Skylar. Father said he did not want to lose Skylar and thought he might want the child to live with him. The supervisor urged father to attend the July 10, 2018 hearing and to have an attorney assigned to represent him.

Father did not appear at the July 10, 2018 hearing at which the juvenile court set an August 6, 2018 hearing date for a

contested hearing on the Department's recommendation to terminate mother's reunification services.

In a "last minute information for the court" filed on August 1, 2018, the social worker reported that father had contacted the Department stating he would appear at the August 6, 2018 review hearing and was requesting a DNA test. The Department also provided a "due diligence report" dated July 10, 2018, documenting its efforts to locate father on June 29, July 2, and July 3, 2018.

Father did not appear at the August 6, 2018 hearing at which the juvenile court terminated mother's reunification services and set a December 3, 2018 hearing date for the section 366.26 selection and implementation and permanency planning hearing.

#### **Section 366.26 proceedings**

In December 2018, the Department reported that Skylar remained placed with Ms. N., who wished to adopt him. Skylar appeared to be happy in Ms. N.'s care and referred to her as "mom." The Department attached a due diligence report for father dated December 3, 2018, as well as notices of hearing and proofs of service indicating that notice had been sent to father at an address on Brynhurst Avenue in Los Angeles.

In a last minute information for the court, the Department reported that on October 23, 2018, the social worker had visited the address on Brynhurst Avenue and had left father a contact letter. Father telephoned the social worker on November 15, 2018, and acknowledged receipt of the contact letter. He provided the social worker with his current telephone number and confirmed that he currently resided at the Brynhurst Avenue address.



Father told the social worker he had not appeared at the August 6, 2018 court hearing because mother had left him a message telling him not to attend the hearing since Skylar's presumed father had been found. The social worker responded that father should have attended the hearing regardless of what mother said. The social worker informed father of the upcoming section 366.26 hearing and arranged to meet him on November 15, 2018, to personally serve him with notice of the hearing. Father did not appear at the scheduled meeting but telephoned the social worker the following day to ask if he could attend the hearing without being personally served with notice. The social worker told father he could attend the hearing without notice and informed him of the date and time of the hearing as well as the Department's recommendations.

Father appeared at the December 3, 2018 hearing and confirmed the correct spelling of his name and his current address. Father acknowledged that he could be Skylar's biological father, and the juvenile court ordered a DNA test. The court granted father monitored visits with Skylar and continued the section 366.26 hearing to January 24, 2019.

On January 22, 2019, the social worker and her supervisor met with father and told him the DNA test results confirmed that he was Skylar's biological father.

### **Section 388 petition**

On January 23, 2019, father filed a section 388 petition seeking to vacate any jurisdictional and dispositional findings relating to him and to allow him to participate in the proceedings. The petition stated that father's counsel had discovered significant issues concerning notice and father's due process rights.

In a last minute information for the court dated February 4, 2019, the Department reported that father tested positive for marijuana and alcohol on January 23, 2019, and that father had an open child welfare referral in Riverside County. Also on February 4, 2019, the Department filed its Delivered Service Log, which documented the Department's contacts with father throughout the history of the case.

Father testified at the February 4, 2019 hearing on his section 388 petition. When the juvenile court asked father about the social worker's August 23, 2017 telephone conversation with a person who answered at the telephone number mother had provided for father, father responded, "That's not me who -- whose phone call. I never had that phone. I object." Father denied that he knew or referred to mother as "Nesha."

Father also denied telling the social worker in July 2018 that he was present at the hospital when Skylar was born. He said the social worker must have misunderstood him because he was released from the hospital in 2018 after being treated for a gunshot wound.

Father said he first saw Skylar at mother's apartment in February 2016. Although mother told him Skylar was his child, he did not take her seriously because mother was using drugs at the time. He said that since December 2018, he had video chatted with Skylar but had not visited with Skylar in person.

