Filed 8/20/07 In re Raymond S. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re RAYMOND S., JR., et al., Persons Coming Under the Juvenile Court Law.	B195548 considered/w B197499, B197606 (L.A.Super.Ct. No. CK 32678)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RAYMOND S., SR., and CELIA M., Defendants and Appellants.	
In re RAYMOND S., SR., on Habeas Corpus.	B197606 considered/w B195548, B197499 (L.A.Super.Ct. No. CK 32678)
In re CELIA M., on Habeas Corpus.	B197499 considered/w B195548, B197606 (L.A.Super.Ct. No. CK 32678)

APPEAL from orders of the Superior Court of Los Angeles County. Irwin H. Garfinkel, Juvenile Court Referee. Affirmed in part, reversed in part and remanded with directions.

ORIGINAL PROCEEDINGS; petitions for writ of habeas corpus. Denied.

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Joseph D. Mackenzie, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner Raymond S.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner Celia M..

Raymond G. Fortner, Jr., County Counsel, O. Raquel Ramirez, Deputy County Counsel, for Plaintiff and Respondent.

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Appellants Raymond S., Sr. (Raymond) and Celia M. (Celia) (collectively, the parents) appeal from orders denying Celia's petition under Welfare and Institutions Code section 388[1] and terminating their parental rights to their children, Raymond S., Jr. (Raymond Jr.) (born in 2002), Jesse S. (Jesse) (born in 2003), and Angel S. (Angel) (born in 2004) (collectively, the children), under section 366.26. Both parents also filed writ petitions for habeas corpus related to this appeal. Celia contends that she was denied effective assistance of counsel as to both her section 388 petition and the section 366.26 hearing, and that the dependency court violated the federal Indian Child Welfare Act (ICWA) by failing to ensure proper inquiry into Celia's possible Native American heritage. Raymond maintains that his counsel also did not provide him with adequate assistance and joins in Celia's argument based on ICWA. Both parents' writ petitions allege ineffective assistance of counsel.

Because the dependency court's ICWA inquiry in this case was insufficient, as the County Counsel concedes, we reverse the order terminating parental rights solely on that

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1 All undesignated statutory references are to the Welfare and Institutions Code.

basis and remand to allow the court to conduct the proper inquiry. On all other issues, we affirm. As to Raymond and Celia's separate petitions for writs of habeas corpus, which we consider with this appeal, we deny both petitions.

BACKGROUND

When Angel was born in 2004, Angel and Celia both tested positive for cocaine, and Celia also for opiates. Celia, who had missed seven prenatal appointments between February and April, denied having used narcotics. The hospital detained Angel on April 30, and the Los Angeles County Department of Children and Family Services (DCFS) placed him in a foster home on May 3, 2004. At the time DCFS detained Angel, the whereabouts of Raymond Jr. and Jesse were unknown, and Raymond refused to divulge this information to DCFS.

On May 5, 2004, DCFS filed a section 300 petition alleging that by her drug use during her recent pregnancy, her history of drug use and domestic violence with another partner that led to the detention of their three children (not involved in this appeal), and her failure to comply with earlier court orders or to reunify with those children, Celia placed Raymond Jr., Jesse, and Angel at risk of physical and emotional harm. DCFS alleged that Raymond knew or reasonably should have known of Celia's drug abuse, noting that he denied any awareness of Celia's drug use during pregnancy, admitted to earlier having spent a year in jail for domestic violence against a former girlfriend, and refused to help DCFS locate Raymond Jr. and Jesse.

At the detention hearing on May 5, 2004, Celia was not present; Raymond appeared, denied the petition's allegations, and stated that he was unaware of any American Indian heritage. The court sustained the petition, detained the children, granted the parents monitored visits with DCFS discretion to liberalize visitation, appointed counsel for each parent, and ordered Raymond to return the next day with Raymond Jr. and Jesse. The court found ICWA inapplicable as to Raymond. On May 6, 2004, Raymond brought Raymond Jr. and Jesse to court. The court ordered them placed in the same foster home as Angel and granted Raymond unmonitored visits of up to three hours at least three times a week.

