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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re AMANA W., a Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

EDDIE W.,

Defendant and Appellant.

D050483

(Super. Ct. No . EJ2676A)

APPEAL from an order of the Superior Court of San Diego County, Gary M.

Bubis, Judge. Reversed and remanded with directions.

Eddie W. appeals a judgment of the juvenile court terminating his parental rights to his minor daughter Amana W. under Welfare and Institutions Code<sup>1</sup> section 366.26.

Eddie contends: (1) the court erred by summarily denying his section 388 modification

petition; and (2) the court and the San Diego County Health and Human Services Agency (Agency) did not comply with the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) requiring reversal and remand for proper notice. The Agency agrees with the notice contention. We conclude the court did not err by summarily denying the section 388 petition. However, we further conclude the record does not contain sufficient evidence that proper notice was given under the ICWA. Accordingly, we affirm the order and reverse the judgment for the limited purpose of ensuring compliance with the ICWA.

#### FACTUAL AND PROCEDURAL BACKGROUND

Amana W. was born in June 1998 to Eddie W. and Laura S<sup>2</sup>. In October 2005, the Agency filed a petition under section 300, subdivision (b) and (g), alleging Amana was at risk of suffering serious physical harm because both Eddie and Laura excessively abused methamphetamines while Amana was in the home. The petition further alleged neither parent would be able to properly care for Amana because Eddie was incarcerated and Laura's whereabouts were unknown.

Laura had a long history of drug abuse and a record that included a number of child welfare referrals and criminal arrests. Eddie had been Laura's "pimp" and also had child welfare referrals against him. After Amana's birth, Laura claims she left Amana in the care of a nonrelative. Amana lived with this nonrelative until June 2004, at which

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code

<sup>2</sup> Laura S. is not a party to this appeal.

time Amana went to live with two of her siblings in the care of Mary C., another nonrelative. Laura did not provide Mary with any financial support. The social workers noted Amana appeared bonded to her siblings and to her caretaker Mary. Amana referred to Mary as "mom." The court declared Amana a dependent, placed her in the custody of Mary and ordered reunification services for Laura but not Eddie.

Eddie remained in prison during the next six months. At the initial six-month review hearing, Eddie requested that the court consider Amana's paternal grandmother for placement. The court ordered that the grandmother's home and other potential relatives be evaluated for potential placement. At the contested six-month review hearing, the court found the parents had not made progress and scheduled a section 366.26 selection and implementation hearing.

The court also considered Eddie's section 388 modification petition. Eddie's petition sought to have the court place Amana in the care and custody of her paternal grandmother. He alleged as changed circumstances that the grandmother's home had been evaluated with "positive results." Eddie believed it would be in Amana's best interests to live with her grandmother because the grandmother had cared for Amana in the past, visited Amana, and Amana would benefit from living with a relative. Eddie asserted the grandmother was willing to take all three minors but admitted the grandmother did not know or have a relationship with Amana's siblings.

At the prima facie hearing, the Agency made an offer of proof that Amana had a "strong preference" to remain in her current caregiver's home with her siblings. Amana's counsel agreed and stated Amana was "very, very bonded" to her siblings. After considering

Eddie's contentions, the position of the Agency and minor's counsel, the court summarily denied the petition. The court found the petition did not meet the prima facie requirement of changed circumstances and there was no evidence in the petition showing it would be in Amana's best interests to change placement. Amana instead wanted to remain with Mary C. and her siblings. The court scheduled a section 366.26 selection and implementation hearing.

In the reports submitted in preparation for the section 366.26 hearing, the Agency noted Amana had no contact with Eddie and had not seen him for about four years. Eddie remained in jail and faced another six years in prison. The social workers arranged for visits between Amana and her grandmother. The visits initially took place at the grandmother's home but later were moved to the Agency's offices after the social worker observed that the grandmother spent little time interacting with Amana.

The grandmother claimed Amana had lived with her until Amana was 18 months old. She further claimed she made attempts to gain custody of Amana for quite some time but became involved in the dependency process only after she learned Amana could be freed for adoption. The grandmother admitted she did not visit Amana on more than three or four occasions during the three years before dependency proceedings began.

The social worker did not believe placing Amana with the grandmother would be appropriate. The social worker noted the grandmother's interaction with Amana was minimal. Conversations rarely took place and they infrequently made eye contact. Amana appeared to enjoy the visits but she told social workers she did not want to live with her grandmother, even if she was placed in the grandmother's care along with her

two siblings. Amana resisted overnight visitation and expressed that she was afraid in her grandmother's house because in the past, her grandmother had asked her and Laura to leave the home. Concerning the grandmother's commitment to Amana's siblings, the grandmother initially indicated she solely wanted to adopt Amana but would adopt the younger two siblings if necessary. When interacting with Amana's siblings, the grandmother appeared overwhelmed by the responsibility of having to monitor all three children.

