Filed 8/29/23 In re A.P. CA4/2
See concurrence/dissent

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.P. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. K.P., Defendant and Appellant.	E080185 (Super.Ct.No. RIJ2000245) OPINION

APPEAL from the Superior Court of Riverside County. Dorothy McLaughlin, Judge. Affirmed in part; conditionally reversed in part with directions.

Marisa L. D. Conroy, under appointment by the Court of Appeal, for Defendant and Appellant.

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

K.P. (mother) appeals the juvenile court's denial of her Welfare and Institutions Code section 388 petition requesting additional services with her two teenage children. She also challenges the court's finding that the Indian Child Welfare Act (ICWA)[1] does not apply, arguing the finding lacks evidentiary support because the department failed to ask readily available family members about the children's possible Native American heritage. (Welf. & Inst. Code, § 224.2, subd. (b).)[2] We conclude the court properly denied mother's section 388 petition. However, because we agree with mother that the department failed to conduct an adequate ICWA investigation, we conditionally reverse the order terminating parental rights and remand for the juvenile court to direct the department to complete its investigation.

I

FACTS

A. *Jurisdiction and Disposition*

The subjects of this appeal are mother's two teenage children, Anthony P. (born in 2007) and Jasmine P. (born in 2009). On April 25, 2020, the Riverside County Department of Public Social Services (the department) began investigating the family

[1] 25 U.S.C. § 1901 et seq.

[2] Unlabeled statutory citations refer to the Welfare and Institutions Code.

after receiving a referral alleging a domestic violence incident between mother and father involving the use of a knife.

A social worker responded to the home with law enforcement. Father reported that mother had grabbed a knife and asked him to kill her. He said she had been using methamphetamine for the last five years and was in poor mental health. During the incident, the maternal grandfather had intervened and taken Anthony and Jasmine out of the home.

The social worker interviewed the children and the maternal grandfather at the maternal grandparents' home. Anthony and Jasmine both said their parents fought frequently and would often take their frustrations out on them. The maternal grandfather said both parents used drugs, though he didn't know which kind or how often. He denied having any Native American ancestry.

The social worker eventually located mother in a local motel. She confirmed the incident with the knife and admitted she'd been harboring thoughts of harming herself. She denied using drugs, however. Based on her mental health admissions, the police placed mother on an involuntary psychiatric hold.

On April 26, 2020, the social worker obtained a protective custody warrant for Anthony and Jasmine and placed them in the home of the maternal aunt. On April 28, 2020, the department filed a dependency petition on behalf of the children, alleging they fell under Welfare and Institutions Code section 300, subdivision (b) (failure to protect).

At the initial petition hearing the following day, the court detained Anthony and Jasmine from the parents and found that ICWA did not apply.

In a second interview several days later, Anthony told the social worker his parents had been fighting regularly for the past three years and would smash plates and threaten each other. He was frightened by their behavior while fighting because they would also get angry with him and his sister. During her interview, mother admitted she had used methamphetamine a few months earlier but denied using regularly. She agreed to drug test and the result was negative. Both parents denied having any Native American heritage.

At the jurisdiction and disposition hearing on June 25, 2020, the juvenile court sustained allegations that the parents abuse methamphetamine and engage in domestic violence in the presence of the children and that mother has unresolved mental health issues. The court found that Anthony and Jasmine were dependents within the meaning of section 300, subdivision (b), removed them from the parents' custody, and ordered family reunification services for both parents. Mother's case plan required her to complete domestic violence and substance abuse treatment programs, drug test, participate in counseling, and complete parenting classes.

B. *The Reunification Period*

During the six-month reunification period, mother continued to live with father and their three adult children. She was employed and attending a domestic violence

program. She had one negative test and one failure to appear. Her unsupervised day visits with Anthony and Jasmine were going well. The children remained in the home of the maternal aunt. They were in good physical health but doing poorly in school. In January 2021, the court extended mother's services for another six months.

