Filed 12/5/22 In re Da.W. CA4/2

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re Da.W. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. T.W., Defendant and Appellant.	E078041 (Super.Ct.No. INJ2100056) OPINION

APPEAL from the Superior Court of Riverside County. Susanne S. Cho, Judge. Affirmed in part; reversed in part with directions.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant.

Teresa K.B. Beecham and Prabhath Shettigar, Deputy County Counsel, for Plaintiff and Respondent.

T.W. (Mother) appeals from the juvenile court's dispositional order removing her nine children from her custody. She argues that the record does not contain substantial evidence to support the removal order. In addition, she argues that the Riverside County Department of Public Social Services (DPSS) failed to comply with its duty of inquiry under the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) and related state law. We affirm the removal order, but we vacate the ICWA finding and direct the court to order DPSS to comply with its duty of inquiry.

BACKGROUND

I. *Investigation and Initial Hearing*

The family came to the attention of DPSS in January 2021. Mother and D.W. (Father) have nine children who were between three and 16 years old at the time.[1] Three of the children had missed over 30 of the 100 school days that year, and the parents had not responded to phone calls or emails from the school. A school administrator visited the home, and Mother seemed to be under the influence of alcohol or drugs. She had slow and slurred speech, and she was unable to focus or hold a proper conversation.

DPSS did not take the children into temporary custody during its investigation. When DPSS visited the home, Mother was cooperative and answered the social worker's questions. Father did not respond to questions directed at him and mostly remained silent.

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[1] Da.W. was 16, Dr.W. was 14, N.W. was 13, C.W. was 12, P.W. was nine, B.W. was eight, I.W. was six, L.W. was five, and Ta.W. was three.

Mother reported that she started using methamphetamine and marijuana as a teen, but she had not used drugs for many years; she had been clean since 2001. She had misdemeanor convictions in 1999 and 2001 for being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). Father stated that he had trouble with drugs before he met mother. He had a felony conviction in 2002 for possession of a controlled substance (*id.*, § 11377, subd. (a)), a misdemeanor conviction in 2002 for being under the influence of a controlled substance (*id.*, § 11550, subd. (a)), and a misdemeanor conviction in 2016 for possession of drug paraphernalia (*id.*, § 11364, subd. (a)). Both parents said that they were willing to drug test that day. The social worker told the parents that she would call and text them once she had made the drug testing referral.

Mother also reported that C.W. had a seizure disorder and took medication for it. According to his medical records, C.W. had complex partial epilepsy. He had last seen his specialist in November 2019. His doctor had ordered some follow-up procedures and a follow-up appointment in six months, but there was no record of those things occurring. Da.W. had thyroid issues and needed to see a doctor as soon as possible.

The family home was cluttered and in disarray. The social worker also saw electrical cables in the kitchen leading into each of the bedrooms. Mother explained that only the electrical outlets in the kitchen worked. There were also issues with the plumbing in the bathroom. Mother had placed clothing around the toilet to prevent any water that overflowed from reaching the hallway. She said that she had contacted the

property owner about the various problems but had not received a response. The social worker advised the parents that the nonfunctioning plumbing and electrical cables were a safety hazard and that the clothing around the toilet could become a health risk if it got wet and moldy. Mother said that she and Father were looking for a new home. In the meantime, she agreed to clean up the clutter in the home.

The social worker spoke privately with two of the nine children; the others were not available to talk for various reasons. Da.W. had been staying with a friend for the last three weeks and had returned home two days ago. She said that she constantly checked in with Mother. Da.W. did not sleep well at home but would not expand on why. She denied that either parent used drugs and denied using drugs herself. Mother confirmed that Da.W. stayed elsewhere for weeks, but she said that the child was with family members. She declined to let the social worker speak with the family members. P.W. explained that she had been missing school because she was tired.

After the home visit, the social worker called and sent text messages to the parents to give them the drug-testing information. She also returned to the home to ensure that they received the information. There was no response at the home, and the parents did not respond by phone.

The following day, the social worker made another unannounced home visit. Mother said that she and Father had not drug tested because they only received the social worker's messages that day. She agreed to complete the drug test by the following morning.

The social worker interviewed two more of the children, C.W. and B.W. C.W. had difficulty getting online for school because he did not sleep well and was tired. Both children denied that the parents used drugs or alcohol.

Two days after the second home visit, the social worker contacted the lab for the parents' drug test results. Both parents appeared for the test but declined to take it. The social worker went to the home and called Mother, but there was no response. The social worker then went to the nearby home of maternal grandmother, where several of the children were visiting. She said that Mother had been hospitalized that day but was on her way home. Maternal grandmother believed that the children were safe in Mother's care, and she was not concerned about Mother using drugs.

