Filed 8/24/23 In re E.C.-S. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.C.-S. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.C., Defendant and Appellant.	E081138 (Super.Ct.Nos. J287587, J287588) OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Reversed..

John P. McCurley, under appointment by the Court of Appeal, for Defendant and Appellant.

Tom Bunton, County Counsel and Tiffany Lok, Deputy County Counsel for Plaintiff and Respondent.

Mother, L.C., appeals the termination of parental rights to her two children, L.E. and E.C.-S. at a hearing for the selection and implementation of a permanent plan of adoption, pursuant to Welfare and Institutions Code section 366.26.[1] The San Bernardino County Department of Children and Family Services (CFS) intervened when E.C.-S. was born with methamphetamine in her system and mother admitted to substance abuse and mental health issues. At the time of E.C.-S.'s birth, mother had an older child., L.E., by a different father.[2] Jurisdiction was established for both the children, and Family Reunification Services (FRS) were provided to mother, but throughout the proceedings CFS indicated it could not locate E.S., the father of E.C.-S., because it lacked sufficient information to identify him. Mother's services were terminated at the 12-month status review stage due to mother's continued drug use. Over the course of the proceedings, CFS conducted multiple inquiries regarding the possible Indian heritage of the children and gave notice to all tribes identified by mother and her relatives. At the hearing held to select and implement a permanent plan of adoption, the juvenile court found the Indian Child Welfare Act (ICWA) did not apply and terminated parental rights. Mother appealed.

On appeal, mother argues that the judgment must be reversed because (1) the father of E.C.-S. was not given notice of the dependency proceedings in violation of his

---

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

[2] T.E., father of L.E., is not a party to this appeal.

due process rights, and (2) the finding that the ICWA did not apply was not supported by substantial evidence. We conditionally reverse.

BACKGROUND

L.C., mother, gave birth the E.C.-S.[3] in December 2020, at which time both mother and child tested positive for methamphetamine. Mother admitted to a history of chronic substance abuse, temporarily abated when she discovered she was pregnant with E.C.-S., as well as a lengthy history of mental illness, for which she was not compliant with her medications, having diagnoses of schizophrenia, bipolar disorder, anxiety, and depression. Mother identified E.S. as the father of E.C.-S., and she had an older child, L.E., by a different father, T.E. The whereabouts of E.S. was unknown, as mother claimed to have no contact information for either father.

The dependency petition was filed on December 24, 2020, alleging the two children came within the provisions of section 300, subdivisions (b) and (g), due to mother's substance abuse and mental illness, and the failure of the respective fathers, whose whereabouts were unknown and who had failed to provide for the children, to protect the children from mother's inability to provide proper care for them. CFS took the children into custody after obtaining a detention warrant for the two children and they were ordered detained out-of-home at the detention hearing.

At that hearing, mother provided father E.S.'s middle name of Richard, indicated he was born on February 10th, and that he was 28 years old, although she was unaware of

[3] The minor was referred to as E.C. through most of the proceedings until CFS noticed that the name on the birth certificate showed her true name to be E.C.-S.

the year of his birth. Also at the detention hearing, the court asked mother about possible Indian heritage; mother indicated she had none to her knowledge, executing the ICWA-030 form to that effect.

On January 13, 2021, CFS submitted its jurisdiction/disposition report. In addition to describing the circumstances under which the children came to the attention of CFS, the report indicated that the social worker had called the phone number provided for E.S., but that there was no answer, so she left a message. The report also indicated E.S. was not listed on the birth certificate for E.C.-S., was not present for her birth, and did not provide for or visit the child. The social worker indicated she could not complete the Department of Justice inquiry to locate him because of the limited identifying information. In the declaration of due diligence, the social worker represented that the only information available to it about E.S. was his first and last names, and no date of birth or social security number.

At the combined jurisdiction and disposition hearing, mother submitted on the reports, executing a JV-190 form, waiving her right to a contested hearing. The court found the allegations of the petitions to be true, that the children came within the provisions of section 300, subdivisions (b) and (g), declared them to be dependents, and removed custody of the children from the parents. The court ordered FRS for mother. Regarding both fathers, the court found them to be "mere biological fathers" as to whom it was not in the best interests of the child to provide them with services. The court found the children did not come within ICWA. In addition, the court found by clear and

convincing evidence that reasonably diligent efforts were made in attempting to locate the children's absent parents and that those efforts were unsuccessful.

