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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re Carson T. et al. Persons Coming Under the Juvenile Court Law.	
DEL NORTE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. Jessica T., Defendant and Appellant.	A144482 (Del Norte County Super. Ct. Nos. JVSQ 12-6146, 12-6150 & 12-6151)

In this dependency appeal, Jessica T. (mother) seeks relief from the juvenile court order terminating her parental rights with respect to her two younger children—S.T. (born September 2008) and T.T. (born November 2011)—and selecting a planned permanent living arrangement for her older son, Carson T. (born April 2007), all pursuant to section 366.26 of the Welfare and Institutions Code.[1] Specifically, mother claims that reversal is required because the mandated tribal notices sent in this case pursuant to the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., were defective. She also argues that the juvenile court erred by failing to appoint separate counsel for the minors, despite the existence of an actual conflict of interest. Seeing no error requiring reversal

[1] All statutory references are to the Welfare and Institutions Code unless otherwise specified. All rule references are to the California Rules of Court.

of the juvenile court's order establishing permanent plans for these three young children, we affirm.

I. BACKGROUND

The Del Norte County Department of Health and Human Services (Department) detained the three minors who are the subject of these proceedings on September 24, 2012, after father was arrested for stabbing mother with a kitchen knife in the presence of the children. According to mother, the stabbing was preceded by an incident in which father choked her to unconsciousness. In petitions filed the next day, the Department highlighted mother and father's chronic history of domestic violence and also indicated that the parents' substance abuse put the minors at risk. Both parents admitted to marijuana use, and mother also admitted to recent methamphetamine use. In addition, although the Department had previously offered voluntary services to this family, those services had proven ineffective in mitigating the family's problems.

At the detention hearing on September 26, 2012, the minors were formally detained in foster care. Thereafter, on October 5, 2012, both parents submitted to jurisdiction, and the juvenile court found that all three children were described by subdivision (b) of section 300. The minors—then five, four, and eleven months of age—remained placed together in a licensed foster home. A dispositional hearing was held on November 2, 2012. At that time, the parents again submitted the matter; the juvenile court declared the minors to be juvenile court dependants; the minors were formally removed from the custody of their parents; and mother and father were ordered to comply with their proposed reunification plans.

On November 30, 2012, the juvenile court authorized overnight visitation for the minors with their parents, subject to the parents' ability to secure housing. Thereafter, the Department sought an interim court review in February 2013, requesting that the juvenile court order placement of the minors back in the home of their parents. According to the Department, the parents were cooperative and actively engaged and progressing in their reunification plans. It was the Department's opinion that the minors

would be safe if returned home. On March 15, 2013, the juvenile court adopted the Department's recommendation, returning the minors to their parents' care.

At the 6-month review hearing on April 26, 2013, the Department recommended that the minors remain in the home of their parents. Although mother and father reportedly still had trouble getting along, both were employed, were cooperative with the Department, and were providing negative drug tests. Other than T.T.'s frequent vomiting and upcoming surgery to have tubes put in his ears, no issues were reported with respect to the children. The two older children were attending weekly individual counseling and were reported to be doing well in school. However, the father had experienced "a couple" of relapses, and the parents continued to argue in front of the minors. The Department believed that the parents needed its continued support to maintain a home free of violence and substance abuse. The juvenile court adopted the Department's recommendation and continued services for both parents.

Unfortunately, the Department disclosed in its October 2013 status review report that father was no longer living with the family, after a July 2013 domestic violence incident. In fact, according to the report, father had been arrested on charges involving domestic violence on four additional occasions between July and October. Mother was unemployed, but had recently begun an eight week Certified Nurse Assistant (CNA) program. She had been evicted for nonpayment of rent and was living with the minors in the home of a paternal great-aunt and uncle. Further, mother had tested positive for marijuana seven times since the previous court review.

Moreover, during this reporting period, all three minors were showing signs of distress. T.T. had been seen twice for respiratory problems at the University of California San Francisco Medical Center (UCSF), and it was determined that he would need to be on an inhaled steroid for life and would require surgery. He was also going through an intense biting phase. Carson, for his part, was reported to be hearing voices, having trouble sleeping, and having behavior and attention issues at school. He was seen by a psychiatrist, who diagnosed ADHD and prescribed medication. S.T. was engaging

in calculated behavior designed to make her look like the "good girl" at Carson's expense. Carson and S.T. continued to participate in individual therapy.