Father acknowledged that the social worker told him in July 2018 that Skylar was in foster care, that there was an upcoming court hearing, and that the social worker had urged father to appear at the hearing to request a DNA test. Father said he did not appear at that hearing because mother told him not to attend.

After hearing argument from the parties, the juvenile court found that the Department had made its best efforts to provide father with notice and that father had failed to appear until December 2018. The juvenile court denied father's section 388 petition, finding there was no change in circumstances and that the proposed modification was not in Skylar's best interests.

**Further ICWA inquiry**

The Department's counsel then advised the juvenile court that mother had indicated at the initial detention hearing that she might have Cherokee ancestry and that the maternal grandmother might have more information, but the Department had never interviewed any maternal relatives. The Department's counsel stated that mother's whereabouts were presently unknown and the Department had no way of contacting her. The Department's counsel further stated, however, that Skylar's caregiver knew the maternal uncle, and the Department could attempt to contact him and other maternal relatives through the caregiver. The juvenile court agreed to continue the hearing to allow the Department to do so. The court continued the section 366.26 hearing to March 18, 2019, and ordered father to return for that hearing.

In a last minute information for the court dated March 14, 2019, the social worker reported that she had made numerous unsuccessful attempts to contact mother in an effort to obtain relevant ICWA information.<sup>3</sup>

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<sup>3</sup> We grant the Department's motion to augment the record on appeal to include the March 14, 2019 last minute information for the court.

### **Section 366.26 hearing**

Father did not appear at the March 18, 2019 section 366.26 hearing. The Department's counsel stated that the Department had made its best efforts to follow up on mother's potential Indian heritage and asked the court to find that it had no reason to know that Skylar was an Indian child under ICWA. The juvenile court reiterated its previous finding that Skylar was not an Indian child.

The juvenile court then found that Skylar was adoptable, terminated parental rights, and declared Skylar's caregiver, Ms. N., to be his prospective adoptive parent.

This appeal followed.

## **DISCUSSION**

### **I. Section 388 petition**

Section 388 provides, in relevant part: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) A section 388 petition is a proper means of raising a due process challenge based on lack of notice. (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 481, 487-488 (*Ansley*).)

It is not enough, however, for a parent to show a change of circumstances under section 388. To obtain relief under the statute, the parent must also show that modifying or setting aside the prior order would be in the best interests of the child. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529; § 388, subd. (b).) "[T]he burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that

there are changed circumstances that make a change . . . in the best interests of the child. [Citations.]” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).

“Whether a previously made order should be modified rests within the dependency court’s discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established.’ [Citation.]” (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685.) We will not reverse a juvenile court’s denial of a section 388 petition ““unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].” [Citations.]” (*Stephanie M., supra*, 7 Cal.4th at p. 318.)

The record discloses no abuse of discretion. Father failed to meet his burden of showing that the requested change in court orders would promote Skylar’s best interests. After reunification services are terminated, “the parents’ interest in the care, custody and companionship of the child [is] no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability’ [citation].” (*Stephanie M., supra*, 7 Cal.4th at p. 317.) At the time father filed his section 388 petition, reunification services had been terminated and Skylar had been placed with Ms. N., his prospective adoptive parent, since August 2017. Skylar was bonded to Ms. N. and referred to her as “mom.” Father had no relationship with Skylar, and had not participated in a single visit with Skylar.

Citing *Ansley, supra*, 185 Cal.App.3d 477, father contends his requested relief was in Skylar’s best interests because it “is always in the best interests of a minor to have a dependency adjudication based upon all material facts and circumstances and the participation of all interested parties entitled to notice.” (*Id.*

at pp. 490-491.) Father further contends that “a judgment that is proven void due to lack of due process notice suffers from a fatal jurisdictional defect . . . may not be perpetrated on the rationale that setting it aside would not, in the court’s view, be in the best interest of the child. [Citations.]” (*Id.* at p. 490.) Father argues, in effect, that any section 388 petition that establishes a notice violation satisfies the “best interests” requirement under section 388 as a matter of law. That argument was previously rejected by the court in *In re Justice P.* (2004) 123 Cal.App.4th 181 (*Justice P.*).