On July 12, 2021, CFS submitted its status review report for the six-month review hearing pursuant to section 366.21, subdivision (e). This report indicated the social worker had made further inquiry regarding possible Indian heritage, and, although mother again denied Indian heritage, she identified her mother and her godmother as persons who might have relevant information. The report indicated mother had completed a psychological evaluation and participated in undescribed outpatient services, attended some parenting classes, counseling, and drug testing. Mother also regularly visited the children.

However, while mother had tested negative for drugs on five occasions, she had failed to test on seven other occasions, two of which mother indicated she was in quarantine due to the pandemic. Of the remaining missed tests, mother indicated she had been tested by her personal doctor and that results were negative. The report recommended continuation of FRS.

On July 19, 2021, the court conducted the six-month status review hearing and adopted the social worker's recommendations, continuing FRS for mother. However, because it was unclear from the psychological evaluation what testing instrument had been used, and because the diagnoses provided in the evaluation were not consistent with the medication prescribed to mother, the review hearing was continued to obtain additional information.

In an additional information to the court, the social worker clarified that mother had been referred for four additional sessions of counseling, was completing outpatient drug treatment at Inland Behavior Health Services (IBHS) Perinatal program where she was close to graduation and had completed four out of 16 parenting education classes. Respecting drug testing, the additional information indicated mother was a no-show on two dates, but that on a third date she did not test due to lack of transportation.

On September 2, 2021, the court completed the six-month status review, continuing the children as dependents in out-of-home care, found mother's progress to be moderate, and continued FRS.

The twelve-month review report prepared pursuant to section 366.21, subdivision (f), recommended termination of services and that the matter be set for a hearing pursuant to section 366.26. The report did not indicate any ongoing inquiries into ICWA applicability except to recite that on January 19, 2021, the court found ICWA did not apply. As to mother's participation in court ordered services, the report indicated she still had not completed parenting education classes, although she had completed individual counseling and her outpatient drug treatment program. With respect to drug tests, mother had tested positive for opioids on one occasion, relating to a prescription for Tylenol with codeine for a tooth infection, and she tested negative on two occasions as well as positive on two other occasions, with seven no-shows, which were deemed positive test results.

The review hearing set for January 5, 2022, was continued to give mother an opportunity to complete the parenting classes and was set as a contested matter. On

March 4, 2022, the social worker submitted an additional information to the court report, indicating that mother had completed her parenting classes, that she had negative drug tests on two occasions, but she failed to show up for a third drug test. Mother still lacked housing and on January 19, 2022, she disclosed to the social worker that she was staying in a motel with E.S., the father of E.C.-S., with whom she continued to be in a relationship. Mother inquired of the social worker how E.S. could get reunification services to reunify with E.C.-S., but there is no indication in the report that the social worker followed up with E.S. to obtain biographical information about him or to serve him with notice of future hearings.

The contested twelve-month review hearing took place on March 7, 2022, at which time the court found by clear and convincing evidence that mother had failed to complete the court ordered plan, ordered limitations on mother's educational rights, and terminated FRS. On March 8, 2022, proof of service of forms advising E.S. of the need to seek review by way of a writ petition were served at "address unknown."

On April 15, 2022, CFS applied for an order for service by publication of citation, serving a copy of it on E.S. at "Address Unknown." In the attached declaration of due diligence, CFS used the same information included in the earlier declaration, with no updated or additional information, indicating that information about E.S.'s location was not possible due to the numerosity of results which could not be verified without a date of birth or other identifying information.

On June 22, 2022, CFS submitted its section 366.26 report, recommending termination of parental rights and a permanent plan of adoption for both children. In this report, the social worker explained that the Native American heritage inquiry had been completed on January 7, 2021, and June 24, 2021, and mother had denied Indian heritage. The social worker also reported attempts to contact the maternal grandmother and the maternal uncle, but had not received responses in time for the report. On July 5, 2022, mother set the section 366.26 hearing as a contested matter.