Five days later, the social worker again visited the family's home and called Mother, but again there was no response. Six days after that, the social worker went to the home and found the parents there. Mother said that she had declined to complete the drug test because she was struggling with hair loss, and she did not want to pull hair out for the follicle test. She said that Father declined to test because she declined. Father refused to explain why he did not drug test, and he would not engage in any conversation with the social worker.

The social worker proposed a family meeting with DPSS. Mother said that she would have to discuss the issue with Father before committing to a meeting, and the social worker told Mother that she would contact Mother the next day. The social worker attempted to reach Mother two days later and did not receive a response. A little over a

week later, the social worker made another unannounced visit to the family's home and left a note requesting a return call, but again there was no response.

DPSS filed a petition under Welfare and Institutions Code section 300, subdivision (b)(1), alleging that the children were at substantial risk of serious physical harm or illness. (Unlabeled statutory citations are to the Welfare and Institutions Code.) More specifically, the petition alleged that the parents had failed to maintain a clean and safe living environment, failed to ensure that the children attended school or logged into the virtual classroom, failed to follow through with medical directives intended to treat C.W.'s seizure disorder, and failed to supervise Da.W. properly.

Mother and Father both filed Parental Notification of Indian Status forms (ICWA-020). Father's form indicated that he did not have any Indian ancestry, and he told DPSS that he did not have any such ancestry.[2] Mother also told DPSS that she did not have any Indian ancestry, but her ICWA-020 form indicated that she might have such ancestry.

At the initial hearing in March 2021, the juvenile court concluded that DPSS had made a prima facie showing that section 300 applied to the children, but available services prevented the need for detention. The court ordered that the children remain in the care and custody of the parents and that DPSS offer the parents alcohol and drug testing, parenting education, substance abuse treatment, and counseling. The court further ordered the parties to participate in a child and family team meeting to address

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[2] "[B]ecause ICWA uses the term 'Indian,' we do the same for consistency, even though we recognize that other terms, such as 'Native American' or 'indigenous,' are preferred by many." (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 739, fn. 1.)

what other services might be necessary. Lastly, the court ordered that the parents allow DPSS access to the children and the home so that the agency could check on the children's welfare. Mother's counsel stated that Mother was willing to do a hair follicle or urine drug test, and Father's counsel said that he was willing to do a urine test.

As for ICWA, the court asked about Mother's response on the ICWA-020 form. Mother's counsel replied that Mother had Indian ancestry through her father, but Mother did not know which tribe. The court found that ICWA did not apply to the children because they were not being removed from the parents' custody. The court nevertheless ordered DPSS to follow up with Mother regarding her possible Indian ancestry.

II. *Amended Petition and Detention*

DPSS gave the parents referrals for mental health evaluations, drug rehabilitation services, drug testing, housing resources, and medical services. The social worker attempted to visit the family home on several days in early April 2021. On the first day, no one answered the door, Mother did not answer the social worker's phone call, and Mother's voicemail box was full. The social worker left a note. The next day, the social worker spoke with Father and Da.W. at the home and with Mother by phone. Father refused to allow the social worker inside the home. He reported that the children were fine and that there were no hazardous conditions in the house. He felt that DPSS was harassing the family, did not want the worker to interview him, and said that neither a hair follicle nor a urine drug test was necessary. He nevertheless agreed to take a urine test the following day, but he failed to appear for the test.

When the social worker reached Mother by phone, she said that she was not willing to drug test because she had read online that the hair follicle tests required her to shave a portion of her head, and she already had thin hair. The social worker explained "the actual hair follicle testing process," but Mother still refused. Mother denied that she was currently using drugs and stated that she had last used methamphetamine "'at least a year ago.'" She declined to answer any more questions about her history of drug use. When the social worker reminded her that the court was expecting her to cooperate with DPSS, Mother replied, "'My attorney already told me you guys have a weak case, so I don't have to do anything. We are fine. And I'm not going to speak anymore without my attorney present.'" Mother agreed to take a urine drug test the next day, but like Father, Mother failed to appear for the test.

When the social worker asked about C.W.'s seizure disorder, Mother said that the child was on a waiting list to see his doctor but that he was "'fine'" and "'good,'" and he did not need to see the doctor again. As for the children's school attendance, Mother claimed that it was a "lie" that the children did not attend, despite the school records showing their excessive absences. She said that the school administrator who had reported the absences was harassing the family. She also said that the social worker who conducted the initial investigation lied about the nonfunctioning plumbing in the family home. But when the current social worker asked to inspect the condition of the home, Mother refused. She claimed that she was not at home, even though the worker could hear Da.W.'s voice in the background, and the worker had just seen the child at the home.

The social worker pointed out that Father was home but had denied her access, and Mother had no response. They agreed on a time five days later for the social worker to inspect the home and interview the children.