As the court in *Justice P.* explained, the law “requires only reasonable efforts to search for and notice missing parents” and “[i]f a missing parent later surfaces, it does not automatically follow that the best interests of the child will be promoted by going back to square one and relitigating the case.” (*Justice P.*, *supra*, 123 Cal.App.4th at p. 191.) The court in *Justice P.* distinguished *Ansley*, noting that that case was decided under a previous statutory scheme that did not place the same emphasis on expediency in achieving permanency and stability for a dependent child, which is a paramount goal under the current statutory framework. (*Justice P.*, at p. 191.)

We agree with the court’s reasoning and analysis in *Justice P.* and apply it here. The juvenile court did not abuse its discretion by denying father’s section 388 petition.<sup>4</sup>

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<sup>4</sup> Because father failed to meet his burden of proving the requested relief was in Skylar’s best interests, we need not decide whether father’s section 388 petition demonstrated changed circumstances, or whether any error resulting from his alleged lack of notice was harmless beyond a reasonable doubt. (*In re*

## II. ICWA

Under ICWA, if there is a reason to believe a child who is the subject of a dependency proceeding is an Indian child, the child's Indian tribe must be notified of the proceeding and its right to intervene. (25 U.S.C. § 1912(a); § 224.3.) Both the juvenile court and the Department have an affirmative and continuing duty to investigate and obtain, if possible, the information necessary to give the required notices. (§ 224.3; Cal. Rules of Court, rule 5.481(a)(4)(A); *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167-1168 (*Gabriel G.*)). Only a minimal showing is required to trigger ICWA's inquiry and notice obligations. That showing may be met by a mere suggestion of Indian ancestry. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 258; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408.) "Any violation of this policy requires the appellate court to vacate the offending order and remand the matter for further proceedings consistent with ICWA requirements." (*In re J.D.* (2010) 189 Cal.App.4th 118, 124 (*J.D.*)).

Here, both mother and the maternal uncle stated at the detention hearing that they had Indian ancestry. The maternal uncle identified the maternal grandmother as a source of further information. The Department was accordingly required to investigate and obtain, if possible, the information necessary to provide proper notice under ICWA. (See § 224.3 [duty to inquire about possible Indian status of child]; *Gabriel G.*, *supra*, 206 Cal.App.4th at pp. 1167-1168 [same].) The record does not show, however, that the Department did so. The matter must

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*James F.* (2008) 42 Cal.4th 901, 918; *Justice P.*, *supra*, 123 Cal.App.4th at p. 193.)

accordingly be remanded for compliance with ICWA. (*J.D.*,  
*supra*, 189 Cal.App.4th at p. 124.)

### **DISPOSITION**

The order terminating parental rights is conditionally reversed. The matter is remanded to the juvenile court with directions to proceed in compliance with the inquiry and notice provisions of ICWA. Upon remand, the Department should be ordered to: (1) further investigate mother's claimed Indian ancestry by (a) reviewing the file in the previous related juvenile dependency case in which mother and the maternal uncle were subject minors; and (b) attempting through Skylar's caregiver to locate and interview maternal relatives, including the maternal uncle and the maternal grandmother, about the family's possible Indian heritage; (2) notice any identified tribes, the BIA, and the Secretary of the Interior in accordance with ICWA; and (3) submit all notices, signed return receipts, and any tribal responses to the juvenile court.

If, after proper notice is given, the juvenile court finds that Skylar is an Indian child, the court shall proceed in accordance with ICWA. If, however, the juvenile court finds that Skylar is not an Indian child, the court shall reinstate the order terminating parental rights. The juvenile court's orders are otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
HOFFSTADT