Although concerned about the current situation, the Department recommended that the minors remain in mother's care since they were living with the paternal great-aunt and uncle in a stable, drug-free environment. At the October 25, 2013, review hearing, the juvenile court adopted the recommendations of the Department, continuing the minors in their in-home placement. A further review hearing was set for April 2014.

By January 2014, however, the Department felt enough unease about the minors' continued placement with their mother that it filed an interim report with the juvenile court. In this report, the Department detailed multiple concerns regarding the minors' overall emotional and physical health. Carson's teacher, for instance, reported that the minor continued to have school tantrums; that his stutter had grown worse despite participation in speech therapy; that his homework was not being consistently turned in; and that, due to his excessive weight, he was often unable or unwilling to engage in activities requiring him to move. Carson stated that his psychotropic medication helped him to behave better, although he was still having scary dreams and hearing voices. According to the minor, when he doesn't take his medication, "he is bad and he doesn't know why but he can't control himself." Despite this fact, mother failed to attend a scheduled appointment with Carson's psychiatrist and did not reschedule in a timely manner, thereby compromising Carson's medication supply.

S.T. was reported by her teacher to be doing fairly well academically in kindergarten. Recently, however, she had been falling apart emotionally at school, crying and acting upset. Notably, neither S.T. nor Carson had been seeing their mental health counselor on a consistent basis. Further and of significant concern, two-year old T.T had missed appointments at UCSF in October and November 2013 to address his serious health issues. And, mother had failed to reschedule, despite the fact that the Department had offered her financial assistance to make the trip. In addition, T.T., a child with pulmonary issues, had recently tested positive for marijuana in hair follicle testing.

The Department also reported that both mother and father had ceased to participate in substance abuse treatment. Further, the parents had only drug tested once since the October 2013 six-month review, with father testing positive for marijuana on December 23, 2013, and mother testing positive for both methamphetamine and marijuana on December 4. In addition, mother was unable to provide a sample on December 23, 2013, and asked to return later, but failed to do so. Mother also did not test when referred on January 10, 2014.

Finally, it was unclear to what extent father—who had been arrested repeatedly on domestic violence and substance abuse-related charges—remained a member of the household. Although mother claimed that she was "done" with father after a November 2013 domestic violence incident and stated that he did not live in the home, the Department was aware that father was in the home during Christmas week and mother further admitted in January that father was helping out with the children and was in the home after school when Carson got off the bus. In sum, the Department wanted mother to "take care of her children's medical and mental health needs, stay clean and sober, protect herself and her children from violence and chaos, stay in contact with the Department, and test when asked without excuses." After reviewing the interim report on January 17, 2014, the juvenile court informed mother that she "really" needed to "[s]tep up."

Ultimately, however, on March 17, 2014, the Department filed supplemental petitions pursuant to section 387 seeking re-detention of the minors. In addition to the concerns described above, the Department reported that mother had failed to drug test on three occasions in early March. She also continued to neglect the minors' emotional and medical needs. The children, for instance, were provided with poor nutrition, despite Carson's obesity. Further, mother failed to follow up with a pediatric cardiologist as required for Carson due to concerns regarding his medication. As a result, Carson's medication was decreased, his negative behaviors escalated, and he was sent home from school on independent study until he could better control himself. Mother also neglected burns Carson received on a wood stove to the extent that he developed MRSA

(Methicillin Resistant Staphylococcus Aureus) abscesses that required lancing, draining, and packing. In addition, S.T. was not attending school on a regular basis, with 18 absences and 9 tardies. T.T., who suffers from pulmonary problems, was exposed to second hand marijuana and tobacco smoke. Also of concern was the fact that mother had cashed a $599 benefit check she had been provided to buy wood to heat the family home, but instead had purchased bicycles for her children, given money to a friend, and bought drugs.

Moreover, on February 13, 2014, mother reportedly drove while under the influence of alcohol with Carson in the car and ultimately left the minor with a paternal uncle who had recently been arrested on domestic violence charges. S.T. and T.T. (then five and two years old) were left home alone. That same night, mother made a threatening phone call to a cousin-in-law and later drove to her house and threatened her in person. The next day, family members brought mother home intoxicated and, when she woke up, she reportedly did not know where her children were. On February 15, 2014, mother made a false police report indicating that the paternal uncle had stolen her car and kidnapped Carson while threatening her and the minor with a firearm. That same day, she was observed standing in the extreme cold with her children in a parking lot. Mother, having located her car, refused to leave without it, despite the fact that it was locked and she had no keys. While the domestic violence in the household had dissipated with father's absence, the Department opined that mother was creating a different kind of chaos for the minors that was equally, if not more, detrimental. It sought removal of the minors from their mother's care.