At the appointed time for the home visit, no one answered the door. The social worker called Mother, but her voicemail box was still full. The worker sent Mother a text message and did not receive a response.

The child and family team meeting took place approximately one week later. Father did not participate. Mother was guarded during the meeting and refused to drug test.

At the jurisdiction hearing in April 2021, the parents requested a contested hearing, and the court continued the matter. Roughly one week later, the social worker visited the home, but there was no answer at the front door. The worker could see and hear some of the children swimming in an above-ground pool in the backyard. There was no adult present. Maternal uncle arrived at the home but refused to provide his name and refused to allow the social worker access to the home and the children.

The social worker then called and sent text messages to the parents, who did not reply. The worker requested a welfare check from law enforcement. The responding officers knew maternal uncle; he had an outstanding warrant for possession of a controlled substance. (A later check of maternal uncle's criminal history revealed numerous convictions for drug offenses between 2012 and 2017 and an open 2020 case charging two more drug offenses.) The officers arrested and searched maternal uncle and

found that he had methamphetamine and drug paraphernalia on him. Father arrived after that and called Mother. He said that he had been at the grocery store. The officers also arrested Father because he had outstanding warrants. The social worker was left alone with the children.

When Mother arrived approximately five minutes later, she appeared to be under the influence of drugs; she had a "confused look" and tired eyes, she could not answer questions coherently, and her replies were delayed. She did not explain where she had been and said that she had left the younger children in Da.W.'s care. She also admitted that she had last used methamphetamine two days ago. She said that she stored the drug in her bedroom closet and smoked there "'everyday, all the time.'" The dependency case was a stressor and triggered her methamphetamine use. She needed time to clean up the home, and she said that methamphetamine "slow[ed] time down for her." She had been hiding her drug use from Father and maternal grandmother. Mother thought that she did not need treatment. Rather, she needed a new home and someone to clean for her regularly. The social worker discussed drug testing and treatment options with Mother, and Mother agreed to test the next day, but again she did not.

Maternal grandmother continued to deny any concerns about the parents' care of the children and believed Mother could safely care for them. Dr.W. reported that Mother slept a lot and that he had to help care for his younger siblings.

DPSS filed an amended petition adding allegations that (1) Mother had a history of substance abuse and admitted currently abusing methamphetamine, (2) Father had a

warrant for possession of a controlled substance, had a history of substance abuse, and refused to submit to drug testing, (3) the parents left the children without adult supervision while the children were using or had access to the swimming pool, and (4) the children were at the home with maternal uncle when he possessed methamphetamine and drug paraphernalia. DPSS took the children into temporary custody and placed them in foster homes.

The court held a detention hearing on the amended petition in May 2021 and detained the children from the parents. It ordered DPSS to provide the parents with referrals for drug testing and other services. Further, the court found that ICWA did not apply to the children. DPSS had asked Mother about her Indian ancestry again, and she reported that her paternal great-grandfather had Indian heritage, but she could not recall the name of the tribe.

III. *Events Before the Jurisdiction Hearing*

The court continued the jurisdiction hearing twice, so it did not occur for several months. In preparation for that hearing, DPSS reported that Mother drug tested negative on one occasion in late May 2021. It was a urine test, and Mother still refused to take a hair follicle test because of her concerns about hair loss. She completed three more urine tests in August and September 2021, testing negative each time. She was assessed at a substance abuse treatment center, but the program rejected her because she denied using drugs for the last several years. She also completed three parenting classes and had started counseling.

Mother did not permit DPSS to assess the home for any improvements. She said that she did not see the point, because the children were not in the home and the parents were trying to relocate. The parents had been staying at motels while they continued to have electricity and plumbing issues. Mother refused to review the allegations of the amended petition with the social worker and called the allegations "lies," and she accused the school administrator of using drugs and harboring a personal vendetta against her.

Father refused to drug test in any form and did not explain why he would not test. He engaged minimally with the social worker and allowed Mother to speak for both of them. He also sent long, hostile text messages to the social worker, calling her a liar and accusing her of taking his children "'because misery loves compa[n]y.'" He followed those messages with a phone call in which he made similar statements, raised his voice, called the social worker a "'bitch,'" and used profanity.

A few of the children had mental health or medical issues that were revealed in their interviews or medical assessments after being placed in foster care. In addition, all of them needed dental care. In particular, P.W. and T.W. had seven and eight cavities, respectively, and Da.W. had begun to remove her own braces because the parents had not followed up with her orthodontist.

