Filed 1/25/07; part. pub. order 2/20/07 (see end of opn.)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ROBERT A., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ROBERT A., Defendant and Appellant.	D048994 (Super. Ct. No. J515635)

APPEAL from an order of the Superior Court of San Diego County, Hideo Chino, Referee. Reversed and remanded with directions.

Robert A. (Father) appeals an order under Welfare and Institutions Code[1] section 387 removing his son Robert A. (Robert) from his custody. Father contends the allegations of the section 387 or supplemental petition did not state a basis for

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

jurisdiction. Father also contends the evidence was insufficient to support the juvenile court's findings that (1) the previous disposition had not been effective, and (2) it would be detrimental to Robert to remain in Father's custody. Additionally, Father contends the court did not comply with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.).

We agree the ICWA noncompliance requires reversal and remand for the purpose of securing ICWA compliance. Otherwise, we find no error.

FACTUAL AND PROCEDURAL BACKGROUND

Robert is the son of Father and Roberta A., who were married but living separately at all relevant times.[2] In November 2004, Robert, then 10 years old, was living with Father in a motel room.

On November 24, police executed a search warrant and found methamphetamine in various places — including some within Robert's reach — along with marijuana, pornography and switchblade knives. Father told police he used methamphetamine "on and off" for several years. Father said all of the methamphetamine found was his —

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[2] Roberta is not a party to this appeal and will be mentioned only when relevant to the issues that Father raises.

including that found in the purse of his girlfriend.[3] Police arrested Father and his girlfriend for possession of a controlled substance.

Father told a social worker that his grandfather was a "full-blooded Cherokee" Indian from Louisiana, but neither he nor Robert were registered tribal members.

On November 30, the San Diego County Health and Human Services Agency filed a dependency petition on behalf of Robert, alleging he was at substantial risk of harm because of Father's excessive use of methamphetamine and marijuana. (§ 300, subd. (b).)

Father did not appear at the detention hearing. The court gave Agency discretion to place Robert with Roberta with the concurrence of the child's counsel. The court found ICWA did not apply.

On December 21, the court sustained the petition. By this time, Robert was living with Roberta, and Agency's recommendation was that the child be placed with her. With respect to ICWA, Agency indicated ICWA was not applicable because Robert was going to be placed with Roberta,[4] and Robert's counsel did not object.

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[3] Father subsequently recanted his admission that the methamphetamine belonged to him. He told a social worker the methamphetamine belonged to a friend, and the reason he did not tell this to the police was that he thought they would not believe him. Father also told the social worker that the marijuana was for his personal use and that it helps relieve the aches and pains of his shoulder, which was injured during work. Father, then 43 years old, admitted smoking marijuana since he was 10 years old. Father did not believe he had a substance abuse problem.

[4] See title 25 of the United States Code section 1912(a), which provides that Agency's obligation to comply with ICWA notice requirements takes effect when Agency is seeking foster care placement of the child or termination of parental rights.

On January 12, 2005, the court declared Robert a dependent child, removed him from Father's custody, and placed him with Roberta. The court ordered Father, who did not attend the hearing, and Roberta to comply with their case plans. Father's case plan required him to participate in individual therapy, complete a parenting class, submit to an evaluation by the Substance Abuse Recovery Management System program (SARMS), enroll in a drug treatment program and undergo drug testing.

Later that month, Father told a social worker that he wanted to reunify with Robert, but did not believe he needed to comply with the case plan. Father had no further contact with Agency.

On July 5, the court found Roberta had not made substantive progress with the provisions of her case plan. The court ordered six more months of services.

Agency reported that in July, Roberta and Robert moved into a motel. The social worker noted that Roberta and Robert lived in either a motel or the maternal grandmother's apartment during the next six months. Roberta and Robert told the social worker that Father had chosen not to have regular contact with Robert. The social worker opined that regardless of Robert's living condition, he appeared to be receiving adequate care. "The child always appears happy, well groomed, well fed and attends school regularly," the social worker wrote.

On January 17, 2006, the court ordered six more months of services.

In March, Agency learned that Robert had been living with Father rather than Roberta in contravention of the court's order that removed Robert from Father's custody

and placed him with Roberta. The social worker reported that Robert started living with Father shortly after the court had made that order. The social worker had monthly contacts with Robert at his school. Roberta and Robert lied to the social worker about Robert's living with the maternal grandmother. Roberta had been homeless for several months, living in her car and in sober living facilities. The El Cajon police department performed a child welfare check on Father's home and found it to be clean and with adequate food. Police did not observe any drugs or drug activity.

