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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re JERMAINE H., a Person Coming
Under the Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

CARLOS H.,

Defendant and Appellant.

A107483

(Alameda County
Super. Ct. No. 186249)

Carlos H. (appellant) appeals the juvenile court’s order denying his petition for modification, pursuant to Welfare and Institutions Code section 388,¹ and its order terminating his parental rights, pursuant to section 366.26, with respect to his child, Jermaine H. On appeal, appellant contends (1) his due process rights were violated by the failure of the Alameda County Social Services Agency (Agency) to provide him with notice of the relevant hearings; (2) the juvenile court abused its discretion when it denied his section 388 petition; (3) his due process rights were violated by the Agency’s failure to obtain paternity testing within a reasonable time; and (4) the failure to comply with the notice requirements of the Indian Child Welfare Act (ICWA) requires the order determining parental rights be reversed and the matter remanded for compliance.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Because we find that notice was inadequate under ICWA, we shall reverse the order terminating parental rights and remand the matter to the juvenile court so that proper notice can be provided. We shall otherwise affirm the juvenile court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

On November 26, 2002, the Agency filed an original petition, pursuant to section 300, subdivisions (b) and (g), alleging that then two-week-old Jermaine H.'s mother, Robin C., had tested positive for cocaine when she arrived at a hospital due to a threatened premature delivery. Robin C. had received no prenatal care, and two weeks later, Jermaine was born eight weeks premature; he tested positive for cocaine the day after his birth. The petition further alleged that Robin C., who had a long history of unstable housing, was currently homeless. She had admitted to using cocaine for at least 15 years, and she had five other children for whom she was not providing care due to her long history of unremitting drug use. Finally, the petition alleged that the identity of the father was unknown.

In the report prepared on November 26, 2002 for the detention hearing, the social worker reported that Robin C. had five other children, four of whom were living with the maternal grandmother; the status of the fifth child was unknown. A social worker who had visited Robin C. at the hospital after Jermaine's birth reported that Robin was uncommunicative and continually sleeping, although she did inform the social worker that "her greatest concern was that the maternal grandmother not be informed about this latest child." The social worker further reported that she had had no contact with Robin C. because attempts to reach her at the telephone number provided by the hospital had been unsuccessful. A hospital social worker had reported that Robin C. refused to provide a telephone number or address for the maternal grandmother and that "she was not forthcoming regarding information on Jermaine's father."

At the detention hearing, at which Robin C. did not appear, the juvenile court ordered Jermaine detained.

In the December 11, 2002 report prepared for the combined jurisdictional/dispositional hearing, the social worker reported that Jermaine had been

discharged from the hospital and was now in foster care. Robin C.'s whereabouts were unknown and a formal search for her had been initiated. The social worker also noted that "[e]arlier referrals do provide some information regarding the alleged father of one or more of the siblings, Carlos [H.]. However, it does not seem appropriate to report that information since the mother did not identify Mr. [H.] as Jermaine's father."

At the December 12, 2002 jurisdictional/dispositional hearing, at which Robin C. did not appear, the social worker told the juvenile court that the hospital had informed the maternal grandmother of Jermaine's birth. The juvenile court found both allegations in the petition to be true, adjudged Jermaine a dependent of the court, adopted the findings and orders requested by the Agency,² and continued the matter for a six-month review hearing.

In the May 21, 2003 report prepared for the six-month review hearing, the social worker reported that Robin C. had contacted the social worker five times, and each time presented as possibly being under the influence. She had declined to identify a possible father. A formal search had resulted in learning her current address in Oakland. Jermaine was "catching up" developmentally and had become an easy baby to care for. The report identified Jermaine's five siblings, one of whom lived with his father, the rest of whom lived with the maternal grandmother. The maternal grandfather and his wife, who lived in Seattle, Washington, were "very anxious" to have Jermaine placed with them.

The social worker recommended that reunification services be terminated and that a section 366.26 hearing be set.

At the six-month review hearing, which took place on June 4, 2003, the maternal grandmother appeared and stated that she did not know where Robin C. was. The juvenile court asked the maternal grandmother whether she knew of any Native American heritage, to which she responded, "No, I don't. I don't know anything as far as the father

² Among the findings and orders was the order that "[t]he Agency is not required to provide reunification services to the unknown father of Jermaine, unless and until he establishes a legal basis for receiving those services."

is concerned at all.” She also stated that there was no Indian heritage in her own family. The court adopted the findings and orders requested by the Agency and continued the matter for a due diligence hearing on August 20, 2003 and a section 366.26 hearing on October 1, 2003.