In an interim review report filed on May 13, 2004, DCFS stated, "The Indian Child Welfare Act does not apply," and attached documents showing Raymond's previous convictions for misdemeanor use, and felony possession, of narcotics, his warrant for driving while intoxicated, and his arrest for inflicting corporal injury on a cohabitant in January 2004. In its report for the jurisdiction/disposition hearing on May 26, 2004, DCFS repeated its general statement that ICWA did not apply, but noted that Celia had told the DCFS caseworker that she thought her father had Indian heritage but did not know which tribe. Celia gave her father's and paternal grandmother's names and said that her father's birthplace was unknown and that he never knew his father. Celia admitted a 2002 conviction for driving while intoxicated that resulted in her losing her driver's license and being ordered to attend Alcoholics Anonymous for six months. She admitted to ingesting cocaine once during her recent pregnancy, just a few days before Angel was born, and to having used cocaine twice in one year eight years earlier, but she attributed the positive test result for opiates to medical treatment during pregnancy. She denied having a drinking problem. Celia also admitted having had domestic violence problems with the father of one of her older children. Raymond said he had used marijuana and cocaine in the 1980s, but not since 1986. He denied having any drug problem or any awareness that Celia used drugs during her pregnancy.

Both Celia and Raymond attended the May 26 jurisdiction/disposition hearing, where the court sustained the petition's allegations that Celia was a current user of cocaine, that the three older half-siblings had been detained due to Celia's problems with drugs and domestic violence, and that Celia had failed to comply with court orders or to reunify with those children. The court deleted from the petition allegations that Raymond knew or should have known of Celia's drug abuse in exchange for his submission to court jurisdiction and agreement to participate in a court-ordered case plan.[2] The court ordered Celia to enroll in drug rehabilitation, random drug testing, parent education, and individual counseling programs. It ordered Raymond to attend parent education classes

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[2] See Cal. Rules of Court, rule 5.682; *In re S.G.* (2003) 112 Cal.App.4th 1254, 1258-1259.)

and individual counseling for domestic violence, to undergo six random drug tests, and to enroll in drug rehabilitation if any test showed positive results. The court granted Celia monitored visits and Raymond unmonitored visits, with DCFS given discretion to liberalize visitation for both parents.

By the six-month review hearing on November 30, 2004, Raymond had completed parenting classes and six random drug tests, though he had missed some test dates in between. He had enrolled in individual counseling in September 2004, but missed three appointments, was 40 minutes late to another, and only had completed two full sessions. The program staff also suspected that he had come to one session under the influence of alcohol and recommended that he receive services for alcohol abuse. Celia's drug tests showed negative results except for prescription medications. She had completed a parenting course, and she was participating in drug rehabilitation and counseling. The parents' visits with their children had occurred "without incident." Raymond and Celia requested a contested hearing seeking return of the children, which the court set for January 12, 2005. At the latter hearing, the court still found jurisdiction over the children to be necessary, but ordered DCFS to prepare a progress report within three months to address possible return of the children. The court found both parents in compliance with the case plan.

By the hearing on April 12, 2005, Celia had completed a six-month drug rehabilitation program, but had missed four random drug tests between January and March 2005. Raymond had attended only half of his scheduled counseling sessions and had not achieved program goals. Although the parents had begun conjoint counseling in February 2005, they had missed three sessions and showed alarming volatility in the sessions they attended, accusing each other of physical and emotional abuse and of abusing alcohol, and at times smelling of alcohol. The parents missed a weekend visit with the children in November 2004, canceled two consecutive weekend visits in December 2004, and often were at least 45 minutes late to other visits. The parents blamed eviction troubles, transportation problems, Celia's recent abortion, and serious

marital discord for their irregular visits. Although the court had ordered them back in April 2005, neither parent appeared at the hearing.