During the 12-month reunification period, mother continued to live with father, and the results of her drug tests became more concerning. She failed to appear for three tests and tested positive for amphetamine and methamphetamine on February 15, 2021. The department referred her to a substance abuse treatment program; however, based on her self-report of not using drugs, the program determined she did not meet the criteria for services.

Mother's counselor told the social worker she did not believe mother was benefitting from the domestic violence classes. The counselor said mother was in denial about the violent aspects of her relationship with father, angry with the department for making her go to the classes, and not attending the classes regularly.

The children were still doing well physically and emotionally and had also begun doing better in school. In January 2021, the court extended mother's services for another six months.

During the 18-month reunification period, mother's participation in her case plan continued to decline. She failed to follow up on the department's drug test referral, and on July 14, 2021, the juvenile court ordered that the children could not be returned to her

without a clean hair follicle test. Despite that order, mother still failed to follicle test. The social worker spoke with mother nine separate times during the review period to urge her to enroll in the drug treatment program the department had referred her to and to submit to a hair follicle test. Despite those attempts, mother did neither. She did, however, end up completing her domestic violence class, and her counselor ultimately came to believe she had benefitted from the course.

On August 12, 2021, the maternal aunt informed the social worker that mother had told her she was scared to be home with father and that mother had been showing her text messages and photos demonstrating that father had been physically assaulting mother. The aunt also said the police had been to the parents' home a couple times that month to respond to reports of domestic violence.

The following day (August 13), mother was arrested for possession of a controlled substance. On August 24, she called the police to report a domestic violence incident at her home but when the police arrived, they were unable to locate father. Despite telling the police that father had hit her and kicked her, she declined an emergency protective order. However, two days later she successfully sought a temporary restraining order against father.

On September 12, police arrested father for violating the restraining order. On September 15, the temporary order expired and mother did not request a permanent restraining order.

On October 6, the maternal aunt told the social worker that mother had recently come to her home, gotten angry, and slapped both her and Anthony in the face.

Leading up to the 18-month review hearing, the department recommended the court terminate mother's services. They reported that the children were in good health and doing very well in school. Anthony was receiving straight As and Jasmine mostly As. Anthony told the social worker that he did not want to return home and believed "110%" that his parents should get divorced because of their issues with anger and violence. Jasmine said she was okay not to return home because her parents' behavior had not changed.

Mother finally submitted to a hair follicle test on November 16, 2021, the day before the scheduled review hearing. The court continued the matter so it could review the results of the test, which came back positive for high levels of amphetamine and methamphetamine.

The review hearing took place on December 15, 2021. Mother filed a letter indicating she had enrolled in a drug treatment program on November 3, 2021, as well as a copy of a restraining order the district attorney had obtained to protect her against father on November 12, 2021. During her testimony, she said she wanted to coparent with father but admitted that arguments with him trigger her to use drugs. She said father moved out of the house in September, and she admitted she didn't benefit from her domestic violence class. She also admitted it had taken her about 20 months to enroll in the court-ordered drug treatment program.

Noting mother's recent positive drug test and domestic violence incident with father, the court found by clear and convincing evidence that mother failed to make sufficient progress on her case plan, that the children could not be safely returned to her care, and that additional services would not make a return substantially probable. The court terminated mother's services and set a section 366.26 hearing for the children.

On March 28, 2022, we denied mother's writ petition challenging the court's decision to set a section 366.26 hearing. (*K.P. v. Superior Court of Riverside County* (Cal. Ct.App., Mar. 28, 2022, No. E078291) [unpub. opn.].)

C. *Mother's Section 388 Petition and the Section 366.26 Hearing*

On April 7, 2022, the department filed a report requesting a six-month continuance to assess the maternal grandmother as a potential legal guardian. The children had been placed in her home on March 16, 2022. They were doing well in her care, and she had expressed an interest in guardianship. At a hearing on April 20, 2022, the court granted the department's request and set the section 366.26 hearing for September 19, 2022. The court also found that ICWA did not apply.