Da.W. had an upcoming appointment to evaluate her thyroid condition. As for Da.W.'s mental health, she disclosed that she was having anxiety attacks and had previously been diagnosed with anxiety. She had seen a therapist once but did not continue after Mother delegated her appointments to an adult sibling. Da.W. cut herself

on her wrists when she was younger but said that she no longer engaged in self-harm. The social worker asked about her goals. Da.W. replied that she did not have any and believed that "there was 'no point' since 'we are all going to die and have no control over anything.'" She was "hopeless" and felt that she had no future. Da.W. insisted that Mother was doing all that she could and had done nothing wrong, and she blamed the school administrator for DPSS's intervention.

Da.W. had been in her foster home for approximately three months when her caregiver discovered that Mother had given the child a cell phone. Da.W. had been using the phone to communicate with Mother without her caregiver's or DPSS's knowledge. The child had become increasingly argumentative with the caregiver and hostile toward her siblings, and she had resumed cutting herself.

C.W. was hospitalized to assess his medically fragile status when DPSS took him into temporary custody. The medical providers determined that his seizure medication was not suitable for his current needs and was making him irritable and aggressive, so they changed his medication.

The parents visited the children in the months between the detention and jurisdiction hearings. At their first visit, Mother started discussing the case with the children, and DPSS staff had to redirect her. Mother told the children that she was hiring a private attorney and that the allegations of her drug use were false. At the parents' second visit, DPSS staff suspected that Mother used drugs during the visit. She went to

the restroom and returned drowsy, and the visit ended early because of the parents' inability to remain engaged.

A third visit proceeded similarly. Mother went to the restroom and returned lethargic, and she appeared to be hiding something in her shirt. DPSS staff overheard one child, B.W., tell Mother that his ear was hurting. Afterward, B.W. told his caregiver that he and I.W. had put small balls in their ears during the visit. B.W. said that Mother removed the ball from I.W.'s ears but not from B.W.'s ears. The caregiver took B.W. to urgent care and the emergency room, where medical staff removed a small foam ball from B.W.'s ear.

Similar concerns with the parents' behavior arose at subsequent visits. Mother either was fidgety and spoke rapidly or was lethargic and dozed off. She continued to change her demeanor after "suspicious" visits to the restroom. Sometimes the parents would use the restroom at the same time, leaving DPSS staff to supervise the children. The parents consistently ended visits early. At one visit in particular, Father appeared to pass Mother a message by giving her his cell phone. Mother looked at the phone and then said to the caregivers (who were supervising that visit), "He said I'm moving too fast. Am I moving too fast?" The parents left that visit early without telling the caregivers. Mother also continued to try to discuss the case with the children. She told them that she was forced to confess drug use to law enforcement, she was "'doing all that she can,'" and there was no issue with the home because they would be getting a new

place soon. She also blamed the school administrator, DPSS, and law enforcement for the court's intervention.

IV. *Jurisdiction Hearing*

Mother testified at the contested jurisdiction hearing in late September 2021. According to her, the toilet had been broken, but Father fixed it. The landlord had not yet fixed the electrical outlets but was supposed to do so by the end of the week. He also needed to replace the kitchen sink. The clutter in the house was the children's clothing. Mother had recently arranged for a storage unit to store their extra things.

The parents allowed Da.W. to stay with a friend nearby, but they had contact with the child whenever she was not at home, and they always knew where she was. Mother planned on giving Da.W. a cell phone so that they could keep in touch at all times. She believed that Da.W. needed counseling, and Mother wanted her to be assessed for bipolar disorder. Mother thought that Da.W. was cutting herself because she was angry about her cell phone being taken away and "about the situation." Mother felt that having a phone would help Da.W. but would not fix all of her problems.

C.W. always took his seizure medication, although he missed "probably a couple [of] appointments." Mother rescheduled an appointment in January 2020, and the child was put on a waiting list but then could not get an appointment because of the COVID-19 pandemic. He was on the waiting list for an appointment throughout 2020. She never told the social worker that he was fine and that he did not need to see the doctor. Mother

had taken a pediatric CPR class and a course on medically fragile children to address his needs.

Mother testified that she was under duress when she made the statement about currently using drugs. On the day of the incident, the children were playing in a mud puddle in the backyard, and she left them under Da.W.'s supervision while she went to the store to buy drinks. The family had a pool, but it was full of debris and did not have water in it. Mother came home to find two social workers and an officer there. The officer grabbed her shoulders, shook her, bent her wrist backward, and said she "needed to tell them." She then said, "[O]kay, I do them all day, every day." She never admitted to using methamphetamine specifically. And she did not say that methamphetamine slows time down for her or that she needed a new home and someone to clean for her instead of treatment. The social worker must have invented those statements.

Mother also testified that she did not know maternal uncle was going to be in the home that day, and she did not know that he had methamphetamine or drug paraphernalia on him. He did not have a key to the home and only visited occasionally, and she never left him alone with the children.