The 12-month review hearing on July 13, 2005 exposed additional problems. The parents continued to miss some weekend visits, including one after a Friday night party where Raymond drank alcohol. After being evicted in May 2005, the parents had no permanent home. DCFS refused to allow them to have weekend visits at the home of a friend because that friend had an open dependency case, so the parents arranged to have visits at the paternal grandfather's home, but DCFS learned that the visits were occurring at the friend's house. The foster parents found that the children experienced an unusually high rate of sickness after visits, as well as coming home tired, hungry, and with dirty clothes. The children also showed sleep disturbances, disciplinary problems, and combative or fearful behavior after visits. An anonymous informant reported concerns about the parents' inadequate care, cocaine and alcohol abuse, physical and verbal abuse of each other, and verbal abuse of the children during weekend visits. Raymond Jr. reported that he had seen Celia hit Raymond and that she also had hit or spanked Raymond Jr. on the buttocks. The parents had missed four of eleven conjoint therapy sessions and admitted to drinking frequently. Celia had missed eight drug tests, had tested positive for cocaine in July 2004, and declined to take the psychotropic medication her therapist recommended. Neither parent appeared at the July 2005 hearing. The interim judicial officer continued the hearing for the regular judge's return.

At a followup hearing on August 12, 2005, which both parents attended, the court ordered the parents to comply with their case plan, attend mandated programs regularly, and observe DCFS rules on visitation locations. The court also ordered Celia to get appropriate psychiatric care. It found the parents in partial compliance with their case plan.

Both Celia and Raymond attended the 18-month review hearing on November 7, 2005. The parents had missed three more weekend visits, as well as several conjoint counseling sessions, and Raymond had missed 17 individual counseling sessions since April, while Celia had missed four more random drug tests since July. Raymond Jr. and

Jesse continued to show sleep disturbances, combativeness, and fearfulness after weekend visits. All the children showed developmental delays. Various anonymous callers reported domestic violence, substance abuse, and other problems in the parents' home. In August, Celia told her therapist that Raymond had been verbally and physically abusive and sexually inappropriate with her, including throwing her out of the house. Raymond admitted hitting Celia in frustration. The caseworker, therapist, and foster parents all had witnessed the parents' heated verbal arguments. Noting that the parents already had received 18 months of reunification services with little sign of progress, DCFS recommended that the court set a section 366.26 hearing to terminate parental rights and allow the foster parents to adopt the children. The parents requested a contested hearing, and the court continued the proceedings to December 9, then to January 9, 2006.

On December 9, 2005, counsel for the children filed a section 388 petition requesting the court to limit the parents to monitored visits. The court set the petition hearing for December 13, 2005 and ordered the parents, who were at the December 9 hearing, to appear without further order, notice, or subpoena. They did not attend, however, and on December 13, the court granted the children's petition.

On January 9, 2006, the dependency court terminated the parents' reunification services, finding them not in compliance with the case plan and their progress to be marginal and incomplete. The court set a permanency planning hearing pursuant to section 366.26 for May 8, 2006 and ordered the parents, who were both present, to return without further notice. The court maintained the parents' existing monitored visitation and ordered a bonding study regarding the parents, children, and foster parents.

On April 24, 2006, court-appointed psychologist Dr. Alfredo Crespo submitted a 29-page bonding evaluation. Dr. Crespo opined that the children were relatively detached from their parents but closely bonded to their foster mother. He also noted that the parents, to some extent, were in denial regarding their problems and the children's problems.

In a report for the May 8, 2006 section 366.26 hearing, the caseworker reported regarding parental visits, "Parents have continued to visit children (with occasional gaps) with an average frequency of approximately 2 to 3 times a month over the last two-year supervision period. Since the last hearing of 11/7/06 [sic] visits have been monitored and these visits have occurred without incident or detriment to the well-being of the minors." Both parents were present at the May 8 hearing. The court continued the matter to June 1, 2006, for a contested section 366.26 hearing and ordered the parents to return to court without further notice. On June 1, however, Celia's counsel requested a four-week continuance, informing the court that Celia, who was then pregnant again, was required to stay in bed and expected to deliver her baby in a week. The court continued the hearing to June 29, 2006, and ordered counsel to notify their clients.