In its due diligence report, filed on August 5, 2003, the social worker reported that she had requested Jermaine’s birth certificate on June 27, 2003. The birth certificate, which she received on July 1, 2003, listed appellant as Jermaine’s father. On July 3, 2003, the social worker submitted a formal search request for appellant and, on July 24, 2003, she received a letter from him indicating he was in Sierra Conservatory Center State Prison. He requested a paternity test to determine if he was Jermaine’s father.

The social worker also reported, as to Robin C.’s other five children, that the oldest lived with his father out-of-state, the second oldest lived with the maternal grandfather and his wife, and the younger three lived with the maternal grandmother. The maternal grandmother did not feel she could take on another child, but the maternal grandfather and his wife, who were raising Jermaine’s 10-year-old sister, were willing to take in Jermaine as well.

Also on August 5, 2003, the Agency filed an ex parte application requesting court approval of Jermaine’s placement with the maternal grandfather and his wife in Seattle, Washington. The court granted the application.

On August 7, 2003, the social worker filed a request for paternity testing for appellant. The court granted the order, with the notation, “update on 8/20/03” with “results no later than 10/1/03.”

At the August 20, 2003 due diligence hearing, the juvenile court appointed counsel for appellant, noted that appellant had already been served with notice of the section 366.26 hearing, and found that the Agency had exercised due diligence in attempting to locate Robin C.

In its September 22, 2003 report prepared for the October 1, 2003 section 366.26 hearing, the social worker recommended termination of the parental rights of Robin C. and appellant, in order to free Jermaine for adoption. Jermaine was now living in the

home of his prospective adoptive parents in Seattle, Washington. Robin C. was in agreement with this recommendation and appellant's position was unknown. Appellant had been personally served with a notice of the October 1, 2003 hearing.

The report also indicated that ICWA did not apply, noting that, when recently questioned, the maternal grandmother had said she did not know if there was any Native American ancestry in her family.

The parents did not appear at the October 1, 2003 hearing. The court found that notice had been given as required by law and continued the matter to the previously-set November 19, 2003 hearing date.

In a November 18, 2003 addendum report, the social worker reported that appellant had been personally served with notice of the November 19, 2003 section 366.26 hearing. Appellant had provided a blood sample on October 17, 2003 and Jermaine had provided a blood sample on November 13, 2003. The results of the paternity test were expected to be available by the end of the week of November 21, 2003. The Agency recommended termination of the parental rights of Robin C., appellant, and any unknown father.

On November 19, 2003, appellant filed a petition, under section 388, to set aside the jurisdictional and dispositional findings and orders made on December 2, 2002. In the petition, he alleged, as changed circumstances or new evidence, that he was not given notice of prior proceedings and did not receive services; he would like to receive reunification services; and he would like to have Jermaine placed with his mother until he was released from prison, at which time he would like to have custody of Jermaine.

At the November 19, 2003 hearing on the section 388 petition, the juvenile court initially found appellant's petition untimely, but continued the matter to December 29, 2003 for a review hearing and to January 12, 2004 for hearings on the section 388 petition and pursuant to section 366.26.

In the status review report prepared on December 24, 2003, the social worker reported that it was more than 99.99 percent certain that appellant is the biological father of Jermaine. Jermaine had adjusted well in his placement with his maternal grandfather,

his wife, and Jermaine's sister. On December 29, 2003, the court continued the matter to January 12, 2004.

On January 6, 2004, appellant filed a second section 388 petition, in which he alleged that he was not given notice of the jurisdictional and dispositional hearings and it was in Jermaine's best interest to have appellant participate in the proceedings. He further stated that he wanted to be involved in his son's life.

The hearings on the section 388 petition and pursuant to section 366.26 were continued to February 23, 2004. In an addendum report prepared on February 10, 2004, the social worker reported that she had requested a declaration of paternity from the Office of Child Support Services and that there was no such declaration on file. The Agency recommended that the juvenile court find appellant to be the biological father of Jermaine, based on paternity test results. Also, at the January 12, 2004 hearing, appellant had claimed Native American ancestry, although he did not identify a tribe, and the social worker was attempting to determine if Jermaine was ICWA eligible. The social worker recommended termination of parental rights as to both parents.