At the conclusion of the contested detention hearing on March 21, 2014, the juvenile court detained all three minors, and they were placed with their paternal great-aunt and uncle. Jurisdiction on the supplemental petitions was uncontested and was established on April 4, 2014. In its dispositional report on the supplemental petitions, the Department detailed escalating problems with Carson, noting that he had daily outbursts and had hurt every individual in his current relative placement. According to the paternal great-aunt, he had threatened to stab both S.T. and T.T. with a knife, choked

both minors, pulled out chunks of hair, spit at people and objects, hit her twice in the face, and kicked her in the calf causing serious bruising and pain. In addition to individual therapy and medication, Carson was receiving rehabilitative services, which included accompaniment to school, one-on-one behavior modification, and art therapy. More intensive in-home therapeutic services were planned. At the April 18, 2014, dispositional hearing on the supplemental petitions, the juvenile court adopted the Department's recommendations and ordered the parents to comply with the terms of their reunification plans.

Shortly thereafter, however, the Department filed an update on Carson, recapping the many concerning behaviors engaged in by the six-year old and indicating that he had recently been taken to the emergency room for his behavior, where he had attempted to unplug monitors and equipment and tear the television down. He had also begun smearing his feces on the wall, floor, toilet, and bathtub in the bathroom and would urinate on the floor or on the top of the toilet lid in hopes that someone would sit on it. On May 2, 2014, after a hearing during which it learned that Carson had been hospitalized and psychiatrically evaluated the day before, the juvenile court authorized Carson to temporarily reside with mother, with daily services in place. The Department felt that a one-on-one placement with intensive services was, at that point, the best option for the minor. On May 9, 2014, the Department reported that Carson was doing well in his placement with mother, although mother was neglecting her own services to focus on the minor. The court ordered the return of Carson to his mother's care.

By May 23, 2014, however, things had again deteriorated. Carson was not doing well and was not attending school or speech therapy due to his violent behaviors. His visitation with his siblings was suspended due to his violence towards them and staff, as well as his destructive behavior in the visitation room at the Department. Visitation at the park was not an option because Carson would run away. Moreover, mother had missed one of Carson's appointments with his rehabilitation specialist and had failed to refill his medications, contributing to his escalating behaviors. On May 12, 2014, mother refused to drug test, and the next day she tested positive for methamphetamine. Finally, mother

admitted to driving Carson in an unregistered vehicle without insurance, despite repeated warnings that she was not to drive with the minor.

On May 28, 2014, the Department chronicled its concerns in a supplemental petition, asking the juvenile court to again remove Carson from his mother. In the opinion of the Department, Carson needed a consistent, structured environment with skilled, experienced staff in order to gain control over his behaviors. The juvenile court detained Carson over mother's objection on May 29, 2014. Jurisdiction was established with respect to certain portions of the supplemental petition on June 20, 2014. At the July 11, 2014, dispositional hearing on this second supplemental petition, mother was reported to have been arrested on June 25 for receiving stolen property, criminal conspiracy, and petty theft. She was not engaged in services. Father, in contrast, had recently decided to change his life and was engaged and doing well in services. The court ordered both parents to comply with their case plans and set a review hearing for October 2014.

As for Carson, after he was re-detained from mother, he was initially placed in out-of-county foster care. Following a supervised telephone visit between Carson, his mother and his siblings on June 17, however, Carson began engaging in increasingly aggressive behavior, including: name calling, yelling, hitting, kicking, spitting, throwing, destruction of property, refusing medication, refusing to follow the house rules, threatening to hurt himself, stabbing himself with a butter knife, threatening to stab the foster parent, throwing tacks at his foster parent, masturbating in front of his foster parent, and repeatedly slamming his bedroom door. As a result of these unmanageable behaviors, Carson was ultimately placed out-of-county in a licensed group home.