Mother denied having a current substance abuse problem. She had a problem 20 years ago, and she completed three in-patient treatment programs. She had no issues with substance abuse since then. She did not want to submit to a hair follicle test because she suffered from hair loss, and she became depressed when she lost her hair. In addition to the drug tests through DPSS, Mother had voluntarily arranged four tests, which she took

in May, June, and July 2021. She submitted exhibits showing that all of those tests were negative.

Mother had finished two parenting courses and was in the middle of a third course. She had also done five counseling sessions. The sessions had helped her, and she wanted to continue seeing her therapist.

After considering the evidence and the parties' arguments, the court found most of the allegations in the amended petition to be true. It expressly found that Mother was not credible when she claimed that the officer made her confess to current drug use. The court found only two allegations not true—specifically, (1) that Father had a warrant for possession of a controlled substance, had a history of substance abuse, and refused to submit to drug testing, and (2) that the parents had left the children without adult supervision while the children were using or had access to the swimming pool.

The court took jurisdiction over the children on the basis of the sustained allegations. It found that DPSS had conducted a sufficient inquiry into the children's potential Indian ancestry, and it found that ICWA did not apply to the children.

The court initially intended to address disposition, but at Mother's request, the court continued the disposition hearing to the following month. In the meantime, the court ordered an assessment of the parents' home and a psychological evaluation of Mother. It also authorized DPSS to continue offering the parents random drug testing. The court questioned whether Mother's concern about hair loss was a legitimate reason for refusing a hair follicle test. The court thought that the parents were "more worried

that they cannot dilute the test results of a hair follicle, unlike a urine test." The court also observed that if Mother was not testing randomly, "it doesn't have much impact," explaining further: "[Y]ou're scheduling it so that you take it on the day that you're clean. . . . [T]hat's great, what does that mean? That doesn't help me as much."

V. *Disposition*

Da.W.'s caregiver requested a change of placement shortly after the jurisdiction hearing. The child's behavior had become problematic in a number of ways. Among other things, she was smoking marijuana in the bathroom and brought 18 marijuana pipes into the caregiver's home. Mother gave her the pipes. Da.W. claimed that she was using the pipes to build a sculpture, and she denied smoking marijuana.

Mother completed her psychological evaluation shortly before the disposition hearing, but the psychologist did not have time to prepare and submit his report before the hearing. Father did not appear for a random drug test. The parents' visits before the disposition hearing went well, except that Mother promised three of the children that they would be returning to her care at the next hearing. DPSS assessed the parents' home, and it met minimal standards. The electricity worked in all of the rooms.

At the disposition hearing in October 2021, the court found clear and convincing evidence of the circumstances described in section 361, subdivision (c)(1). It removed the children from the parents' custody and ordered reunification services for both parents.

DISCUSSION

I. *Removal Order*

Mother argues that the record does not contain substantial evidence to support the juvenile court's dispositional order removing the children from her custody. DPSS argues that Mother's challenge is moot because the children were returned to her custody while this appeal was pending. We agree that Mother's challenge is moot. Even if it were not moot, we would conclude that her challenge fails on the merits.

In support of its mootness argument, DPSS filed an unopposed motion to consider postjudgment evidence. The agency requested that we augment the record to include the minute order from the six-month review hearing, which occurred in March 2022. At that hearing, the juvenile court found that Mother had made substantial progress in her case plan, continued her reunification services for another six months, and ordered unsupervised visits.[3] The court also authorized DPSS to give Mother overnight and weekend visits and eventually place the children in Mother's home with family maintenance services.

On our own initiative, we obtained from the juvenile court the minute orders from the 12-month review hearing. (One minute order concerns C.W., and the second minute order concerns the other eight children.) That hearing occurred on June 29, 2022, and the court ordered all nine children placed in Mother's care and custody with family maintenance services.

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[3] The court noted in its minute order that Father had died.

"An appeal may become moot where subsequent events, including orders by the juvenile court, render it impossible for the reviewing court to grant effective relief." (*In re E.T.* (2013) 217 Cal.App.4th 426, 436.) "While appellate courts rarely consider postjudgment evidence or evidence developed after the ruling challenged on appeal, such evidence is admissible for the limited purpose of determining whether the subsequent development has rendered an appeal partially or entirely moot." (*In re M.F.* (2022) 74 Cal.App.5th 86, 110 [taking judicial notice of minute orders from hearings that occurred after the challenged order]; see also *In re Salvador M.* (2005) 133 Cal.App.4th 1415, 1422 [augmenting the record to show the issue on appeal was rendered moot by subsequent events in the juvenile court].)

We grant DPSS's request to augment the record to include the minute order from the six-month review hearing. (Cal. Rules of Court, rules 8.155(a)(1)(A), 8.410(b)(1).) In addition, on our own motion, we augment the record to include the minute orders from the 12-month review hearing.[4] (Cal. Rules of Court, rules 8.155(a)(1)(A), 8.410(b)(1).)