On February 23, 2004, appellant withdrew the original section 388 petition, and the matter was continued to March 23, 2004.

In an addendum report prepared on March 11, 2004, the social worker reported that ICWA did not apply because, due to appellant's failure to inform the Agency of Jermaine's tribal affiliation, the California Department of Social Services was unable to determine whether he possesses Indian ancestry for purposes of ICWA.

On March 23, 2004, the hearing on the section 388 petition began. Social worker Belinda Shavers testified that, on January 24, 2003, she had asked Robin C. who Jermaine's father was, but Robin C. was too intoxicated to respond.

The section 388 hearing could not conclude on March 24, 2004, and so was continued, first to April 23, 2004, and then to June 3, 2004;³ the hearing was later continued again to July 15, 2004. At the continued hearing, social worker Belinda Shavers testified that, prior to January 15, 2003, she asked the maternal grandmother who Jermaine's father was, and the grandmother said she did not know.

Shavers testified that Jermaine's birth certificate, which listed appellant as the father, was issued on June 30, 2003. After receiving the birth certificate, she submitted a search request for appellant on July 3, 2003. Shavers had originally requested the birth certificate under the name, "Jermaine C.," because that was the name always used by Robin C. and the maternal grandparents.

Shavers also received a letter from appellant, dated July 16, 2003, in which he said he would be honored to provide Jermaine a permanent home, and that his mother would take care of Jermaine in the meantime. In the letter, appellant also requested a paternity test, to find out if he was Jermaine's father. Shavers never checked out appellant's mother as a potential caretaker and did not write back to appellant. Appellant never provided any contact information for his mother and his mother never contacted Shavers.

At the continued July 15, 2004 hearing, appellant testified that he had heard that Jermaine had been born before he received notice of the section 366.26 hearing in July 2003. Appellant had six more months to serve in prison before being released.

Immediately following arguments on the section 388 petition, the section 366.26 hearing took place, with submission of the Agency reports the only evidence presented, and the juvenile court took the matters under submission.

On July 19, 2004, appellant filed a "Statement Regarding Paternity," in which he asked the court to enter a judgment of paternity.

Also on July 19, 2004, the juvenile court found that appellant is the biological father of Jermaine, but found the request for a judgment of paternity untimely and further

³ Appellant's counsel requested a continuance of the June 3, 2004 hearing date due to appellant's not being present on that date. The court denied the request based on the numerous continuances that had already occurred.

found that appellant was not the presumed father due to the lack of any parent-child relationship between appellant and Jermaine. The court denied the section 388 petition, finding that there was no requirement to notify appellant of the jurisdictional/dispositional hearing because his identity at the time was unknown.⁴ The court further found that, even if appellant had received notice at the time, he was incarcerated and, almost two years later, remained incarcerated. Thus, he could not have reunified with Jermaine within six months, as would have been required since Jermaine was only one month old at the time he was removed from his mother's custody. (See § 361.5, subd. (a)(2).) The court also found that it was not in Jermaine's best interest "to roll the clock back, so to speak, because the father's pattern of conduct has demonstrated an inability to parent this child under the circumstances."

With respect to the section 366.26 hearing, the juvenile court found that there was clear and convincing evidence that Jermaine would be adopted and found that adoption was appropriate for the permanent plan. The court then terminated the parental rights of Robin C., appellant, and any unknown fathers.

Appellant filed a timely notice of appeal on August 18, 2004, in which he challenged both the juvenile court's denial of the section 388 petition and the termination of parental rights, pursuant to section 366.26. On October 14, 2004, amended orders were filed nunc pro tunc to correct clerical errors in the original orders made under section 366.26.⁵

DISCUSSION

I. Appealability of Issues Related to the Section 388 Petition

The Agency asserts that we do not have jurisdiction to consider appellant's arguments related to the court's denial of his section 388 petition because, in his second

⁴ The court stated that appellant's name was placed on the birth certificate in error, since he was not present at the birth. (See Health & Saf. Code, § 102425, subd. (a)(4).)