In its report for the October 2014 status review hearing in these matters, the Department finally recommended that reunification services be terminated for both parents and that the three children be referred for the development of permanent plans. On September 29, 2014, father had been asked to leave his sober living environment due to a positive drug test, and he admitted to staying with mother at a friend's home. He appeared to be "caught up again in his addiction." Mother was assigned to a dual

diagnosis substance abuse treatment group, but had failed to attend. She tested positive for methamphetamine five times in June and July 2014 and had not tested since that time. She was not consistent with visiting the minors. According to the Department, mother seemed to have lost interest in working to get her children back.[2] The Department, after working "tirelessly" for two years "to believe in and support this family" so that they could reunite, had come to the conclusion that mother was a "manipulative, untrustworthy, and self-absorbed person" who—unable to get her children back—was now sabotaging father so that he would also fail.

At the conclusion of the contested review hearing on October 28, 2014, the juvenile court terminated reunification services and scheduled a permanency planning hearing with respect to all three minors for February 20, 2015. Thereafter, mother filed writ petitions in this court challenging the juvenile court's October 2014 setting order, which we subsequently denied on their merits. (*Jessica T. v. Superior Court* (Jan. 7, 2015, A143444) [nonpub. opn.].)

In the meantime, in January 2015, S.T. and T.T. were moved out of county to the home of prospective adoptive parents, as their relative placement was not a concurrent home for them. Both children were reported to be adjusting well in this home, with T.T. in particular appearing to "have really wanted and needed a positive, strong, male figure in his life." S.T. was struggling somewhat with split loyalties between her former relative caregiver and current prospective adoptive mother, but this issue was being addressed and counseling was planned. Although S.T. indicated her desire to maintain contact with Carson, she was also "very adamant that she wants a permanent place to live, with parents who will take care of her 'no matter what.' " In its report submitted in advance of the February 2015 hearing, the Department recommended termination of

[2] Carson, for his part, was reported to be doing well in his group home. Significantly, he was attending second grade in a mainstream class with few behavioral issues. Although he was behind in school, his group home counselor was working with him on his academic issues.

parental rights and permanent plans of adoption with the prospective adoptive parents for S.T. and T.T.

Carson, in contrast, had lost ten pounds, was continuing to improve in school and had slowly been taken off all of his psychotropic medications, without any adverse impact on his mood stability. He was determined not to be adoptable at that point, however, due to his behavioral issues. The Department therefore recommended a planned permanent living arrangement for him. It was hoped that he would be able to transition from the group home to a regular foster home within a few months and ultimately be reassessed for a more permanent plan.

During the February 2015 hearing, the social worker testified that all three children were closely bonded together. It was her hope that this sibling bond would not be broken, as the prospective adoptive parents had indicated an interest "in having an ongoing relationship with Carson as long as the children would benefit from that." The social worker reported no chance, however, that these prospective adoptive parents would be willing to also adopt Carson in the future if "things change." She also testified that she saw no benefit to guardianship as opposed to adoption for S.T. and T.T. Rather, with respect to the benefits of adoption for S.T. and T.T. over maintenance of the sibling relationship, the social worker opined: "[I]f we held off and waited to find a permanent home for [S.T.] and [T.T.] until Carson was determined to be adoptable, that's an indefinite. We don't know how long that's going to be. [¶] [S.T.] and [T.T.] are young enough. They're both emotionally healthy. It is time for them to stop living this chaotic lifestyle, this unhealthy, harmful lifestyle and start learning how to be [children] again."

At the conclusion of the permanency planning hearing, the juvenile court followed the recommendations of the Department, terminating parental rights with respect to S.T. and T.T. and ordering permanent plans of adoption for the two minors. Carson was ordered into long-term foster care. In reaching its decision, the court noted several times that it "wanted permanency" for the children, stating specifically with respect to S.T. and T.T.: "It's very clear to me these children need a permanent home. I certainly wish that

Carson could go with his brother and sister but at this time it is not possible. But I think it is extremely critical for [T.T.] and [S.T.] to have the permanency of a final home."

Timely notices of appeal by mother brought the matter before this court for a second time.

II. DISCUSSION

A. *ICWA Inquiry and Notice Issues*

Mother first argues that the juvenile court's order establishing permanent plans for the three minors and terminating her parental rights with respect to S.T. and T.T. must be reversed because the Department did not properly comply with the notice provisions of the ICWA. The Department, in contrast, contends that the information supplied by mother and her relatives regarding their possible Indian heritage amounted to no more than "family lore," insufficient to trigger the need for ICWA noticing. We agree with the Department that, after appropriate inquiry, it did not "know[ ] or have reason to know" that any Indian children were involved in this matter. (25 U.S.C. §§ 1903(4), 1912(a).) Thus, no tribal noticing was required.