On August 19, 2022, the social worker submitted an additional information to the court report following up on the ICWA inquiry. The social worker stated mother had recently been informed of possible Indian ancestry through the Apache Tribe of Oklahoma. The social worker contacted the Apache Tribe of Oklahoma by email, but had not yet received a response from the tribe. The court continued the scheduled section 366.26 hearing to follow up on the ICWA issue.

On September 29, 2022, the social worker submitted an ICWA declaration of due diligence, outlining the tribes to which CFS had sent notices of the pending dependency proceedings. Notices were sent on August 22, 2022, to the Apache Tribe of Oklahoma, the White Mountain Apache Tribe, Fort Sill Apache Tribe of Oklahoma, Yavapai-Apache Nation, Tonto Apache Tribe of Arizona, Mescalero Apache Tribe, Jicarilla Apache Nation, and the San Carlos Apache Tribe. Attached to the filing were copies of receipts for the certified mail from all tribes served, along with letters from the following

tribes indicating the children were not members or eligible for membership in a tribe[4]: the Tonto Apache Tribe, Fort Sill Apache Tribe of Oklahoma, Jicarilla Apache Nation, San Carlos Apache Tribe, and the Yavapai-Apache Nation.

On October 3, 2022, the social worker filed an additional information to court report indicating that it had not yet received a response to the ICWA notice from the Apache Tribe of Oklahoma. On October 4, 2022, at the continued section 366.26 hearing, the court made further ICWA inquiry of the maternal grandmother who indicated there was possible Apache heritage through her grandfather, who may have been born on a reservation, and that an aunt was possibly enrolled or had tried to enroll. The court continued the hearing again to complete the ICWA inquiry.

On November 29, 2022, the court made a formal order finding that ICWA did not apply. The order was accompanied by an ICWA declaration of due diligence, explaining that the Mescalero Apache Tribe and the White Mountain Apache Tribe had determined that the children were not members or eligible to become members of the respective tribes. On December 12, 2022, the social worker submitted an additional information to the court report indicating she had attempted to follow up with the maternal grandmother and uncle by telephone, but that the maternal grandmother's phone was disconnected, and the uncle did not return her call. The section 366.26 hearing was continued to give the social worker an opportunity to review the maternal grandmother's ICWA-030 form.

[4] The notices included father E.S.'s name and date of birth.

On March 3, 2023, another additional information to the court was submitted, in which the social worker updated the court with information that the Fort Sill Apache Tribe had determined the children were not members or eligible to become members of the tribe. In addition the report indicated that mother and maternal grandmother had visited with E.C.-S. and were dropped off for visits by E.S. The report also noted that after visits, L.E., the older child, acted out and said that he was going home to his mother, although neither child cried at the end of visits.

On March 8, 2023, the social worker submitted another additional information to the court indicating that on March 7, 2023, the uncle had contacted the social worker and identified the Apache Tribe as the family's Native American heritage. The social worker was also able to communicate with the maternal grandmother who indicated she had learned her family may have Indian ancestry through a Mexican tribe, because her mother was from Mexico, but denied Indian ancestry through a United States tribe. The information from the uncle and a maternal great-great aunt was added to the ICWA-030 form.

On April 11, 2023, in another additional information report, the social worker indicated that the updated ICWA-030A notices were submitted for re-sending to the tribes with the additional information. The social worker attached an ICWA due diligence declaration, including return receipts and responses from tribes. This report also included an update on mother's visits with the children, again reporting that mother was transported to the visits by E.S., but that he did not visit. The social worker noted

that L.E. still acted out after visits, including wetting the bed, was aggressive to other children in the foster home, and wrote backwards.

On April 20, 2023, the selection and implementation hearing took place pursuant to section 366.26. Mother testified at the hearing about her bond with her children and her counsel argued for a permanent plan of legal guardianship. The trial court found that the benefits of adoption outweighed any detriment the children would suffer by severing the parent-child relationship and terminated parental rights of mother and both fathers.

Mother timely appealed the judgment.

DISCUSSION

Mother raises two arguments on appeal, neither of which pertain to the correctness of the findings that the children are adoptable, and termination of parental rights would not be detrimental to them.