On September 14, 2022, the department filed a report recommending the court select legal guardianship with the maternal grandmother as the children's permanent plan. The department believed the maternal grandmother had demonstrated she could provide a safe home for the children, was fully committed to becoming their guardian, and was willing to facilitate continued contact with mother. Both children were comfortable with the idea of her as their guardian.

On September 16, mother filed a section 388 petition seeking an order either returning the children to her care with family maintenance services or authorizing additional reunification services. She alleged her circumstances had changed because she was staying sober, attending counseling, and maintaining positive, extended (5-hour) weekend visits with the children. She said she provided clothing, food, and necessities for the children and participated in their school and sport functions. She alleged her request was in the children's best interest because she had a strong bond with them.

At the section 366.26 hearing on September 19, 2022, the court first heard mother's section 388 petition. In support of her request, mother testified that in July 2022 she voluntarily enrolled in counseling services designed to help her cope with the trauma of losing physical custody of Anthony and Jasmine and to address domestic violence issues. She said she hadn't had any contact with father since November12, 2021 and was having no problems staying sober. She described her bond with Anthony and Jasmine as very strong, and she noted she had been very involved in their lives since the reunification period ended, participating in their school and sporting events and giving them clothing. She said if her petition were granted, she would follow all court orders and department directives.

Counsel for the department and counsel for the children both argued that the court should deny mother's petition. The children's counsel commended mother on being involved in Anthony's and Jasmine's lives but did not think she had shown enough

progress on her substance abuse issues. Counsel said the children had recently told her they didn't feel ready to return to mother's care. In addition, counsel argued that the fact the children had wanted mother's visits to be supervised since March 2022 indicated a return to her care was not in their best interests.

The court denied the petition. It concluded that while mother maintained consistently good visits with the children and clearly shared a strong bond with them, she had failed to demonstrate both that her circumstances had changed and that additional services would be in the children's best interests.

The court then selected legal guardianship with the maternal grandmother as the children's permanent plan. It ordered supervised visits with mother once per week at minimum and gave the maternal grandmother authority to liberalize visitation and decide whether supervision was necessary. The court terminated the dependency, and mother filed a timely appeal.

II

ANALYSIS

A. *The Section 388 Petition*

Mother argues that she demonstrated she is entitled to additional reunification services and the court denied her section 388 petition in error. We disagree.

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new or changed circumstances exist, and (2) the proposed change would promote the best interest of the

child. The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child." (*In re S.J.* (2008) 167 Cal.App.4th 953, 959 [cleaned up].)

In determining whether the petitioning party has carried his or her burden, "'the court may consider the entire factual and procedural history of the case.'" (*In re N.F.* (2021) 68 Cal.App.5th 112, 120.) "'Not every change in circumstance can justify modification of a prior order.' [Citation.] The change in circumstances supporting a section 388 petition must be material. [Citations.] In the context of a substance abuse problem that has repeatedly resisted treatment in the past, a showing of materially changed circumstances requires more than a relatively brief period of sobriety or participation in yet another program." (*Id.* at pp. 120-121.) We review a denial of a section 388 petition for abuse of discretion, asking whether the court's decision exceeded the bounds of reason. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460.)

While we do not doubt that mother shares a strong bond with her children, we conclude the record sufficiently supports the juvenile court's determination that she failed to demonstrate her circumstances had materially changed. Because mother had such a poor track record of addressing her substance abuse issues during the reunification period, she faced an uphill battle in seeking additional services. Thus, to demonstrate her circumstances had materially changed, she needed to present evidence that she had completed or was receiving treatment services and was regularly testing negative for amphetamines. Instead, she simply asked the court to take her at her word and find she

"had no issues with any type of sobriety issues." The court was correct not to do so. Given the fact she failed to seek treatment during the reunification period and her last drug test was positive for high levels of methamphetamine, the court reasonably viewed her declaration of sobriety as insufficient to demonstrate changed circumstances. We therefore uphold the denial of her petition.