Congress enacted the ICWA in 1978 "in an effort to protect and preserve Indian tribes and their resources." (*In re G.L.* (2009) 177 Cal.App.4th 683, 690 (*G.L.*); see 25 U.S.C. § 1901.) Specifically, the ICWA codifies "the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ." (25 U.SC. § 1902.) For purposes of the ICWA, an Indian child is defined as "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 § 224.1, subd. (a) [generally adopting federal definition of "Indian child" in California].)

When a court " 'knows or has reason to know that an Indian child is involved' " in a juvenile dependency proceeding, a duty arises under the ICWA to give the Indian

child's tribe notice of the pending proceedings and of its right to intervene.[3] (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538 (*Shane G.*); see 25 U.S.C. §§ 1912(a); 224.3, subd. (d), 290.1, subd. (f), 290.2, subd. (e), 291, subd. (g), 292, subd. (f), 293, subd. (g), 294, subd. (i), 295, subd. (g), 297, subd. (d).) Concomitantly, "if there is insufficient reason to believe a child is an Indian child, notice need not be given." (*Shane G.*, *supra*, 166 Cal.App.4th at p. 1538.) Put in terms of the statutory language, notice is not required where there is insufficient reason to believe that a child is either a member of an Indian tribe or is eligible for tribal membership as the biological child of a member.

In addition to this notice requirement, both the juvenile court and the county welfare department have "an affirmative and continuing duty" in dependency proceedings "to inquire whether a child . . . is or may be an Indian child." (§ 224.3, subd. (a).) Circumstances that may provide reason to know a child is an Indian child include without limitation: "(1) A person having an interest in the child . . . provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe. [¶] (2) The residence or domicile of the child, the child's parents, or Indian custodian is in a predominantly Indian community. [¶] (3) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service." (§ 224.3, subd. (b); see rule 5.481(a)(5).) "If these or other circumstances indicate a child may be an Indian child, the social worker must further inquire regarding the child's possible Indian status. Further inquiry includes interviewing the parents, Indian custodian, extended family members or any other person

[3] This notice must contain sufficient information to allow the tribe to determine whether the child at issue is an Indian child. (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630 (*Louis S.*).) Pursuant to both state and federal law, this includes: "All 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." (§ 224.2, subd. (a)(5)(C); see also 25 C.F.R. § 23.11 (a), (d)(1)-(4), (e)(1)-(6) (2015).)

who can reasonably be expected to have information concerning the child's membership status or eligibility." (*Shane G., supra*, 166 Cal.App.4th at p. 1539; see § 224.3, subd. (c).) If the inquiry leads the court or the social worker to "know or have reason to know that an Indian child is involved," formal notice to the relevant tribes must then be provided.[4] (*Shane G., supra*, 166 Cal.App.4th at p. 1539; see also § 224.3, subd. (d).)

In the present case, mother initially maintained that the maternal great-grandparents were Cherokee and so the Department indicated in its detention report that it was working with mother to obtain further information. Thereafter, at the time of the dispositional hearing, the social worker reported speaking to the maternal great-grandmother regarding the family's possible Indian ancestry. Mother had identified her maternal great-grandfather as a Cherokee tribal member. However, according to the maternal great-grandmother, while her husband might be Cherokee, they had no verification of any affiliation and had never attempted to determine his eligibility for membership. Based on this information, notices were sent to the three potentially relevant Cherokee tribes on October 25, 2012, to inquire as to the eligibility of the children. On December 11, 2012, the Department filed responses indicating that, based on the information provided, the children were not members of, or eligible for membership in, the noticed Cherokee tribes. Thus, in its interim review report dated February 22, 2013, the Department indicated that ICWA did not apply to these children.

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[4] Federal guidelines with respect to the ICWA contain similar inquiry requirements. (Bureau of Indian Affairs, Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10152-10153 (Feb. 25, 2015).) First, at the commencement of any dependency proceeding, each party must certify on the record "whether they have discovered or know of any information that suggests or indicates the child is an Indian child." (*Id.* at p. 10152.) A child welfare agency, however, must use active efforts to work with all relevant tribes to determine a child's membership status only if there is "reason to believe the child is an Indian child." (*Ibid.*) An agency or court has "reason to believe" that a child is an Indian child if, among other things, "[a]ny agency involved in child protective services or family support has discovered information suggesting that the child is an Indian child" or "[a]n employee of the agency or officer of the court involved in the proceedings has knowledge that the child may be an Indian child." (*Id.* at pp. 10152-10153.)