On June 29, Celia filed a section 388 petition requesting that the court return her children to her and alleging changed circumstances based on her bonding with her children, her completion of her case plan, and her drug-free lifestyle since May 2004.[3] The court scheduled a section 388 hearing for July 25, 2006 and ordered DCFS to file a report responding to the petition.

Before the continued sections 366.26/388 hearing, DCFS filed a report reviewing its permanency plan and noting that although the parents' monitored visits with the children seemed not to affect Jesse or Angel negatively, Raymond Jr. would sometimes isolate himself socially after these visits and would act aggressively toward his brothers. The foster parents said that Raymond Jr.'s nightmares had stopped after the unmonitored weekend visits ended. The court ordered DCFS to facilitate the parents' monitored visits and to update information on the parents' visits in the next report.

In its report on Celia's section 388 petition for the hearing on July 25, 2006, DCFS noted that Dr. Crespo's bonding study contradicted Celia's claim of significant bonding

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3 Celia's section 388 petition consisted of the court's standard checklist form plus a page of handwritten assertions that "Significant bonding exists between the minors and mother," "Mother has completed all her assigned programs and has continued random drug testing voluntarily for two years," "Mother has maintained a drug free lifestyle since May 2004," and "The parents visit regularly and the children are emotionally bonded to them. The WIC .26 (c)(1)(A) exception applies."

with the children; that contrary to her claim that she had completed all ordered programs and drug testing, Celia had missed 20 drug tests, had irregular attendance at her conjoint counseling, and admitted serious recent domestic violence problems; that her positive drug test results for cocaine on July 30, 2004, belied her claim of having been drug-free since May 2004; and that the parents' visitation was irregular. The record indicates that neither Celia nor Raymond was present.[4] The court continued the hearing to August 24, 2006, because Raymond's usual counsel was ill. On August 17, however, the court granted Celia's counsel's ex parte motion for a continuance because he would be out of the state throughout that week. Raymond's counsel was present. The court ordered each counsel to notify their respective clients that the hearing would recommence on October 11, 2006.

Neither parent was present on October 11, 2006. Counsel for the parents presented no evidence. Finding that proper notice of the hearing had been given, the court denied Celia's section 388 petition, observing that "the report indicates [Celia] is deficient in all areas of complying with the . . . court-ordered plan, and visitation." Stating that it had read and considered all the reports in the record, the court found clear and convincing evidence that the children would not benefit from continued parental contact and terminated the parents' parental rights. Celia and Raymond each timely appealed.

DISCUSSION

A

Both Celia and Raymond contend that the record demonstrates that they were denied effective assistance of counsel by their respective counsel's silence at the sections 388/366.26 hearing on October 11, 2006.[5] We disagree.

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4 Celia contends that she appeared at the July 25, 2006 hearing. Both the minute order and the transcript indicate that she did not.

5 Specifically, Celia contends that her trial counsel improperly failed to inform the court that she had born another son, Vincent, and elicit testimony that he remained in her custody; to cross-examine the DCFS caseworker regarding insufficient or out-of-date information in the agency's reports pursuant to

"All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel." (§ 317.5, subd. (a).) The test for showing ineffective assistance of counsel in dependency proceedings is the same test used in criminal proceedings. (See *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667-1668; see also *In re Elizabeth G.* (2001) 88 Cal.App.4th 496, 502-503; *In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.) An appellant claiming ineffective assistance of counsel must show "(1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice." (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146-1147; see also *Strickland v. Washington* (1984) 466 U.S. 668, 688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) There is a strong presumption that counsel's conduct falls within the wide range of adequate professional assistance. (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) A reviewing court may reverse on the ground of inadequate assistance on appeal only if the record affirmatively discloses no rational purpose for counsel's act or omission. (See *People v. Lucas* (1995) 12 Cal.4th 415, 436-437; *People v. Osband* (1996) 13 Cal.4th 622, 700-701.)