B. *The Initial Inquiry under ICWA*

Mother argues the court's finding that ICWA did not apply lacks evidentiary support because the department failed to ask available extended family members whether Anthony and Jasmine are or may be Indian children, as required by section 224.2, subdivision (b) (section 224.2(b)). We agree.

Congress enacted ICWA in 1978 out of concern that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them" by state agents who "fail[] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (25 U. S. C. §1901(4) & (5).) The statute's purpose is to protect Indian children and promote the stability and security of Indian tribes and families. (25 U.S.C. § 1902.) ICWA effectuates this purpose by setting minimum federal standards state courts must follow in voluntary or involuntary custody proceedings involving Indian children. (*Ibid.*; see also *In re T.G.* (2020) 58 Cal.App.5th 275, 287 (*T.G.*).)

ICWA and its related federal regulations constitute the minimum standards of protections for Indian children, their families, and their tribes. (*T.G.*, *supra*, 58 Cal.App.5th at p. 288, 272 Cal.Rptr.3d 381.) ICWA expressly authorizes states to set higher standards, and it provides that where states do so, the higher state standard "shall apply." (25 U.S.C. § 1921.)

This case concerns a social worker's duty to inquire whether a child involved in a dependency proceeding "is or may be an Indian child," a duty commonly referred to as the "initial inquiry." That duty is set forth in section 224.2, which was enacted as part of Assembly Bill No. 3176 (2017-2018 Reg. Sess.) (A.B. 3176). Effective January 1, 2019, A.B. 3176 added several new ICWA-related provisions to the Welfare and Institutions Code. (Stats. 2018, ch. 833, §§ 1-39.)

Section 224.2, subdivision (a) provides that a social worker is under an "affirmative and continuing duty to inquire" whether a child in a dependency proceeding "is or may be an Indian child." (§ 224.2, subd. (a).) It states that the duty "begins with the initial contact," and includes, but is "not limited to" asking 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).)

Section 224.2(b), the provision at issue here, provides further guidance on the steps a social worker must take in conducting the initial inquiry. It states: "If a child is placed into the temporary custody of a county welfare department pursuant to Section 306, the county welfare department . . . has a duty to inquire whether that child is an

Indian child. Inquiry includes, but is not limited to, asking the child, parents, legal guardian, Indian custodian, *extended family members*, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child." (§ 224.2(b).)

In addition, rule 5.481 of the California Rules of Court, which the Judicial Council revised to implement section 224.2(b), states in relevant part: "The party seeking a foster-care placement, . . . termination of parental rights, preadoptive placement, or adoption must ask the child, if the child is old enough, and the parents, Indian custodian, or legal guardians, extended family members, others who have an interest in the child, and where applicable the party reporting child abuse or neglect, whether the child is or may be an Indian child." (Cal. Rules of Court, rule 5.481(a)(1) (rule 5.481).)[3]

Read together, these provisions impose on social workers a duty of initial inquiry that begins at first contact, lasts throughout the proceeding, and includes "but is not limited to" the reporting party, the child's parents and extended family members, and others who have an interest in the child, as those individuals become available during the case. In other words, the "duty to inquire begins with initial contact . . . and obligates the juvenile court and child protective agencies to ask *all relevant involved individuals* whether the child may be an Indian child." (*T.G.*, *supra*, 58 Cal.App.5th at p. 290, citing § 224.2, subds. (a)-(c), italics added.)

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[3] Unlabeled citations to rules refer to the California Rules of Court.

Here, the social worker failed to ask the maternal grandmother, maternal aunts, paternal uncle, and the children's adult brother whether the children have Native American ancestry. We conclude this failure is a violation of the express mandate in section 224.2(b) and rule 5.481 that social workers ask available family members whether the child is or may be an Indian child. And, because these individuals were readily available throughout the proceeding and could have meaningful information about the children's ancestry, we conclude the violation was prejudicial and remand is necessary. (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 744; see also *In re S.S.* (2023) 90 Cal.App.5th 694, 711 [placing a child with biological family members "does not dispel prejudice to tribes"].)