Clearly, under these circumstances, mother's claim that the maternal great-grandparents were Cherokee was sufficient to trigger the Department's duty to inquire further regarding the minors' possible Indian heritage. This the Department did, by contacting the maternal great-grandmother for additional information. However, the Department's further inquiry produced no information that would lead it to know that the three minors at issue in these proceedings were Indian children. Rather, the great-grandmother reported only that the maternal great-grandfather might be Cherokee, but that the family had never attempted to verify his status. This information was simply too vague, speculative, and attenuated to require formal tribal noticing under the ICWA or related California law. (Cf. *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467-1469 [potential Indian ancestry through maternal grandfather and great-grandmother was too speculative to require ICWA noticing where no specific tribe was identified, mother could not identify any relative who was a tribal member, and mother failed to identify any other relative who could reveal additional information; "family lore" is not a reason to know a child falls under the ICWA]; *In re Z.N.* (2009) 181 Cal.App.4th 282, 297-298 [possible Cherokee and Apache ancestry through maternal great-grandparents insufficient to trigger the need for ICWA noticing where mother was not a tribal member and did not believe that her mother had established any tribal affiliation; information was insufficient to suggest minors at issue were tribal members or eligible for membership as children of a member].)

Moreover, the fact that mother mentioned in passing at an October 2014 hearing that she was splitting rent while living in tribal housing with another woman does not change our conclusion. Nothing in this statement indicates what, if any, requirements mother had to comply with in order to be eligible for this housing. Further, throughout these proceedings, mother has never indicated that she is herself either a member of, or eligible for membership in, any tribe, stating instead (incorrectly as it turns out) that it was the maternal great-grandfather who was a tribal member. Given the inquiry already conducted by the Department in this case, mother's offhand statement was insufficient to cause the juvenile court or the Department to "know or have reason to know" that this

matter involved Indian children, thereby triggering the need for ICWA notice. And, because formal noticing was not here required, any deficiencies in the notices actually sent by the Department are perforce not cause for reversal of the court's February 2015 permanent plan order.[5]

B. ***Failure to Appoint Separate Counsel for the Minors***

Mother also argues that the juvenile court erred by failing to appoint separate counsel for these minors, despite the existence of an actual conflict of interest. Specifically, mother claims that a conflict of interest arose when Carson was placed in an out-of-county group home and denied visitation with his siblings as well as when the Department recommended different permanent plans for the three minors—a planned permanent living arrangement for Carson and adoption for S.T. and T.T. According to mother, separate counsel could have conveyed Carson's and S.T.'s wishes to maintain their relationship; fostered the sibling connection in order to better support later application of the sibling exception to adoption; and advocated for S.T. and T.T. to remain with their long-term relative caretaker under a plan of guardianship.

As a preliminary matter, we note that mother did not appeal from the July 2014 dispositional order removing Carson from her care via supplemental petition and placing him in an out-of-county group home. It is well settled that a juvenile court's " 'dispositional and following orders are directly appealable, with the exception of an order

[5] Given our conclusion in this matter, we need not rule on the legal sufficiency of the noticing that was done in this case. We feel compelled, however, to express our disappointment in viewing on appeal yet another ICWA notice that omits mandated information which clearly could have been collected by the social worker with relative ease. (See *In re A.G.* (2012) 204 Cal.App.4th 1390, 1401-1402; *In re I.G.* (2005) 133 Cal.App.4th 1246, 1255; *Louis S.*, *supra*, 117 Cal.App.4th at p. 634.) Here, the social worker was able to speak by telephone with the maternal great-grandmother and thus could presumably have easily obtained from her, at a minimum, the name, address, and birth information for both great-grandparents. While social workers are undeniably overworked and the collection of such information is perhaps tedious, the prompt resolution of a dependent minor's ICWA status is critical to that minor's ultimate well being and best interests. Decreasing unnecessary omissions in these forms would certainly help streamline the process of permanence for these extremely vulnerable children.

scheduling a selection and implementation hearing under section 366.26.' " (*In re T.G.* (2010) 188 Cal.App.4th 687, 692.) Moreover, a parent may generally not attack " 'the validity of a prior appealable order for which the statutory time for filing an appeal has passed.' " (*Ibid.*) Thus, mother may not now challenge the juvenile court's failure to appoint separate counsel for the minors in the context of the July 2014 hearing.