1. *Due Process Violation*

Mother argues the judgment terminating parental rights must be reversed because father E.S. was never properly given notice of the proceedings. We agree. We first address her standing.

a. Mother's Standing to Raise Father's Lack of Notice.

Mother argues that E.S., the father of E.C.-S., was never given notice of the pending dependency proceedings, in violation of his due process rights to notice and opportunity to be heard, requiring that the judgment terminating parental rights as to E.C.-S. must be reversed. Mother asserts she has standing to invoke the violation of

E.S.'s due process rights because her rights are intertwined with his. In its brief, CFS concedes error in the minimal efforts made by the social worker to locate and serve E.S., arguing only that the error was harmless beyond a reasonable doubt. CFS does not challenge mother's standing to raise the issue. We review de novo whether inadequate notice violated a parent's due process rights.[5] (*In re Jayden G., supra,* 88 Cal.App.5th at p. 308; *In re J.H.* (2007) 158 Cal.App.4th 174, 183.)

"'[T]he general rule is that '"[a]n appellant cannot urge errors which affect only another party who does not appeal."' [Citations.]'" (*In re J.R.* (2022) 82 Cal.App.5th 569, 581, quoting *In re Joshua M*. (1997) 56 Cal.App.4th 801, 807.) However, "[w]here the interests of two parties interweave, either party has standing to litigate issues that have a[n] impact upon the related interests." (*In re Patricia E.* (1985) 174 Cal.App.3d 1, 6 [disapproved on a different point in *In re Celine R.* (2003) 31 Cal.4th 45,60]; see also *In re Caitlin B.* (2000) 78 Cal.App.4th 1190, 1193.) Mother's standing to assert alleged violations of father's right to notice of the dependency proceedings depends on whether mother and father have "'intertwined interests.'" (*In re J.R., supra*, at p. 581, quoting *In re Caitlin B., supra,* at p. 1193.)

We find mother had standing to raise this issue which would otherwise forever evade review given that mother's "appeal is the only practicable means by which the

---

[5] We take into account that the trial court found father was a biological father, rather than an alleged father, for reasons unclear from the record. Nevertheless, "'Due process for an alleged father requires only that he be given notice and an opportunity to appear and assert a position and attempt to change his paternity status.'" (*In re Jayden G.* (2023) 88 Cal.App.5th 301, 309, quoting *In re Kobe A*. (2007) 146 Cal.App.4th 1113, 1120.)

agency's contravention of [father's] due process rights can be remedied." (*In re J.R., supra,* 82 Cal.App.5th at p. 573.)

b. Failure to Exercise Diligence to Locate and Serve Father

The Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend., § 1.) "Because parents have a fundamental liberty interest in the companionship, care, custody, and management of their children, the due process clause requires child welfare agencies to exercise reasonable diligence in attempting to locate and notify them of dependency proceedings." (*In re Jayden G., supra,* 88 Cal.App.5th 301, 308, citing *In re J.R.* (2022) 82 Cal.App.5th 569, 572; *In re Mia M.* (2022) 75 Cal.App.5th 792, 807.)

Reasonable diligence includes not only "'"standard avenues available to help locate a missing parent," but "'specific ones most likely, under the unique facts known to the [Agency] to yield [a parent's] address.'" [Citations.]' [Citation.]" (*In re Mia M., supra,* 75 Cal.App.5th at pp. 807-808.) "This requires a thorough and systematic investigation to protect a parent's fundamental liberty interest." (*In re Jayden G., supra,* 88 Cal.App.5th at p. 308; *In re Mia M., supra*, at p. 808

A biological father[6] has a due process right to notice of all juvenile dependency proceedings affecting their interest in the custody of their children. (*In re Julia U.* (1998)

---

[6] The court specifically found E.S. was a biological father, although no paternity testing had been performed. "A biological father is one whose paternity of the child has been established but who has not qualified as the child's presumed father under Family Code section 7611." (*In re Jayden G., supra,* 88 Cal.App.5th at p. 309.)