In so concluding, we reject the department's reliance on *In re Robert F.* (2023) 90 Cal.App.5th 492 (*Robert F.*), review granted July 26, 2023, S279743, in which our court held that the duty to ask extended family members about a child's possible Native American heritage arises only when the child was initially removed from home without a warrant (and thus does not apply where, as here, the child was removed by warrant). (*Id.* at p. 497.) As we explained in *In re Delila D.* (2023) 93 Cal.App.5th 953 (*Delila D.*), *Robert F.*'s holding is based on an overly narrow interpretation of the phrase "placed into the temporary custody of a county welfare department pursuant to Section 306" in the first sentence of section 224.2(b). (*Delila D.,* at p. 966.)

According to *Robert F.*, the duty of initial inquiry set out in section 224.2(b) applies *only when* a child has been "placed into the temporary custody of a county welfare department pursuant to Section 306," and the *only way* a department assumes temporary custody of a child is if the child has been removed from home without a warrant under exigent circumstances. (See *Robert F.*, *supra*, 90 Cal.App.5th at p. 497 ["[a] department that takes a child into protective custody pursuant to a warrant does so under section 340, not section 306"].) Under *Robert F.*'s holding, there are two types of initial inquires applicable to social workers—an expanded inquiry for children initially removed from home without a warrant (i.e., the inquiry described in section 224.2(b)) and a default or nonexpanded inquiry for all other children (i.e., the inquiry described in § 224.2, subd. (a)).

Robert F. and an opinion that recently reaffirmed *Robert F.*'s holding, *In re Ja.O.* (2023) 91 Cal.App.5th 672 (*Ja.O.*), review granted July 26, 2023,S280572, argue that it makes sense to impose such a dichotomy in dependency proceedings because "[t]he warrantless detention of an Indian child . . . triggers [the] especially time-sensitive requirements" A.B. 3176 added to section 306, and those requirements do not apply to children removed by protective custody warrant. (*Id.* at p. 501, citing § 306, subd. (d), see also *Ja.O.*, at p. 681 ["because warrantless detentions trigger various time-sensitive ICWA-related requirements that are otherwise inapplicable (§ 306, subd. (d)), it makes sense in such cases to expand the duty of initial inquiry—confirming whether the child in such a case is an Indian child is *particularly urgent*"], italics added.)

First, and as we explained in *Delila D.*, children removed from home by protective custody warrant under section 340 *are* "placed into the temporary custody of a county welfare department pursuant to Section 306." (*Delila D.*, *supra*, 93 Cal.App.5th at p. 966.) The placement occurs as soon as they are delivered to the department upon execution of the warrant. (See §§ 340, subd. (c) [requiring children removed from home by warrant to be immediately "delivered to" the department]; 306, subd. (a)(1) [authorizing social worker to "maintain" temporary custody of child delivered by a peace officer].)

Second, A.B. 3176 did not add new ICWA-related requirements to section 306 only. The amendment also added new requirements to section 319, which governs the detention of children at the initial petition hearing. (See Stats. 2018, ch. 833, §§ 19 [amending Welf. & Inst. Code, § 306 to add ICWA-related requirements] & 22 [amending Welf. & Inst. Code, § 306 to add ICWA-related requirements].) For example, as amended by A.B. 3176, section 319 now provides that if a court "knows or there is reason to know the child is an Indian child," it may not detain the child at the initial petition hearing *unless* it "finds that detention is necessary to prevent imminent physical damage or harm" and "state[s] on the record the facts supporting this finding." (§ 319, subd. (d); Stats. 2018, ch. 833, § 22.) Additionally, if the court does order an Indian child detained at the initial petition hearing, the ICWA placement preferences codified in § 361.31 apply to the child's temporary placement unless the court finds "good cause" to deviate from them. (§ 319, subd. (h)(1)(C).)