To establish prejudice, the defendant must show that there is a reasonable probability, sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different but for counsel's unprofessional errors. (*People v. Montoya*, *supra*, at p. 1147; see also *In re Kristin H.*, *supra*, 46 Cal.App.4th at p. 1668.) The appellant must prove prejudice as a demonstrable reality, not merely by speculation as to the effect of counsel's errors or omissions. (*People v. Williams* (1988) 44 Cal.3d 883, 937.) A court "'need not determine whether counsel's performance was deficient before examining the prejudice suffered by [the appellant] as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of

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sections 366.26 and 388, or to object to these alleged flaws; to assert her beneficial relationship with her children pursuant to section 366.26, subdivision (c)(1)(A); or to offer other evidence or argument on her behalf. Raymond offers basically the same arguments as to his counsel. In their habeas corpus writ petitions, both parents also maintain that their respective counsel failed to notify them of the October 11, 2006 hearing.

lack of sufficient prejudice . . . , that course should be followed.'" (*In re Elizabeth G.*, *supra*, 88 Cal.App.4th at p. 503; see also *In re Nada R.*, *supra*, 89 Cal.App.4th at p. 1180.)

Taking the latter approach, we find that the record shows no reasonable probability that Celia or Raymond would have had better outcomes had their attorneys acted differently, or had the parents been present at the October 11, 2006 permanency hearing, because there was no substantial likelihood that the dependency court would have granted Celia's section 388 petition. A parent who petitions to modify an existing dependency court order under section 388 must show, by a preponderance of the evidence, both changed circumstances and that the modification would be in the child's best interest. (§ 388; Cal. Rules of Court, rule 5.570(a), (h); *In re Casey D.* (1999) 70 Cal.App.4th 38, 47, 48.) A change of circumstances "must be of such significant nature that it requires a setting aside or modification of the challenged prior order." (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.) Section 388 requires changed, not merely changing, circumstances. (See *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 49.)

As to Celia's section 388 petition, given her many missed drug tests, her use of cocaine at least once after the children were detained, the volatility and violence in her relationship with Raymond, evidence of her drinking, and her irregularity in attending visits and conjoint counseling sessions, Celia could hardly show positively changing circumstances, let alone truly changed circumstances as required by section 388. Also, given Dr. Crespo's detailed study indicating limited bonding between the parents and children, together with the evidence of improper conditions and behavior in the parents' home during unmonitored weekend visits and of the children's emotional disturbance following those visits, Celia also had little probability of convincing the court that returning the children would be in their best interest.

Regarding termination of parental rights under section 366.26, there was similarly little probability that the dependency court would not have terminated Celia and Raymond's parental rights even if trial counsel had acted differently. After reunification services have been terminated and a section 366.26 hearing has been set, the primary

focus of dependency proceedings shifts from parental reunification to the child's need for stability and permanency (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310), and a court must consider the strong legislative preference for adoption from that point onward. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) In such cases, termination of parental rights is rebuttably presumed (see *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310), unless a parent can establish that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c).

Both parents maintain that they each had meritorious "defenses,"[6] which counsel failed to raise, pursuant to section 366.26, subdivision (c)(1)(A), which creates an exception to termination of parental rights where "[t]he parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." Courts have interpreted the exception to require a very significant and beneficial relationship that promotes the child's well-being to a degree that outweighs the benefits the child would gain from a permanent home with new adoptive parents, such that severing the natural parent/child relationship would deprive the child of such a substantial, positive emotional attachment that the child would be greatly harmed. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.) A sufficient relationship must be of the sort that "arises from day-to-day interaction, companionship and shared experiences" resulting from regular visits and contact. (*Brandon C.*, *supra*, 71 Cal.App.4th at p. 1534, quoting *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The parent must occupy a parental role in the child's life and provide the sort of ongoing care and nurturing that parents normally provide. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) Again, given Dr. Crespo's finding of limited bonding, the extensive evidence that the unmonitored weekend visits had a detrimental impact on the children, the irregularity of the parents' visits during the dependency proceedings, the change from unmonitored to monitored visits, and the general lack of evidence of the parents filling a parental role,