64 Cal.App.4th 532, 544; *In re B.G.* (1974) 11 Cal.3d 679, 688-689.) Unlike an alleged father, a biological father may get services if doing so is in the child's best interest. (§ 361.5, subd. (a).) "'Further, such a man may take the child into his home to establish presumed father status.'" (*In re A.H.* (2022) 84 Cal.App.5th 340, 372, citing *In re O.S.* (2002) 102 Cal.App.4th 1402, 1411.) Due process requires """notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [Citation.]' [Citation.]" (*In re Anna M.* (1997) 54 Cal.App.4th 463, 468; *In re Phillip F.* (2000) 78 Cal.App.4th 250, 258 [parent entitled to notice of a continued section 366.26 hearing].)

Plainly, reasonable efforts to locate E.S. were not accomplished in the present case. Despite being informed at the detention hearing of father's middle name, his then current age, and his birthday (from which his birth year could be extrapolated), CFS did not attempt to locate father for the jurisdiction hearing. During the reunification period, despite knowledge mother was still involved in a relationship with father, that mother had even inquired of the social worker about how to get reunification services for father, and that father transported mother to the visits with his child, no attempt was made by the department to locate and serve him before the permanency planning stage. Instead, in its due diligence declaration attached to the application for order to publish the notice, CFS repeated the information alleged in the original due diligence filing, that father's first and last names were too common and that without a birthdate or social security number, there was insufficient information to locate him through the databases.

However, limiting search efforts to databases using limited information has been deemed to be unreasonable where the agency possesses more complete information or where such information is readily available. "Where the party conducting the investigation ignores the most likely means of finding the defendant, the service is invalid, even if the affidavit of diligence is sufficient." (*In re D.R.* (2019) 39 Cal.App.5th 583, 592, citing *David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1016; see also *Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, 1137–1139.) Clearly there was a lack of reasonable diligence in locating and serving father with formal notice of the proceedings.

Father did not attend any hearings (where he might have been orally notified of subsequent hearings), and he was never orally notified of the proceedings by the social worker outside the courtroom, despite having a phone number to contact father[7] and knowledge mother was still in a relationship with him, so it cannot be said he had actual notice that his parental rights could be terminated at the section 366.26 hearing. We recognize father was likely aware that some type of proceeding was pending involving mother, but we have no way of knowing what information was shared between the two parents, and it is not a parent's duty to give notice.

The agency failed to explore specific information provided by mother, as was the case in *In re Jayden G.* And while we recognize that the fact he transported mother to visits is a strong indicator he was aware his child was involved in a dependency

[7] The social worker's statement that she attempted to call father on the telephone does not indicate that her message included information about the upcoming hearings.

proceeding, there is nothing in the record to support an inference he was given notice of any hearing date, especially the hearing at which his parental rights were terminated, or that he had a right to appear and to participate in the proceedings.

No thorough or systematic investigation was undertaken here. We appreciate that there was little information available about father *prior* to the detention hearing, when CFS simply ran his first and last name through a number of databases and reported a failure to obtain any useful information. But at the detention hearing, additional information was provided, including father's middle name and his birthday (sans the year of birth) and his age at that time, which would have provided CFS with a year of birth by the simple expedient of subtracting his age from the current year. Indeed, it appears CFS made the deduction of his year of birth as reflected in the ICWA-030 notice, which shows a complete date of birth for father. Yet CFS did not follow up with the additional information - even by way of database search - to give him notice of the dependency proceedings.

The lack of any meaningful attempt to locate father, who was apparently locally available, given the nature of his ongoing relationship with mother and mother's knowledge of his whereabouts, and whose date of birth and middle name were known to CFS from the time of the detention hearing was not cured by publication of notice of the permanency planning hearings. That order was sought using incomplete information,

given it failed to acknowledge father's telephone number, date of birth, or middle name.[8] Service by publication will not satisfy due process if it is not the most likely means of notifying the parent. (*In re Mia M., supra*, 75 Cal.App.5th at pp. 808–809.) Given the localized search alternatives described above, we cannot find that publication by notice fulfilled CFS's duty of due diligence. (*In re Jayden G.*, *supra*, 88 Cal.App.5th at p. 310.)