Thus, the reason the first sentence of section 224.2(b) imposes "a duty to inquire whether th[e] child is an Indian child" in cases where the child is "placed into the temporary custody of a county welfare department pursuant to Section 306" is because A.B. 3176 imposed heightened requirements for detaining Indian children at the initial petition hearing under section 319 that did not previously exist under California law. In other words, the first sentence is not intended to limit or define the initial inquiry that applies throughout the dependency proceeding. Rather, it is intended to frontload a social worker's investigative duties in cases where the child may be detained at the initial petition hearing.

Because heightened requirements now apply to the detention of Indian children at the initial petition hearing, the Legislature wanted to ensure that social workers provide juvenile courts with enough ancestry information *in advance of that hearing* to enable them to determine whether those requirements are triggered. And, because section 319's provisions apply to both categories of children—those removed under exigent circumstance and those removed by warrant—there is no reason to treat the latter category differently for purposes of ICWA. (See § 315 ["If a child has been taken into [temporary] custody . . . and not released to a parent or guardian, the juvenile court shall hold a hearing (which shall be referred to as a 'detention hearing') to determine whether the child shall be further detained"].) The need to determine whether a child who may be detained at the initial petition hearing is an Indian child is as urgent for children removed by warrant as it is for children removed without one.

Third, the need to determine whether a child is an Indian child does not diminish in urgency once a case moves past the initial petition hearing stage. If anything, it becomes even more important to determine whether ICWA applies once a child has been adjudged a dependent and removed from parental custody at disposition, as the possibility of permanently separating the child from their family is more concrete than at the initial petition stage. The holdings of *Robert F.* and *Ja.O.* lead to the irrational result that procedural circumstances predating the initial petition hearing dictate the scope of the initial inquiry throughout the entire proceeding. The result is irrational because the way in which a child is initially removed from home has no bearing on whether they may have Native American ancestry.

We instead include that if a child is removed from parental custody after being adjudged a dependent of the court, as Anthony and Jasmine were here, the initial inquiry described in section 224.2(b) and rule 5.481 applies throughout the proceeding.

III

DISPOSITION

We affirm the order denying the section 388 petition. We conditionally reverse the order terminating parental rights and remand the matter to the juvenile court with directions to comply with the inquiry provisions of section 224.2. The juvenile court shall order that within 30 days of the remittitur, the department perform its initial inquiry of the children's potential Indian ancestry consistent with this opinion. If, after completing the initial inquiry, there is no reason to believe the children are Indian children, the court

shall reinstate its order terminating parental rights. If the inquiry produces information substantiating Indian ancestry, the court shall vacate the order and proceed in compliance with ICWA and related California law.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
Acting P. J.

I concur:

RAPHAEL
J.

[*In re A.P. et al.; DPSS v. K.P.*, E080185]

MENETREZ, J., Concurring and Dissenting.

I agree with the majority opinion's analysis and conclusion concerning the Welfare and Institutions Code section 388 petition. (Unlabeled statutory citations refer to this code.) I disagree with the majority opinion's analysis and conclusion concerning the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). I continue to agree with *In re Robert F.* (2023) 90 Cal.App.5th 492 (*Robert F.*), review granted July 26, 2023, S279743, and *In re Ja.O.* (2023) 91 Cal.App.5th 672, 680 (*Ja.O.*), review granted July 26, 2023, S280572, that the expanded duty of initial inquiry under subdivision (b) of section 224.2 applies only if the child was placed into temporary custody without a warrant. For the reasons explained in *In re Andres R.* (August 23, 2023, E079972) __ Cal.App.5th __[2023 Cal.App. LEXIS 638], I am not persuaded by the criticisms of *Robert F.* that were expressed in *In re Delila D.* (2023) 93 Cal.App.5th 953 (*Delila D.*). (The majority opinion in *Delila D.* never cites *Ja.O.* and does not address its analysis).

For all of the foregoing reasons, I respectfully dissent from the majority opinion's discussion and judgment as to the ICWA issue, and I otherwise concur.

MENETREZ
J.