Before the section 366.26 hearing, the social workers recommended the court change Amana and her siblings' placement to the home of Kimberly R., a relative to one of Amana's younger siblings. Kimberly was a licensed foster care provider and had participated in courses pertaining to foster youth. Kimberly was employed and was eager to adopt Amana and her two siblings. The change in placement was authorized for Amana and her two siblings. The social workers observed that Amana was very happy and excited with her new living arrangements and expressed her desire to live with Kimberly.

In February 2007, Eddie filed a second 388 petition seeking to have Amana and her siblings placed in the paternal grandmother's home. As changed circumstances, Eddie raised the same allegations as in his September 2006 petition. As to best interests, Eddie alleged Amana lived with her grandmother for three years, the grandmother was willing to care for Amana and her siblings, and she would facilitate visits between Amana and Eddie.

The court addressed Eddie's second section 388 petition at a prima facie hearing. Eddie argued Amana had a relationship with her grandmother and believed that his own relationship with Amana would be facilitated if she lived with her grandmother. He further argued Amana recently was moved to Kimberly's home and another move to the grandmother's home would not be prejudicial.

The Agency and Amana's counsel reiterated that moving Amana to live with her grandmother would be detrimental and there was not showing of how the move would be in Amana's best interests. The court considered the Agency's reports and arguments of counsel. The court summarily denied the petition finding it did not meet the prima facie requirements showing changed circumstances or best interests. The court determined Amana and her siblings were adoptable by clear and convincing evidence and found no statutory exceptions to adoption applied. The court terminated parental rights and referred Amana for adoption. Eddie timely filed a notice of appeal.

## DISCUSSION

Eddie contends the court erred by summarily denying his second section 388 modification petition seeking a change in Amana's placement. He asserts he made a prima facie showing circumstances had changed and the proposed modification was in Amana's best interests because she could live with her paternal grandmother.

### A.

Under section 388, a party may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new

evidence, and (2) the proposed modification is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.)

The petition must be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*Id.* at p. 310.) "[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing." [Citation.]" (*Jasmon O.*, *supra*, 8 Cal.4th at p. 415; see also *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798-1799.) However, if the liberally construed allegations of the petition do not make a prima facie showing that the relief sought would promote the best interests of the child, the court may deny the petition without an evidentiary hearing. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 322-323.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

## B

As changed circumstances, Eddie alleges that the grandmother's home had been evaluated with "positive results." However, this fact does not indicate any new changes or developments or changes had taken place since the last section 388 petition that would warrant placing Amana with her grandmother. The record shows Eddie alleged this same change in his initial section 388 petition, which was denied. Eddie did not set forth new facts for the court's consideration in this petition.

Even had Eddie shown changed circumstances, he did not show it was in Amana's best interests to be placed with her grandmother. The record shows the grandmother did have a relationship with Amana and Amana may have lived with her grandmother as a small child. However, the relationship was not one that would warrant placing Amana and her siblings in the grandmother's care. The grandmother admitted before the dependency proceedings began, she did not visit Amana more than three or four times in the past three years. During that time, Amana remained in the care of nonrelatives and she did not have an ongoing relationship with her grandmother. Only after the grandmother learned Amana's dependency could result in adoption did the grandmother seek custody of Amana. Once visits between Amana and her grandmother took place, the social worker observed the grandmother did not engage or interact with Amana. Conversation was sparse and the two made little eye contact. Amana told social workers she did not want to live with her grandmother or have overnight visits with her. Aside from scheduled visits, the grandmother did not see Amana and rarely appeared at dependency proceedings. In addition, the grandmother had a tenuous relationship with Amana's younger siblings and initially did not want to care for them. She eventually stated she would care for all three girls if the Agency required it. The record shows Amana is bonded to her siblings and she wants to live with them. Therefore, the need for a secure home committed to caring for all three siblings is of great importance. The minors' current caregiver remains committed to adopting all three siblings. Amana needed to feel safe and secure at this point in the dependency. She and her two siblings were doing well in their current placement and wanted to remain there. Any delay in



ensuring Amana's stability after years of living with different caretakers was not in her best interests. Because the facts alleged would not have sustained a favorable decision on the section 388 petition, Eddie was not entitled to an evidentiary hearing. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 808; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.)