Because it appeared that Father had been able to meet Robert's needs, Agency recommended that Robert be placed with Father.

At a special hearing on May 1, the court placed Robert with Father and ordered him to contact SARMS within 72 hours for an evaluation.[5]

Father, however, did not contact SARMS and continued to refuse to participate in case plan services.

On June 23, Agency filed a supplemental petition (§ 387) on behalf of Robert, alleging the previous disposition of the court — the May 1 order placing the child with Father — had not been effective in protecting Robert. The petition alleged Father's substance abuse problems remained untreated, Father remained noncompliant with his reunification plan and Father did not follow the court's May 1 order to contact SARMS within 72 hours. The petition sought to have Robert placed in a foster home.

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[5] Agency did not file a section 388 or section 387 petition to change Robert's placement, but the parties waived formal filing of a petition.

The court found a prima facie showing had been made and issued a pick up and detain order for Robert. The court ordered Robert be detained at Polinsky Children's Center or an approved foster home.

In an addendum report dated July 11, Agency recommended services for Father, who still had not contacted SARMS for an evaluation, be terminated.[6]

On July 11, the parties stipulated that if called as a witness, the social worker would testify that: (1) Father was convicted of a drug related crime stemming from the incident in which Robert was removed from his custody in 2004; (2) the criminal court sentenced Father to perform community service, imposed fines and placed him on summary probation; and (3) Father had never been treated for his substance abuse.

The court sustained the section 387 petition. Father's counsel told the court that Father wanted to participate in services and was now willing to contact SARMS. Agency's counsel countered that Father had technically received services for 20 months and never participated in any of them. The court terminated services to Father and continued services for Roberta.

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[6] Agency recommended services be offered to Roberta, who had recently started substance abuse treatment.

DISCUSSION

I. *Section 387*

At issue is the supplemental or section 387 petition filed June 23, 2006, which read:

> "1. Under a previous order of this Court dated May 1, 2006, the child has been in the home of: FATHER.
>
> "2. The previous disposition has not been effective in the protection or rehabilitation of the child.
>
> "COUNT 1: On or about and between May 1, 2006 to present the father . . . with whom said child was placed by this Court is no longer willing / able to provide adequate care and supervision for said child in that: the child was originally removed from the father's custody due to his illegal substance issues on 1/12/05. The father remains untreated and non-compliant with his reunification plan. Further, the father has not followed the court's 5/1/06 orders that he must comply with his case plan and contact SARMS within 72 hours.
>
> "3. The recommended modified disposition is placement in the home of: FOSTER CARETAKER."

Father contends the juvenile court erroneously removed Robert from his custody under section 387 because (1) the supplemental petition did not state a basis for jurisdiction, (2) the petition was not supported by substantial evidence, and (3) insufficient evidence supported the removal. The contention is without merit.

Before the juvenile court can change or modify a previous order by removing a child from the physical custody of a parent and direct foster-care placement, there must be a hearing upon a supplemental petition. (§ 387, subd. (a).) The supplemental petition must "contain a concise statement of facts sufficient to support the conclusion that the

previous disposition has not been effective in the rehabilitation or protection of the child." (§ 387, subd. (b).)

However, the petition need not assert any new jurisdictional facts nor urge different or additional grounds for the dependency. (*In re John V.* (1992) 5 Cal.App.4th 1201, 1211.) The only fact necessary to modify a previous placement is that the previous disposition has not been effective in protecting the child. (*In re Joel H.* (1993) 19 Cal.App.4th 1185, 1200.) This is the ultimate "'jurisdictional fact'" in a section 387 proceeding. (*Ibid*.) It is not necessary to establish jurisdiction under section 300 to warrant a change in placement. (*In re Michael S.* (1987) 188 Cal.App.3d 1448, 1460.) "Obviously, when, as in the present case, there is a supplemental petition, there already exists a basis for juvenile court jurisdiction." (*In re Joel H.*, *supra*, at p. 1200.)

In the first or jurisdictional phase of a section 387 proceeding, the court determines whether the factual allegations of the supplemental petition are true and whether the previous disposition has been effective in protecting the child. (Cal. Rules of Court, rule 5.565(e)(1).)[7] If those allegations are found to be true, the court conducts a dispositional phase to determine whether removal of custody is appropriate. (Rule 5.565(e)(2).) A court hearing a supplemental petition brought under section 387 that seeks to remove a child from the custody of a parent must proceed according the procedures and protections of section 361. (*In re Paul E.* (1995) 39 Cal.App.4th 996,

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7 All subsequent rule references are to the California Rules of Court.