CFS wisely concedes the agency's inadequate efforts to locate father, arguing the error was harmless. This cavalier treatment of a fundamental error of constitutional proportions is troublesome to us. We are aware of the pressures put to bear on CFS and its overworked social workers, however, matters of notice of the ongoing dependency proceedings, which have the potential to lead to a severance of the parent-child relationship, must be addressed with diligence. There was a violation of the father's due process right to notice.

c. Prejudice

Mother argues the due process violation requires reversal. We agree that conditional reversal is required. When there is no attempt to serve a parent with notice the error is reversible per se; when there is error in a notice the question is whether the error is harmless beyond a reasonable doubt. (*In re Marcos G.* (2010) 182 Cal.App.4th

---

[8] We observe that there is a discrepancy between the information from mother about father, and the information provided in the due diligence declarations. The due diligence declaration indicates CFS had no middle name for E.S., yet at the detention hearing mother provided that name. Additionally, the declaration states CFS had no date of birth, which is also incorrect. Mother gave E.S.'s birthday, lacking the year of birth, but indicating he was 28 years of age. By subtracting his age from the current year, the social worker could have suppled a date of birth.

369, 387; *In re J.H., supra*, 158 Cal.App.4th at p. 183.) Thus, where notice is served but is defective in some way, there is no structural error; prejudice can and must be assessed. (*In re Christopher L.* (2022) 12 Cal.5th 1063, 1083 (*Christopher L.*).)

In *Christopher L., supra,* the incarcerated father was not given notice of the detention of the child, but was served with notice of the jurisdictional/dispositional hearing, although he did not appear, counsel was not appointed at that time, and reunification services were denied. Counsel was appointed at a later point, prior to the selection and implementation hearing. (*Christopher L., supra,* 12 Cal 5th. at p. 1071.) The Supreme Court found constitutional error in the failure to notify the father of the jurisdiction and disposition hearing but concluded the error was not structural in nature. (*Id*. at pp. 1072-1073.) Instead, it concluded the failure to give proper notice was harmless beyond a reasonable doubt because the father had not been """stripped . . . of his right to participate""" (*id.,* at p. 1075), where father had counsel for the later stages of the dependency who could have filed a section 388 petition to raise the due process notice error, pursuant to *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 486-487, and because the applicability of section 361.5, subdivisions (b)(10) and (12) were inevitable in light of that father's failure to posit a defense to those allegations. (*Christopher L, supra,*. at pp. 1078-1079.)

In the present case, father was never served with notice of any of the proceedings, and counsel was not appointed, yet he was deemed a biological father, which designation confers slightly more rights than those available to an alleged father. For this reason, we

cannot find the error was harmless beyond a reasonable doubt because the record does not establish beyond a reasonable doubt that father would have been deemed an alleged father who lacks a right to services or to object to a termination of rights.

The present situation involves no meaningful attempt to locate father after it came into possession of information that would have facilitated locating and serving him with notice. But we are reluctant to find structural error because the father had to have been aware that child welfare proceedings were ongoing involving the child. It is unclear from the record if E.S. was aware that the child was his, given the fact mother had told the social worker at the time of the child's birth that neither father was involved, and she lacked contact information. But he was aware the mother was involved in Department-supervised visitation.

Because error of constitutional dimension occurred, we conclude the error was prejudicial under the *Chapman* standard (ref. *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 87 S. Ct. 824]; see also *In re Christopher L., supra*, 12 Cal.5th at pp. 1072, 1073). As a person deemed the "biological father," E.S. had a right to participate in the proceedings and to seek presumed father status.[9] If the court found it in the child's best interests, a biological father may be granted reunification services. (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.) An alleged father, on the other hand, is not deemed a party and is not entitled to the appointment of counsel, the right to reunification

[9] Given mother's lengthy history of serious mental problems and the fact the only information possessed by the Department about E.S. came from mother, it cannot be summarily determined he would not have been granted presumed father recognition.

services, or the right to set a hearing as a contested matter. (See *In re Christopher M.* (2003) 113 Cal.App.4th 155, 159-160; see also, *In re Joseph G., supra,* at p. 715.) Because the court deemed E.S. a biological father, we cannot find the due process violation to be harmless beyond a reasonable doubt. We conditionally reverse the order terminating parental rights and remand the matter to the juvenile court with directions to order CFS to exercise reasonable diligence as described in this opinion in attempting to locate and serve father with proper notice of the dependency proceedings. (See, *In re J.R., supra*, 82 Cal.App.5th at pp. 595-596.) If father fails to appear in the proceedings within a reasonable period of time after CFS has discharged this obligation, then the juvenile court shall reinstate its order terminating parental rights as to mother and father. If father makes an appearance within a reasonable period of time after proper service is affected, then the juvenile court shall undertake further proceedings consistent with this opinion.