⁵ Appellant filed a second notice of appeal on October 6, 2004, stating that the order appealed from was the order made under section 366.26, termination of parental rights and selection and implementation of adoption as the permanent plan.

notice of appeal, appellant did not state that he was appealing from the order denying the petition. (See Cal. Rules of Court, rule 37(c)(1) and (c)(2)⁶; see also, e.g., *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 625.)

It appears that appellant filed the second notice of appeal, on October 6, 2004, to ensure that his appeal would not be precluded due to his failure to appeal from the orders amended nunc pro tunc on October 14, 2004, to correct clerical errors in the orders made pursuant to section 366.26. His previous notice of appeal, from the original orders, expressly challenged both the denial of his section 388 petition and the orders made pursuant to section 366.26.

“When a judgment has been modified, an appeal must be taken from the original judgment if the change was a clerical one Changes which correct errors, mistakes and omissions made through inadvertence, but do not involve the exercise of the judicial function, are considered clerical errors that leave the original judgment intact.” (*Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 743-744; accord, *Mulder v. Mendo Wood Products, Inc.* (1964) 225 Cal.App.2d 619, 635 [where amendment merely corrects clerical error, “the original judgment remains effective and unimpaired and the amendment does not operate as a new judgment from which a new appeal may be taken”].)

Here, because the amended judgment merely corrected clerical errors, the appeal was from the original judgment. Hence, the first notice of appeal—in which appellant challenged both the denial of the section 388 petition and the termination of parental rights under section 366.26—is the operative one, and we have jurisdiction to consider all issues related to the denial of the section 388 petition. (See *Stone v. Regents of University of California, supra*, 77 Cal.App.4th at pp. 743-744; *Mulder v. Mendo Wood Products, Inc., supra*, 225 Cal.App.2d at p. 635.)

⁶ All further rule references are to the California Rules of Court.

II. *Alleged Failure to Provide Appellant with Notice of the Detention Hearing and the Jurisdictional/Dispositional Hearing*

Appellant contends his due process rights were violated because the Agency failed to provide him with notice of the detention hearing and the jurisdictional/dispositional hearing.

Upon the filing of a dependency petition, the Agency is required to notify each parent whose whereabouts are known of all proceedings involving their child. (See §§ 290.1, subd. (a), 302, subd. (b).) If a parent's whereabouts are unknown, the Agency must use due diligence to ascertain his or her whereabouts. (See rule 1440(a).)

Here, appellant argues the Agency did not use reasonable diligence to identify and search for him. Although the Agency did not have his name, appellant asserts it should have inquired about the fathers of Robin C.'s other children and should have requested Jermaine's birth certificate immediately, rather than waiting until June 2003.

First, as the social worker noted in her December 11, 2002 report, the Agency had some information, from earlier referrals, regarding the alleged father of one or more of the other children of Robin C. The social worker's conclusion, that it did "not seem appropriate to report that information since the mother does not identify Mr. [H.] as Jermaine's father," was reasonable in light of the Agency's confidentiality concerns and the fact that such an inquiry would be based on speculation.

Second, the Agency had no reason to request Jermaine's birth certificate since, pursuant to Health and Safety Code section 102425, subdivision (a)(4), "[i]f the parents are not married to each other, the father's name shall not be listed on the birth certificate unless the father and the mother sign a voluntary declaration of paternity at the hospital before the birth certificate is prepared." Since no father was present at Jermaine's birth, the Agency had no reason to expect a father's name to be listed on Jermaine's birth

certificate. This was especially true given that the hospital social worker had reported that Robin C. “was not forthcoming regarding information on Jermaine’s father.”⁷

Appellant also argues the juvenile court failed to inquire about Jermaine’s father, contrary to the requirements of section 316.2, subdivision (a).

Section 316.2, subdivision (a), provides in part: “At the detention hearing, or as soon thereafter as practicable, the court shall inquire of the mother and any other appropriate person as to the identity and address of all presumed or alleged fathers.”⁸ Similarly, rule 1413 provides: “(a) The juvenile court has a duty to inquire about and, if not otherwise determined, to attempt to determine the parentage of each child who is the subject of a petition filed under section 300, 601, or 602. . . . [¶] (b) At the initial hearing on a petition filed under section 300, 601, or 602, and at hearings thereafter until or unless paternity has been established, the court shall inquire of the child’s mother and of any other appropriate person present as to the identity and address of any and all presumed or alleged fathers of the child. . . .”