## II

Eddie contends the court erred by finding ICWA did not apply because Agency did not comply with the notice requirements of ICWA. The Agency acknowledges a limited remand in Amana's case is necessary for compliance with the ICWA.

### A

When a court "knows or has reason to know that an Indian child is involved" in a juvenile dependency proceeding, a duty arises under ICWA to give the Indian child's tribe notice of the pending proceedings and its right to intervene or obtain jurisdiction over the proceedings by transfer to the tribal court. (25 U.S.C. § 1912(a); Cal. Rules of Court, rule 5. 664, subd. (f)(5); *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 941; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) " 'Of course, the tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending.' [Citation.] 'Notice ensures the tribe will be afforded the opportunity to assert its rights under the [ICWA] irrespective of the position of the parents, Indian custodian or state agencies.' [Citation.]" (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253.) The tribe determines whether the child is an Indian child within the meaning of ICWA, and its determination is conclusive. (*Id.* at p. 255.)

Notice under ICWA must contain enough information to constitute meaningful notice. "The Guidelines for State Courts; Indian Child Custody Proceedings (44 Fed.Reg. 67584 (Nov. 26, 1979)) (Guidelines), which are designed to implement . . . ICWA, require that the notice include . . . the name of the Indian child; his or her tribal affiliation; a copy of the dependency petition; the petitioner's name and address of the petitioner's attorney; and a statement of the right of the tribe to intervene in the proceeding. (Guidelines, at p. 67588.)" (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) Notice must be sent by registered or certified mail, with return receipt requested, to all tribes of which the child may be a member or eligible for membership. (Cal. Rules of Court, rule 5.664, subds. (f)(1), (f)(3); *In re Brooke C.* (2005) 127 Cal.App.4th 377, 384.) An original or a copy of each ICWA notice must be filed with the juvenile court along with any return receipts (Guidelines, *supra*, 44 Fed.Reg. at p. 67588) "so there will be a complete record of efforts to comply with [ICWA ]." (*Id.* at p. 67589.)

Notice under ICWA must also include, if known, "(1) the name, birthplace, and birth date of the Indian child; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child's parents, grandparents, great-grandparents and other identifying information; and (4) a copy of the dependency petition. (25 C.F.R. § 23.11(d)(3) (2003); 59 Fed.Reg. 2248 (eff. Feb. 14, 1994).) '[T]o establish tribal identity, it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors.' (25 C.F.R. § 23.11(b) (2003).)" (*In re Karla C.*, *supra*, 113 Cal.App.4th at p. 175.)

The burden is on the Agency "to inquire about and obtain, if possible, all of the information about a child's family history" (*In re C.D.* (2003) 110 Cal.App.4th 214, 225), and the juvenile court has an affirmative duty to assure the Agency has complied. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) "[Because] the failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe, notice requirements are strictly construed." (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) When proper notice under ICWA is not given, the court's order is voidable. (25 U.S.C. § 1914; See *In re Francisco W.* (2006) 139 Cal.App.4th 695, 704-710; *In re Karla C., supra*, 113 Cal.App.4th at p. 174.)

## B

In August 2006, Eddie submitted a second paternity questionnaire informing the court of his American Indian heritage through the Blackfoot tribe. The court ordered the Agency to investigate Eddie's claim and report back its findings. The record does not show further references pertaining to ICWA and is silent as to whether the Agency complied with the court's directions. Because there is no evidence of reasonable inquiry or notice as required by the ICWA, a limited remand in the case is necessary for compliance with the ICWA. (*In re Francisco W., supra*, 139 Cal.App.4th at pp. 704-710; *In re Karla C., supra*, 113 Cal.App.4th at pp. 178-179.)

## DISPOSITION

The court's order denying the section 388 petition is affirmed. Based on the failure to comply with notice provisions of ICWA, the judgment terminating parental rights is reversed. The juvenile court is directed to comply with the notice provisions of

the ICWA. If, after proper notice and inquiry, no tribe intervenes, the court shall reinstate the judgment. If a tribe intervenes, the court is directed to conduct a new selection and implementation hearing under section 366.26 in accordance with the ICWA. (See *In re Jonathon S.* (2005) 129 Cal. App.4th 334, 343; *In re Glorianna K.* (2005) 125 Cal.App.4th 1443, 1452; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111-112.)

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HUFFMAN, J.

WE CONCUR:

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BENKE, Acting P. J.

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O'ROURKE, J.