2. *ICWA Findings by the Court.*

Mother argues the court and CFS failed to conduct an adequate inquiry into whether the fathers had Indian heritage. CFS exhaustively inquired as to Indian heritage from mother's family line, so there can be no error there. As to T.E., CFS filed a proof of service on T.E. at all possible residence locations obtained from the parent search (including county jail) and served written notice by mail at all addresses found. Mother has not argued that T.E was not served with notice of the proceedings, and, lacking any information or evidence to the contrary, we are bound by the trial court's finding that

notice was duly given. T.E. did not contact CFS, or appear in court, thereby precluding any inquiry as to his Indian heritage. For this reason, there was no "reason to believe" that L.E. was an Indian child based on paternal ancestry. The finding that ICWA does not apply as to T.E. is supported by substantial evidence.

As to E.S., the lack of reasonable efforts to locate him leads us to conclude that if reasonable efforts to locate him had been made, an inquiry about Indian heritage could and should have been made.

ICWA defines an "Indian child" as any unmarried person under the age of 18 who "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), italics added; see also 25 C.F.R. § 23.108 (2023) ["The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law"].)

ICWA also defines who counts as an "extended family member": a person over the age of 18 who is an "Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent." (25 U.S.C. § 1903(2); *In re A.C.* (2022) 86 Cal.App.5th 130, 133-134.) The juvenile court made specific findings that both T.E. and E.S. were biological fathers of the two

children. Having so found, it was incumbent on CFS to inquire into Indian heritage from the fathers' family lines.

Under California law, the juvenile courts, and the child protective agencies, "(but not parents)[, have] an 'affirmative and continuing duty to inquire' whether a child in the dependency proceeding 'is or may be an Indian child.'" (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 741-742, quoting § 224.2, subd. (a).) "That duty to inquire begins with [the] initial contact [citation] and obligates the juvenile court and child protective agencies to ask all relevant involved individuals whether the child may be an Indian child." (*In re T.G.* (2020) 58 Cal.App.5th 275, 290, citing § 224.2, subds. (a)-(c).)

"Under both ICWA and California law, '"extended family member[s]"' include the child's 'grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.'" [Citations.]" (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1053; see also, *In re Dominick D.* (2022) 82 Cal.App.5th 560, 567.) Upon each party's first appearance in a dependency proceeding, the juvenile court must ask each participant "whether the participant knows or has reason to know that the child is an Indian child" (§ 224.2, subd. (c)), and "[o]rder the parent . . . to complete [an ICWA-020 form]." (Cal. Rules of Court, rule 5.481(a)(2)(C).)

As to E.S., because we conditionally reverse to give CFS an opportunity to locate and serve him with notice, it follows that if and when contact is made with him—or if he appears in court—an ICWA inquiry can and should be made.

DISPOSITION

The termination of parental rights juvenile court's finding that ICWA does not apply are conditionally reversed, and the matter is remanded to the court with directions to: (1) direct CFS to exercise reasonable diligence as described in this opinion to locate and serve father with proper notice of the dependency proceedings, and in the event father is located or appears in court, (2) order the agency to comply with the inquiry and documentation provisions set forth in section 224.2, subdivisions (b) and (e), and California Rules of Court, rule 5.481(a)(5).

If father fails to appear in the proceedings within a reasonable period of time after CFS has discharged the obligation to make reasonable efforts to locate and serve him with notice, then the juvenile court shall reinstate its order terminating parental rights as to mother and father. If father makes an appearance within a reasonable period of time after proper service is effected, then the juvenile court shall undertake further proceedings consistent with this opinion.

If, after making reasonable efforts to locate and serve E.S. with notice of the dependency proceedings, E.S. is not located, or if he fails to appear in court, thereby precluding the court or CFS from identifying relatives, the finding that ICWA does not

apply shall be reinstated. In all other respects, the court's orders terminating mother's parental rights are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

FIELDS
J.

MENETREZ
J.