Here, Robin C. was not present at any of the hearings. She continued to refuse to identify a possible father and her whereabouts were unknown. In addition, the maternal

⁷ Moreover, at the hearing on appellant’s section 388 petition, the social worker testified that she had previously unsuccessfully requested the birth certificate under the name, “Jermaine C.”

⁸ Subdivision (a) of section 316.2 continues: “The inquiry shall include at least all of the following, as the court deems appropriate:

“(1) Whether a judgment of paternity already exists.

“(2) Whether the mother was married or believed she was married at the time of conception of the child or at any time thereafter.

“(3) Whether the mother was cohabiting with a man at the time of conception or birth of the child.

“(4) Whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy.

“(5) Whether any man has formally or informally acknowledged or declared his possible paternity of the child, including by signing a voluntary declaration of paternity.

“(6) Whether paternity tests have been administered and the results, if any.

“(7) Whether any man otherwise qualifies as a presumed father pursuant to Section 7611, or any other provision, of the Family Code.”

grandmother was not present in court until the six-month review hearing, which took place on June 4, 2003, at which time she testified that she did not know where her daughter lived. Also, in response to the court's question whether she knew if Jermaine has any Native American heritage, the maternal grandmother stated, "No, I don't. I don't know anything as far as the father is concerned at all." While her statement is somewhat ambiguous, the court could reasonably have understood the statement to mean the maternal grandmother knew nothing about Jermaine's father.⁹

In conclusion, both the Agency and the juvenile court acted reasonably in attempting to ascertain the identity of Jermaine's father in light of the lack of information and sources of information available.¹⁰ Hence, appellant's due process rights were not violated by his failure to receive notice of the detention hearing and the jurisdictional/dispositional hearing.

III. *The Trial Court's Denial of Appellant's Section 388 Petition*

Appellant contends the trial court abused its discretion when it denied his petition, filed pursuant to section 388.

Under section 388, subdivision (a), a parent may petition to change or modify a previous order "upon grounds of change of circumstance or new evidence." Under subdivision (b) of section 388, the petition must state why the requested change is in the best interest of the child. "[T]he burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed

⁹ We do observe that, at the hearing pursuant to section 388, the social worker testified that, prior to January 15, 2003, she had asked the maternal grandmother who Jermaine's father was, and the grandmother said she did not know.

¹⁰ Furthermore, appellant himself knew he had had sexual relations with Robin C. at the time Jermaine was conceived. Appellant already had several other children with Robin C. Thus, it was his duty to attempt to ascertain whether a child had resulted from the most recent sexual relations with Robin C. (See *In re Zacharia D.* (1993) 6 Cal.4th 435, 452 [biological father's ignorance of child's existence "was born not of malevolence on the part of [the mother] or the County, but of his own indifference"].) Indeed, appellant acknowledged that he had learned of Jermaine's birth before the Agency contacted him in July 2003.

circumstances that make a change of placement in the best interests of the child.’ [Citation.] ‘The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion.’ [Citations.]” (*In re Andrew L.* (2004) 122 Cal.App.4th 178, 190.)

“While a biological father is not entitled to custody under section 361.2, or reunification services under section 361.5 if he does not attain presumed father status^[11] prior to the termination of any reunification period, he may move under section 388 for a hearing to reconsider the juvenile court’s earlier rulings, based on new evidence or changed circumstances. [Citations.]” (*In re Zacharia D.*, *supra*, 6 Cal.4th at pp. 454-455, fn. omitted.)

In the present case, appellant alleged in his section 388 petition that he was not given notice of the detention, jurisdictional and dispositional hearings, and that it was in Jermaine’s best interest to have appellant participate in the proceedings. He further alleged he wanted to be involved in his son’s life.

In denying the petition, the court found that there had been no duty to notify appellant regarding the jurisdictional/dispositional hearing because his identity was unknown. The court also found that, even if appellant had received notice at the time, he was incarcerated and, almost two years later, remained incarcerated. Thus, he could not have reunified with Jermaine within six months, as would have been required under section 361.5, subdivision (a)(2), since Jermaine was only one month old when he was detained. Finally, the court found that it was not in Jermaine’s best interest “to roll the clock back, so to speak, because the father’s pattern of conduct has demonstrated an inability to parent this child under the circumstances.”