The minute order from the six-month review hearing does not show that Mother's challenge to the removal order is moot. The court merely authorized DPSS to place the children in Mother's custody—it did not order the children placed in her custody.

However, the minute orders from the 12-month review hearing demonstrate that her challenge is moot. The court ordered the children returned to her custody with family

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[4] When we sent the parties our tentative opinion in this matter, we also provided them with the minute orders from the 12-month review hearing and gave them the opportunity to file any supplemental briefing regarding the court's augmentation on its own motion.

maintenance services. On appeal, Mother does not challenge the court's jurisdictional order and argues only that there was insufficient evidence to justify removal of the children. But Mother has already obtained the relief she seeks in this appeal—return of the children—and a reversal of the removal order would not grant her any effective relief at this point.

Even if Mother's challenge were not moot, we would affirm the removal order. To order children removed from their parents' physical custody, the juvenile court must find by clear and convincing evidence that (1) there "would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being" of the children in the parents' home, and (2) "there are no reasonable means by which the [children's] physical health can be protected without" removal. (§ 361, subd. (c)(1).) We review those findings for substantial evidence. (*In re R.T.* (2017) 3 Cal.5th 622, 633.) "'[W]e draw all reasonable inferences from the evidence to support the [court's] findings and orders . . . ; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." (*Ibid.*)

In this case, the record contains ample evidence of a substantial danger to the children's physical or emotional well-being in Mother's home. The evidence shows that the parents neglected the children's health and safety in a number of ways when the children were in their care. The plumbing and electrical problems in the family home created a hazardous condition. Dr.W. reported that Mother slept a lot, and he had to help care for the younger children. The parents also relied on Da.W. to supervise the younger

children, including on the day DPSS took the children into temporary custody. The parents claimed to have taken separate trips to the store when the social worker found the children alone that day. But Mother appeared to be under the influence when she arrived home, and she admitted recently using methamphetamine.

In addition, C.W. was overdue for appointments to address his seizure disorder. Mother said that he was on a waiting list to see the doctor but also that he was "'fine'" and "'good,'" and he did not need to see the doctor again. C.W. was not fine—after he was taken into temporary custody, the hospital determined that his medication was making him irritable and aggressive. Da.W. needed care for a thyroid condition. She also had anxiety and had engaged in self-harm (cutting) in the past, and although she had attended one therapy session, the parents failed to ensure that she received further treatment. All of the children were in need of dental care, including two with numerous cavities and Da.W., who had started removing her own braces. Mother appeared to be under the influence during some visits, and at one visit, B.W. and I.W. put small balls into their ears. That was discovered when B.W. told his caregiver about it afterward. Mother apparently got the ball out of I.W.'s ear at the visit, but the caregiver had to take B.W. to the hospital to have the ball removed.

The court could reasonably infer from all of the foregoing evidence that Mother's admitted substance abuse caused her to neglect the children, posing a substantial danger to the children's physical and emotional well-being. Mother's contrary arguments lack merit. She acknowledges the court's unchallenged jurisdictional findings about her

current substance abuse, but she argues that drug use alone is not sufficient to support removal. She relies on cases holding that a parent's drug use "'without more'" did not support jurisdiction. (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003, italics omitted.) But those cases are materially distinguishable—there was no evidence that the children in those cases were suffering from neglect or were otherwise harmed. (*Id.*, at p. 1004; *In re J.A.* (2020) 47 Cal.App.5th 1036, 1050 [no evidence that parent's use of medical marijuana harmed her children]; *In re L.C.* (2019) 38 Cal.App.5th 646, 653 [no evidence that guardian, who had used methamphetamine, ignored his parental responsibilities"].)

Mother also contends that by the time of the disposition hearing, there was no immediate risk of harm to the children, because C.W.'s medical issues had been addressed, Mother had completed counseling and three parenting courses, and she had tested negative on three random drug tests in September and August 2021. However, the provision of some services to the family did not mean that the children were no longer at risk of harm. It is unclear how much Mother benefited from the parenting courses and counseling, particularly given her behavior with Da.W. She had secretly given the child numerous marijuana pipes and a cell phone. Da.W. seemed to have adopted Mother's views that Mother had done nothing wrong and that others were responsible for the dependency case, views that Mother may have been communicating during their unsupervised cell phone contact.

Moreover, the three negative drug tests did not mean that the children were no longer at risk of harm. The court did not find Mother credible when she claimed that the

law enforcement officer forced her to confess to drug use. She had a history of substance abuse, and there was plenty of evidence showing that she was currently using. Early in the case, she said that she had not used drugs since 2001, but she later said that she had last used methamphetamine at least a year ago. She repeatedly said that she would drug test and then either failed to appear or appeared but refused to test. She refused to take a hair follicle test. On the day that she admitted using methamphetamine, her behavior suggested that she was under the influence. She had a confused look and tired eyes, and she failed to answer questions coherently.