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6 We note that dependency proceedings differ from criminal prosecutions, and that the purpose of dependency proceedings is to assure the child's best interest, not to prosecute the parents. (See *In re Cindy L.* (1997) 17 Cal.4th 15, 30.)

there is no reasonable probability that the dependency court would have found a beneficial relationship sufficient to satisfy section 366.26, subdivision (c)(1)(A) even if counsel had raised the argument.[7]

In their respective habeas writ petitions, both parents further argue that their counsel did not properly notify them of the October 11, 2006 sections 388/366.26 hearing,[8] and that they would have appeared and had a reasonable probability of a different outcome had they known of the hearing.[9] The parents attach declarations alleging that they received no notice and that Raymond's trial counsel admitted to having told Celia that he "messed up and you and your husband missed the court date and the judge took away your parental rights."

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7 Both parents contend that the review of parental visitation in DCFS's May 8, 2006 section 366.26 report was inadequate under section 366.22, subdivision (b)(2), and that their counsel should have challenged the report on that basis. That statute provides that in preparation for a section 366.26 hearing, the child welfare agency must prepare an assessment that includes a "review of the amount of and nature of any contact between the child and his or her parents . . . since the time of placement." (§ 366.22, subd. (b)(2).) The statute provides no additional details regarding what is a sufficient review, however, and the parents cite no other authorities to demonstrate that the admittedly brief review of parental visitation in the May 2006 report is legally insufficient. Celia also faults her trial counsel for not bringing to the court's attention that she had born a new son in June 2006, and that DCFS apparently had not detained him. While this fact might provide some weak support for her claim of changed circumstances under section 388, it has little bearing on determining the detained children's best interest pursuant to section 388 or on finding a beneficial relationship or detriment from termination of parental rights pursuant to section 366.26, subdivision (c)(1)(A).

8 Both trial counsel claim to have notified their respective clients.

9 Raymond and Celia also contend that they were denied due process by their respective counsel's alleged failure to notify them of the continued section 366.26 hearing dates. Notably, they do not contend that there was a flaw in the court's provision of notice, but only in their receipt of that notice. They cite no statutory or other authorities showing that the dependency court, and not just their counsel, erred, and they concede that the court's effort to notify them through their counsel "comports with section 294[.]" As the County Counsel points out, however, to the extent the parents maintain that the alleged insufficient notice violated their rights, any such "lack of notice of a continuance is in the nature of a trial error," not a structural error, given that both parents received proper notice of the original section 366.26 hearing and earlier events in these dependency proceedings. (*In re Angela C.* (2002) 99 Cal.App.4th 389, 395.) The court in *In re Angela C.* applied the *Chapman* standard in finding any such error harmless beyond a reasonable doubt. (*In re Angela C.* at pp. 395-396; *Chapman v. California* (1967) 386 U.S. 18.) Assuming without deciding that the parents received insufficient notice in this case, and assuming that the *Chapman* standard is correct in this context, we find such error to be harmless beyond a reasonable doubt, given the record in this case and the parents' irregular attendance at hearings.

The habeas corpus petition procedure allows an appellant to raise issues and evidence that do not appear in the appellate record and so overcome a record that is deficient due to counsel's substandard performance. (See *People v. Mendoza-Tello* (1997) 15 Cal.4th 264, 266-267.) Yet even using the habeas petition approach, a party claiming inadequate assistance of counsel still must make a prima facie showing of prejudice from counsel's alleged deficiencies. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1668, 1671-1672.) Although the declarations from the parents and their respective trial and appellate counsel attached to their habeas petitions may make a prima facie showing that the parents did not receive notice of the October 11, 2006 hearing, the parents offer nothing beyond the record—no evidence of changed circumstances pursuant to section 388, no evidence of a beneficial relationship pursuant to section 366.26, subdivision (c)(1)(A), or any other evidence—to suggest that the outcome of the proceedings would have been any different had the parents received notice. (See, by contrast, *id.* at pp. 1668-1672.) Although the parents argue that the evidence supporting the trial court's determinations pursuant to sections 388 and 366.26 was out of date, and that counsel should have challenged it on that basis, their habeas petitions did not offer any more up-to-date evidence that would support a different result. Absent a prima facie showing of prejudice based on evidence outside the record, the same reasoning that applies to the parents' appeals of the dependency court's orders pursuant to sections 388 and 366.26 also necessarily applies to both parents' petitions for writs of habeas corpus.[10]