According to appellant, the court’s ruling was an abuse of discretion because (1) appellant showed new evidence/changed circumstances, in that a positive paternity test proved he was Jermaine’s biological father, and (2) granting the motion would be in

¹¹ “A natural father can become a presumed father if he receives the child into his home and openly holds out the child as his natural child.” (*In re Andrew L.*, *supra*, 122 Cal.App.4th at p. 191; see § 316.2.)

Jermaine's best interest since appellant had promptly expressed the wish to obtain custody of Jermaine and take care of him, and since appellant's mother could care for Jermaine until appellant's release from prison. Moreover, even if appellant was bypassed for reunification services due to his incarceration, he avers his mother still should have been considered for placement.

First, pursuant to section 361.5, subdivision (a)(2), reunification services could not be offered for Jermaine beyond six months following his removal from Robin C.'s physical custody, unless the court found there was a substantial probability that he would be returned to his parents within 18 months. At the time of the section 388 hearing, Jermaine had been out of his mother's custody for over 19 months, and the court did not extend the reunification period. Moreover, appellant's incarceration did not toll the reunification period. (See *In re Zacharia D.*, *supra*, 6 Cal.4th at p. 452.) In addition, in light of his positive paternity test, appellant was a biological father, not a presumed father; as such, he was not entitled to reunification services once the statutory period had expired. (See *id.* at p. 453.)

Second, we find the juvenile court reasonably concluded that it would not be in Jermaine's best interest to grant appellant's section 388 petition. Jermaine was approximately 20 months old at the time of the hearing, and had had absolutely no contact with appellant, who had been incarcerated since before Jermaine's birth. The trial court heard evidence regarding appellant's parenting of some of his other children, but found this evidence inadequate to meet Jermaine's needs, especially in light of appellant's pattern of involvement with the criminal justice system.¹²

¹² This case is distinguishable from *In re Julia U.* (1998) 64 Cal.App.4th 532, 542-544, in which the Department of Social Services unreasonably delayed ascertaining the father's existence and paternity over many months, despite his repeated attempts to establish paternity and develop a relationship with his daughter. In that case, the juvenile court unreasonably terminated all reunification services even though there was still time to offer reunification services to determine the father's fitness as a parent and the father was not incarcerated or otherwise unavailable to learn parenting skills. (*Id.* at pp. 543-544.)

In addition, with respect to appellant's claim that it would be in Jermaine's interest to live with his paternal grandmother until appellant finished his prison term, Jermaine had been living for almost a year with his maternal grandfather and his wife. There was evidence that these relatives wished to adopt him, and were already raising one of Jermaine's siblings, who lived in the home as well. In contrast, Jermaine not only had no relationship with appellant, he had no relationship with his paternal grandmother. The evidence simply does not support appellant's contention that the proposed changes would be in Jermaine's best interests. (See *In re Stephanie M.* (1994) 7 Cal.4th 295, 320-321 [when party seeks a change in a still-viable placement under section 388, overriding inquiry is whether move is in child's best interests].)

The juvenile court did not abuse its discretion.

IV. *The Agency's Alleged Failure to Obtain Paternity Testing Within a Reasonable Time*

Appellant contends the Agency failed to obtain paternity testing within a reasonable time, thereby violating his due process rights.

The Agency argues that appellant has waived this issue by failing to raise it in the juvenile court. Appellant acknowledges that the issue of delays in paternity testing "was not specifically raised at the hearing on July 15, 2004," but states there was confusion at that hearing regarding his counsel's attempted submission of a Declaration of Paternity. Such confusion, however, does not excuse the failure of counsel to raise the distinct issue appellant is now attempting to raise on appeal. We find that the issue is waived.¹³ (See *In re S.B.* (2005) 130 Cal.App.4th 1148, 1158-1159.)

¹³ Moreover, even were the question before us, we find no evidence in the record demonstrating that the Agency was responsible for the delay.

*V. The Failure to Comply
With the Notice Requirements of ICWA*

Appellant contends the Agency failed to comply with the notice requirements of ICWA, which requires that the order terminating parental rights be reversed and that the matter be remanded to the juvenile court for compliance with ICWA.