Mother's odd behavior at visits with the children also suggested that she was using. She was lethargic and drowsy or fidgety and speaking rapidly. Changes in her behavior often occurred after she went to the restroom. On one occasion, she appeared to be hiding something in her shirt after returning from the restroom. Further, the four drug tests that she arranged on her own were of limited probative value, given that she could plan in advance for those. Taking the evidence as a whole, the court could reasonably conclude that Mother was currently using, and her three negative tests did not establish a lasting period of sobriety such that the children would be safe in her home.

In addition to the evidence of substantial danger in Mother's home, the record also contains substantial evidence that there were no reasonable means to protect the children short of removal. Mother argues that there were reasonable alternatives available, namely, unannounced visits by DPSS and in-home services. But the evidence supports a reasonable inference that those means would not have sufficiently protected the children.

First, the social worker attempted unannounced visits before DPSS took the children into temporary custody, and the parents evaded the visits numerous times. They did not answer the door or answer the social worker's phone calls or text messages. In one instance, Father was home when the social worker appeared. Yet he refused to let her into the home. Shortly after that, the worker spoke to Mother by phone. Mother claimed that she was not at home and could not let the worker in, but the worker could hear Da.W. in the background—and the worker had just seen Da.W. at the home with Father. Moreover, even when the social worker and Mother scheduled a time for the worker to visit the home, Mother failed to answer the door or respond to the worker's call or text message. In short, the evidence shows that unannounced visits would not effectively protect the children.

Second, leaving the children in the parents' custody with in-home services would have required the parents to cooperate fully with DPSS and meaningfully engage in services. However, Father in particular was not cooperative or engaged. He mostly did not respond to DPSS's attempts to interview him. He did not participate in the child and family team meeting after the initial hearing. He was openly hostile with the social worker, yelled at her, hurled profanities at her, and accused her of lying. And he never meaningfully engaged in services. Mother was more cooperative and engaged, but not consistently so. During one interview after the initial hearing, Mother refused to answer certain questions, and she told the social worker that her attorney had advised her DPSS had a "'weak case,'" so Mother did not "'have to do anything.'" Mother participated in

the child and family team meeting but was guarded. After the court detained the children, Mother did not permit DPSS to assess the home for improvements and refused to review the allegations of the amended petition with the social worker. And her lack of cooperation with DPSS was accompanied by a lack of insight into the problems that led to the agency's and the court's intervention. On more than one occasion, she blamed the school administrator for the dependency case, and she accused the administrator of lying or harassing her. She repeated those things to the children at visits and told them that the allegations of her drug use were false and that she had been forced to confess. On the whole, the parents' recalcitrant behavior gave rise to a reasonable inference that in-home supervision by DPSS was not a reasonable means of protecting the children.

In sum, Mother's challenge to the removal order is moot, given that the court has returned the children to her custody. Even if her challenge were not moot, we would hold that the court's removal order is supported by substantial evidence. The record amply supports the conclusion that there was a substantial danger to the children's physical or emotional well-being in Mother's home and that there were no reasonable means to protect the children short of removal.

II. *ICWA Initial Inquiry*

Mother also argues that DPSS failed to comply with its duty of initial inquiry under ICWA-related state law, so we must reverse and remand for the agency to fulfill its duty. We agree that DPSS erred, but the error does not require reversal of the dispositional order.

"In a juvenile dependency proceeding, an Indian child is any unmarried person who is under age 18 and is either (a) a member of a federally recognized Indian tribe or (b) is eligible for membership in a federally recognized Indian tribe and is the biological child of a member of a federally recognized Indian tribe. (25 U.S.C. § 1903(4) & (8); see § 224.1, subd. (a).)

"To determine whether ICWA applies to a dependency proceeding, the juvenile court and [DPSS] have 'an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . may be or has been filed, is or may be an Indian child.' (§ 224.2, subd. (a).) This duty to inquire consists of two phases—the duty of initial inquiry and the duty of further inquiry." (*In re Dominick D.* (2022) 82 Cal.App.5th 560, 565-566 (*Dominick D.*).)

"ICWA also imposes a duty to provide notice of the proceedings to the pertinent Indian tribes. (25 U.S.C. § 1912(a); § 224.3, subd. (a).) Notice enables the tribes 'to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in, or exercise jurisdiction over, the matter.'" (*In re Ricky R.* (2022) 82 Cal.App.5th 671, 678 (*Ricky R.*).)