B

Celia contends that ICWA inquiry and notice was insufficient in this case, and DCFS concedes the point. ICWA protects American Indian tribes' and families' rights by setting minimum standards for the removal of Indian children from their homes, encouraging such children's placement in other Indian homes reflecting Indian culture,

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10 The same reasoning also applies to the parents' various subsidiary arguments, such as Raymond's contention that his counsel failed to provide adequate assistance by not requesting a continuance when Raymond did not appear. We fail to see what further delay in these already prolonged proceedings could have accomplished.

and allowing appropriate Indian tribes to take jurisdiction over dependency proceedings involving foster placement of, or termination of parental rights to, an Indian child at any point in those proceedings. (25 U.S.C. §§ 1902, 1911; *In re S. B.* (2005) 130 Cal.App.4th 1148, 1157.) To assure this tribal participation in dependency proceedings, ICWA and related federal or state rules and guidelines require juvenile courts and dependency agencies to conduct a threshold inquiry into whether a child in dependency proceedings is or may be an Indian child, and if so, to notify the federal Bureau of Indian Affairs (BIA), and any known tribes in which the child might be eligible for membership, of the dependency proceedings. (Cal. Rules of Court, rule 5.664, subd. (d); *In re S. B.*, *supra*, 130 Cal.App.4th at pp. 1157-1158.) Where such notice is lacking, an appellate court must invalidate actions taken in violation of ICWA and remand the case.**11** (*In re I. G.* (2005) 133 Cal.App.4th 1246, 1251.) DCFS concedes that inquiry and notice requirements were not met. Therefore, we will reverse and remand solely to assure proper compliance with these requirements.

DISPOSITION

The order denying Celia's section 388 petition is affirmed. Both parents' petitions for writs of habeas corpus are denied. The order terminating Celia and Raymond's parental rights is reversed subject to the following conditions. The matter is remanded to the dependency court for the limited purpose of assuring that DCFS inquires into Celia's alleged American Indian heritage and notifies BIA and any and all appropriate tribes of the dependency proceedings involving Raymond Jr., Jesse, and Angel. DCFS shall give the dependency court proof of such notice, including copies of the notice sent, proof of service, return receipts, and any responses received, as provided in California Rules of court, rule 5.664(f). If neither BIA nor any appropriate tribe responds within 60 days of

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11 We agree, however, with the reasoning of the court in *In re Brooke C.* (2005) 127 Cal.App.4th 377, that lack of proper ICWA notice is not jurisdictional, so that the only order requiring reversal is the termination of parental rights unless and until Raymond Jr., Jesse, and Angel are determined to be Indian children as defined by ICWA. (See *id*. at pp. 384-385; *In re Jonathon S.* (2005) 129 Cal.App.4th 334, 340, fn. 2; but see *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779 [disagreeing with *In re Brooke C.*].)

receipt of said notice and states that the children are or may be eligible for tribal membership, the dependency court shall reinstate the order terminating parental rights. If, however, the children are determined to be Indian children under ICWA, Celia or Raymond may then petition the dependency court to invalidate any earlier orders that violated sections 1911, 1912, or 1913 of Title 25 of the United States Code. (25 U.S.C. § 1914; Cal. Rules of Court, rule 5.664(n); *In re Brooke C.*, *supra*, 127 Cal.App.4th at pp. 385-386.)

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P.J.

JACKSON, J.*

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)