“Congress passed the ICWA in 1978 ‘to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children “in foster or adoptive homes which will reflect the unique values of Indian culture”’ [Citing, *inter alia*, 25 U.S.C. § 1902.] [¶] The ICWA’s procedural and substantive requirements must be followed in involuntary child custody proceedings when an ‘Indian child’ is involved. An ‘Indian child’ is defined by the ICWA as ‘any unmarried person who is under age eighteen and 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).)

“Among the procedural safeguards included in the ICWA is the provision for notice. The ICWA provides in part: ‘In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. . . .’¹⁴ (25 U.S.C. § 1912(a).) ‘Notice shall be

¹⁴ Pursuant to applicable federal regulations, in California, such notice must be given to the Bureau of Indian Affairs (BIA) in Sacramento. (25 C.F.R. §23.11(b), (c)(12).) “The purpose of notice to the BIA is that it ‘presumably has more resources and skill with which to ferret out the necessary information’ [citation], such as which tribe or

sent whenever there is reason to believe the child may be an Indian child, and for every hearing thereafter unless and until it is determined that the child is not an Indian child.’ (Cal. Rules of Court, rule 1439(f)(5).)” (*In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1106-1107, fn. omitted; see also *In re I.G.* (2005) 133 Cal.App.4th 1246, 1251-1252; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195-196.)

“[T]he ‘minimal showing’ required to trigger notice under the ICWA is merely evidence ‘*suggest[ing]*’ the minor ‘may’ be an Indian child within purview of the Act. [Citation.] . . . Because of the important interests at stake, courts around the country ‘have interpreted the ICWA notice provision broadly.’ [Citations.]” (*In re Antoinette S.*, *supra*, 104 Cal.App.4th at p. 1407.)

The Code of Federal Regulations sets forth the required content of the notice, including when notice is sent to the BIA due to lack of information about tribal affiliation. (25 C.F.R. § 23.11(b).) The relevant regulation provides that notice to the BIA “shall include the following information, if known: [¶] (1) Name of the Indian child, the child’s birthdate and birthplace. [¶] (2) Name of Indian tribe(s) in which the child is enrolled or may be eligible for enrollment. [¶] (3) All names known, and current and former addresses of the Indian child’s biological mother, biological father, maternal and paternal grandparents and great grandparents . . . ; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information. [¶] (4) A copy of the petition, complaint or other document by which the proceeding was initiated.” (25 C.F.R. § 23.11(d).) In addition, the notice must include, inter alia, a statement of the right to intervene in the proceedings. (25 C.F.R. § 23.11(e)(1).)

Two forms were issued by the State of California Health and Welfare Agency and the Department of Social Services to comply with these notice requirements, which were in use during the time period relevant here. They are “Request for Confirmation of Child’s Status as Indian” (form SOC 318) and “Notice of Involuntary Child Custody

tribes might be entitled to notice.” (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406.)

Proceedings Involving an Indian Child” (form SOC 319). (See *In re Jeffrey A.*, *supra*, 103 Cal.App.4th at p. 1108.)¹⁵

“ ‘The failure to provide the necessary notice requires this court to invalidate actions taken in violation of the ICWA and remand the case unless the tribe has participated in or expressly indicated no interest in the proceedings. [Citation.]’ [Citation.]” (*In re I.G.*, *supra*, 133 Cal.App.4th at p. 1252, quoting *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472.)

Finally, the notice requirements of ICWA are mandatory and cannot be waived by the parties. (*In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231-232; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 733; but see *In re Pedro N.* (1995) 35 Cal.App.4th 183, 185.)

In *In re I.G.*, the mother told a social worker that “she was part Native American, which she claimed was ‘part of the reason’ for her alcohol problem.” (133 Cal.App.4th at p. 1251.) While this statement triggered a notice duty on the part of the San Francisco County Department of Human Services, a panel of this Division found that the record contained insufficient evidence of proper ICWA notice for the juvenile court to have made a finding that ICWA did not apply. (*Id.* at p. 1253.)

In remanding the matter to the juvenile court, “we [agreed] with those courts that have emphasized the importance of strict compliance with ICWA notice requirements and, if necessary, have remanded the matter for the juvenile court to ensure that proper notice is given. [Citations.] [¶] Noncompliance with ICWA has been a continuing problem in juvenile dependency proceedings conducted in this state, and, by not adhering to this legal requirement, we do a disservice to those vulnerable minors whose welfare we are statutorily mandated to protect.” (*In re I.G.*, *supra*, 133 Cal.App.4th at p. 1254.)