Further, while mother did seek writ review of the juvenile court's October 28, 2014, order setting a permanency planning hearing in this case, she did not raise the issue of the minors' joint representation by counsel in that proceeding. (*Jessica T.*, *supra*, A143444.) Since "[a]ll orders issued at a hearing in which a section 366.26 hearing is ordered are subject to section 366.26, subdivision (l) and must be reviewed by extraordinary writ" (*In re Tabitha W.* (2006) 143 Cal.App.4th 811, 817 (*Tabitha W.*), mother is also foreclosed from arguing that separate counsel should have been appointed at the October 2014 setting hearing. Under such circumstances, we limit our review solely to the question of whether the juvenile court erred in failing to appoint separate counsel for the minors at the February 2015 permanency planning hearing.[6]

In juvenile dependency proceedings, the juvenile court must appoint counsel for any unrepresented minor, "unless the court finds that the child . . . would not benefit from the appointment of counsel." (§ 317, subd. (c).) Moreover, appointed counsel may not "represent another party or county agency whose interests conflict with the child's . . . interests." (*Ibid.*) Generally, however, at the outset of a dependency case, the juvenile

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[6] Under the facts of this case, mother has standing to raise this potential conflict of interest because the selection of permanent plans for the minors clearly impacts her parent-child relationships. (See *In re Barbara R.* (2006) 137 Cal.App.4th 941, 952-953 [a party must have a legally cognizable interest that is injuriously affected by the court's decision in order to appeal a judgment in a juvenile dependency matter]; *In re Candida S.* (1992) 7 Cal.App.4th 1240, 1252 ["a parent has standing to assert his or her child's right to independent counsel because independent representation of the children's interests impacts upon the parent's interest in the parent-child relationship"].) Moreover, it has been held, by analogy to criminal law, that such a conflict is not waived by the failure to bring it to the attention of the juvenile court. (*In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 564, disapproved on other grounds as stated in *Tabitha W.*, *supra*, 143 Cal.App.4th at p. 817.) Thus, mother may raise this issue for the first time on appeal.

court may appoint a single attorney to represent a group of siblings unless an actual conflict of interest exists among the minors or is reasonably likely to exist due to circumstances specific to the case. (Rule 5.660(c)(1)(A) & (B); see *In re Celine R.* (2003) 31 Cal.4th 45, 50, 58 (*Celine R.*).) Once appointed, the siblings' counsel has an ongoing duty to monitor the proceeding and request separate counsel if an actual conflict develops. (Rule 5.660(c)(2); *Celine R.*, *supra*, 31 Cal.4th at pp. 50, 58.)

When representing multiple children in the dependency context, an actual conflict exists "when an attorney's duties of loyalty, confidentiality, and zealous advocacy require the attorney to take or to refrain from taking some action to serve the 'best interests' of one minor client, but the attorney is unable to do so without violating a duty owed by the attorney to another client; or when the attorney is unable independently to evaluate the best interests of each minor client because of the minors' conflicting interests." (*In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1267 (*Zamer G.*).) Under this definition, the fact that siblings have different permanent plans, does not, standing alone, necessarily demonstrate an actual conflict of interest. (Rule 5.660(c)(2)(B)(v).) Rather, one of the "primary responsibilit[ies]" of minor's counsel is "to advocate for the protection, safety, and physical and emotional well-being of the child." (§ 317, subd. (c).) Thus, "the paramount duty of counsel for minors is not zealously to advocate the *client's* objectives, but to advocate for what the *lawyer* believes to be in the client's best interests, even when the lawyer and the client disagree." (*Zamer G.*, *supra*, 153 Cal.App.4th at p. 1265; see *In re Richard H.* (1991) 234 Cal.App.3d 1351, 1368 ["the preference of the minor is not determinative of his or her best interests"].)