"The duty of initial inquiry begins at the referral stage when [DPSS] must ask 'the party reporting child abuse or neglect whether the party has any information that the child may be an Indian child.' (§ 224.2, subd. (a).) Once a child is taken into temporary custody, the duty of initial inquiry includes asking the child, parents, legal guardian, extended family members, and others who have an interest in the child whether the child

is or may be an Indian child. (§ 224.2, subd. (b); § 306, subd. (b).) Extended family members include adults who are the child's stepparents, grandparents, aunts, uncles, brothers, sisters, nieces, nephews, or first or second cousins. (25 U.S.C. § 1903(2); § 224.1, subd. (c).)" (*Dominick D.*, *supra*, 82 Cal.App.5th at p. 566.)

"If the initial inquiry gives the juvenile court or [DPSS] 'reason to believe that an Indian child is involved in a proceeding,' then 'further inquiry regarding the possible Indian status of the child' must be made. (§ 224.2, subd. (e).)" (*Dominick D.*, *supra*, 82 Cal.App.5th at p. 566.) "The duty to provide notice arises only if DPSS or the court 'knows or has reason to know that an Indian child is involved.' (25 U.S.C. § 1912(a); see § 224.3, subd. (a); [citation].)" (*Ricky R.*, *supra*, 82 Cal.App.5th at p. 679.)

As a threshold matter, DPSS argues that the provisions of ICWA do not apply when a child is placed in the parents' home with family maintenance services. The agency contends that because the court has ordered the children placed in Mother's home, her ICWA challenge is moot. The argument lacks merit, because the cases on which the agency relies are distinguishable. Those cases involved the duty to provide notice under ICWA or provisions that apply when a confirmed Indian child is involved. (*In re K.L.* (2018) 27 Cal.App.5th 332, 335-336; *In re J.B.* (2009) 178 Cal.App.4th 751, 755-758; *In re Alexis H.* (2005) 132 Cal.App.4th 11, 14-16.) The courts' holdings were based on ICWA's definition of a child custody proceeding, which includes proceedings involving foster care placement or termination of parental rights. (25 U.S.C. §§ 1903(1)(i)(ii) [defining child custody proceeding], 1912(a) [requiring notice to the pertinent tribes

when the agency is seeking foster care placement or termination of parental rights], 1912(e) [setting forth the heightened standard of proof for placing an Indian child in foster care]; *In re K.L.*, *supra*, at p. 336; *In re J.B.*, *supra*, at p. 757; *In re Alexis H.*, *supra*, at pp. 14-15.) The courts reasoned that because the children were placed with a parent, and the agency was not seeking foster care placement or termination of parental rights, the ICWA provisions at issue did not apply to the proceedings. (*In re K.L.*, at p. 336; *In re J.B.*, at p. 757; *In re Alexis H.*, at pp. 14-15.)

Here, however, Mother argues that DPSS failed to fulfill its duty of initial inquiry under California law. As discussed, the state law duty of inquiry applies in every dependency proceeding from the moment of referral. (§ 224.2, subd. (a); *In re Austin J.* (2020) 47 Cal.App.5th 870, 883-884.) The duty arises whenever DPSS files a dependency petition, regardless of whether the agency is seeking foster care placement or termination of parental rights, and the duty is "affirmative and continuing." (§ 224.2, subd. (a).) Thus, the duty of inquiry continues in this case, even if the children are placed with Mother. We have no evidence that the court has dismissed the case, so the possibility still exists that DPSS could seek foster care placement or termination of parental rights by filing a subsequent or supplemental petition. (§§ 342, 387.)

As for the merits of Mother's challenge, we agree that DPSS failed to discharge its duty of initial inquiry. Maternal grandmother qualified as an extended family member under ICWA and California law, DPSS spoke with her on several occasions, and the agency did not ask her about the children's Indian ancestry. Accordingly, the court's

findings that DPSS had conducted a sufficient ICWA inquiry and that ICWA does not apply were not supported by substantial evidence. (*Dominick D.*, *supra*, 82 Cal.App.5th at p. 567 [ICWA findings reviewed for substantial evidence].)

DPSS does not deny that it erred or that the ICWA findings were unsupported. Rather, it argues that the error was harmless. We need not address that argument, "because ICWA inquiry and notice errors do not warrant reversal of the juvenile court's jurisdictional or dispositional findings and orders other than the ICWA finding itself." (*Dominick D.*, *supra*, 82 Cal.App.5th at p. 567.) We therefore vacate the finding that ICWA does not apply, but we otherwise affirm and direct the juvenile court to order DPSS to comply with its duty of inquiry under ICWA and related California law.

DISPOSITION

The finding that ICWA does not apply is vacated. The juvenile court is directed to order DPSS to comply with its duty of inquiry and (if applicable) duty to provide notice under ICWA and related California law. In all other respects, the dispositional findings and orders are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MENETREZ
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.