¹⁵ As of January 1, 2005, these two forms were replaced by a single form, “Notice of Involuntary Child Custody Proceedings for an Indian Child, (Juvenile Court)” (JV-135), which is now used for ICWA notice purposes. (See rule 1439(f)(1).)

In the present case, in its February 10, 2004 addendum report, the social worker reported that, at the January 12, 2004 hearing, appellant had “claimed Native American ancestry, although he did not identify a tribe.” The social worker reported that she was in the process of gathering information to determine if Jermaine was ICWA eligible, and had sent form AD 4311 (Information on American Indian Child) to the California Department of Social Services (CDSS), which would notify the BIA. The social worker also had sent the father a questionnaire regarding Native American descent on February 10, 2004. Also on that date, she had spoken to the maternal grandmother, who provided the name of the paternal grandmother, who lived in Oakland. The social worker was unable to obtain the telephone number for the paternal grandmother, which was unlisted.

In a March 11, 2004 addendum report, the social worker reported that “[t]he Indian Child Welfare Act does not apply.” In support of this statement, she stated that she was notified by CDSS that, because the tribal affiliation was unknown, it was unable to determine whether or not Jermaine possessed Indian ancestry for purposes of ICWA. The social worker further stated that appellant had not responded to the questionnaire regarding Native American ancestry she had sent to him, and further stated that she had “provided notice of hearing to the Bureau of Indian Affairs (as instructed by CDSS).” The notices in the record, showing service to the BIA for the March 23, 2004 section 366.26 hearing and, later, for the June 3, 2004 section 366.26 hearing, consisted of form JV-300, “Notice of Hearing on Selection of a Permanent Plan–Juvenile.” The notices informed the BIA of the date, time, and address of the hearing, and also included Jermaine’s full name. No other factual information was included in the notices.¹⁶

The notice the Agency provided to the BIA was inadequate. While the Agency had limited information available, it could have advised the BIA, using the appropriate forms, of Jermaine’s birthdate and birthplace, appellant’s name and birthdate, the name

¹⁶ We presume the juvenile court’s implicit finding that ICWA is inapplicable was based on the Agency’s claimed provision of notice to the BIA and its “determination” that ICWA did not apply in this case.

of Jermaine’s paternal grandmother, and any other pertinent information known to it. (25 C.F.R. § 23.11(d)(1), (d)(3).) It also should have included a copy of the petition and a statement of the right of Jermaine’s tribe to intervene in the proceedings. (25 CFR § 23.11(d)(4), (e)(1).)

In conclusion, the matter must be remanded to the juvenile court so that the Agency and the court can comply with ICWA’s notice requirements. (See *In re I.G.*, *supra*, 133 Cal.App.4th at pp. 1253-1256.) It may be that the available information will be insufficient to permit the BIA to determine any tribal affiliation. (See *In re Levi U.*, *supra*, 78 Cal.App.4th at p. 199 [once notice has been provided, “[n]either the Act nor the various rules, regulations, and case law interpreting it require [the Agency] or the juvenile court to cast about, attempting to learn the names of possible tribal units to which to send notices, or to make further inquiry with BIA”].) However, “[t]he opportunity for a tribe or the BIA to investigate [whether a child is eligible for tribal membership] means little if the [Agency] does not provide the available Indian heritage information it possesses.” (*In re Gerardo A.* (2004) 119 Cal.App.4th 988, 995.)

DISPOSITION

The order terminating parental rights is conditionally reversed, and the matter is remanded to the juvenile court with directions to order the Agency to comply with the notice provisions of ICWA and to file copies of all notice-related documentation with the juvenile court. If, after proper notice, no response is received or the BIA or a tribe determines that Jermaine is not an Indian child, all previous findings and orders shall be immediately reinstated. If any tribe determines that Jermaine is an Indian child within the meaning of ICWA, the juvenile court shall proceed in conformity with all provisions of ICWA. In all other respects, the orders are affirmed.

Kline, P.J.

We concur:

Haerle, J.

Ruvolo, J.*

* Presiding Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.