In the present case, mother contends that separate counsel could have supported maintaining the sibling relationships of the minors by advocating for application of the sibling exception to adoption or for a relative guardianship for S.T. and T.T. Of course, it is possible that such a position could have been in the best interests of all three minors, and thus no conflict of interest would exist. What mother is really claiming, then, is that minor's counsel had an actual conflict of interest because counsel could not effectively advocate for Carson's presumed desire to maintain his sibling relationships with S.T. and

T.T. without ignoring or discounting the interest of those two young minors in attaining a permanent home through adoption. In other words, mother asserts, counsel owed Carson a duty to advocate against the best interests of his other two clients.

Although the record discloses that S.T. and T.T. desired continued contact with Carson, it is silent as to Carson's wishes with respect to maintaining his sibling relationships. The social worker, however, testified that all three children were bonded with each other and that she hoped that the prospective adoptive parents of S.T. and T.T. would facilitate continued contact with Carson. This is at least some evidence that such continued contact was deemed to be in Carson's best interests. On the other hand, it is also possible—given Carson's experience of extreme dysfunction within his family and his significant psychological and behavioral problems stemming from that dysfunction—that minor's counsel may have concluded that separating Carson from his siblings so that he could focus on his own individual recovery was in Carson's best interests. Mother repeatedly stresses the fact that minors' counsel submitted the matter without argument at the permanency planning hearing, taking this as an indication that he could not speak without revealing the conflict among the minors. In fact, it is equally plausible that he did not speak because he believed that the Department's recommendations were in the best interests of all three children, including Carson, or because he believed that contesting the recommendations would be futile under the facts and law.

Ultimately, however, we need not determine whether an actual conflict of interest existed in this case, because—even assuming such a conflict was present, any error in failing to appoint separate counsel was harmless. "A court should set aside a judgment due to error in not appointing separate counsel for a child or relieving conflicted counsel only if it finds a reasonable probability the outcome would have been different but for the error." (*In re Celine R., supra*, 31 Cal.4th at p. 60.) Here, there is no such probability.

There is no dispute in this case that S.T. and T.T. were adoptable and that Carson, at least at that point, was not. Thus, the only way that the minors' sibling relationships could possibly have been preserved would have been for the juvenile court to find some exception to the statutory preference for adoption for S.T. and T.T. Mother suggests that

separate counsel could have argued that the younger siblings be placed back with the relative caretaker, with whom they were bonded, under a plan of legal guardianship. Pursuant to subdivision (c)(1)(A) of section 366.26, the juvenile court need not terminate parental rights with respect to an otherwise adoptable child if: "The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child."

However, even assuming S.T. and T.T. had not already been removed from their relative placement, mother's argument is, at best, speculative. At worst, it is contrary to the record, which indicates that the minors' relative placement was not a concurrent home, and thus the relative caretaker was not willing to provide permanence for S.T. and T.T. Indeed, the reason the minors were moved when they were was, according to the court, because the relative caregiver was having surgery and said she could no longer care for the children. Separate counsel could have done nothing to change these fundamental facts.

The only other possible option in this case would have been to argue that S.T. and T.T. should not be adopted—despite their adoptability—because adoption would substantially interfere with their sibling relationship with Carson. This "sibling exception" to adoption is only available when termination of parental rights would be detrimental to the child because "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).) When determining the applicability of the sibling exception, a court must first "determine whether terminating

parental rights would substantially interfere with the sibling relationship by evaluating the nature and extent of the relationship." (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 951-952.) If a court finds an existing sibling relationship to be so significant that its severance would cause detriment to the minor, the court must then go on to balance competing interests. Specifically, the court must then weigh "the benefit to the child of continuing the sibling relationship against the benefit to the child adoption would provide." (*Id.* at pp. 952-953.)

Although the sibling exception was not expressly argued by any party in this case, the court was very aware of Carson's relationship with his siblings and essentially undertook the necessary analysis on its own when it concluded: "It's very clear to me these children need a permanent home. I certainly wish that Carson could go with his brother and sister but at this time it is not possible. But I think it is extremely critical for [T.T.] and [S.T.] to have the permanency of a final home." Given the court's strong emphasis on the minors' need for permanence, we see no likelihood that argument by separate counsel as to the applicability of the sibling exception would have swayed the juvenile court to any other conclusion.

In sum, we are firmly convinced that the appointment of separate counsel would have done nothing to change the outcomes in this case. Thus, if any error exists, it is harmless and does not require reversal of the juvenile court's permanency planning orders.

III. DISPOSITION

The judgment is affirmed.

_____
REARDON, J.

We concur:

_____
RUVOLO, P. J.

_____
STREETER, J.

In re Carson T. A144482