1001-1003.) Thus, before the child can be removed from the parent's custody under section 387, the court must find, by clear and convincing evidence, that there is "a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor [or would be] if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parents." (§ 361, subd. (c)(1).)

We review the juvenile court's findings under the substantial evidence test. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

With respect to Father's claim that the supplemental petition did not state a cause of action or basis for jurisdiction under section 387, he is mistaken. Father claims the petition did not allege abuse or neglect sufficient to remove the minor from his custody. However, removal is a dispositional issue. The jurisdictional issue under section 387 is whether the previous disposition has not been effective in protecting the child. (*In re Joel H.*, *supra*, 19 Cal.App.4th at p. 1200.) Agency's supplemental petition contained such an allegation.

Father is also mistaken in claiming the evidence was insufficient to support the court's finding that the May 1, 2006 order placing Robert with him had not been effective in protecting Robert. There is ample evidence in the record supporting the court's finding.

Robert was removed from Father's custody in January 2005 after police found marijuana and methamphetamine, along with pornography and switchblade knives, in the

home. Father admitted the methamphetamine was his and that he used marijuana and methamphetamine. (See fn. 3 and accompanying text, *ante*.) Robert said Father sold marijuana. The court ordered Father to comply with his case plan, which included requirements he undergo a SARMS evaluation and participate in drug treatment and drug testing.

Over the next one and one-half years, Father did not comply with his case plan nor make any attempt to do so. Father never went to SARMS despite repeated court orders during this time frame. Significantly, Father, along with Roberta, Robert and the maternal grandmother, participated in a dishonest scheme to allow Robert to live with Father in direct contravention of the January 2005 order removing the child from his custody. It is true that Robert appeared to do well during his surreptitious and fraudulent stay with Father. When Agency discovered the scheme, it apparently took that into account in recommending that Robert be removed from Roberta's custody and placed with Father. The court followed the recommendation, but also ordered Father to report to SARMS within 72 hours. Father ignored this order as well. None of the above-stated facts is in dispute.

We acknowledge that removal of a child should not be predicated solely on the parent's failure to comply completely with his or her case plan. (*In re Paul E.*, *supra*, 39 Cal.App.4th at pp. 1003-1004.) It does not follow, however, that the court erred here in removing Robert from Father's custody. This is not a case in which the parent failed to completely comply with the case plan. Father did not comply *at all* with the plan.

Moreover, in flagrant disregard of the court's original dispositional order, Father illegally retained de facto custody of Robert for more than one year.

At the section 387 hearing, the court reasonably could conclude that the risk to Robert remained the same as it was one and one-half years earlier. Father was a long-time drug abuser, and had not done anything during the dependency to treat this problem. A child is in danger of harm when a parent is a substance abuser. (See, e.g., *In re Ashley G.* (1988) 205 Cal.App.3d 1235, 1243.)

We agree with Agency's tacit acknowledgement that it made a mistake in recommending Robert be placed with Father after discovering the scheme that flouted the original dispositional order. However, regardless of which party erred, the court does not need to continue a child in an unsafe situation. Despite the lack of evidence showing abuse or neglect, Robert was being exposed to untreated drug abusers and drug dealing, which put him at risk of harm.

Turning to the 2006 removal of Robert from Father's custody, we find substantial evidence supported it. The same evidence that supported the true finding on the section 387 petition supported the court's concurrent order removing Robert from Father's custody.

In this regard, we also note "[t]he failure of the parent . . . to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental." (§§ 366.21, subds. (e) & (f), 366.22, subd. (a); see also *Sue E. v. Superior Court* (1997) 54 Cal.App.4th 399, 404.) Here, the

only evidence to refute this presumption of detriment was that drugs were not found in Father's home during Fourth Amendment searches or upon inspection by the social worker. Such evidence only showed that drugs were not present at the time of the searches or inspections. The court could reasonably conclude it was insufficient to rebut the presumption of detriment.

Further, an important factor to consider in deciding whether the child is at substantial risk of detriment is the likelihood the parent will maintain a "stable, sober and noncriminal lifestyle for the remainder of [Robert's] childhood." (*In re Brian R.* (1991) 2 Cal.App.4th 904, 918.) In this regard, the juvenile court, sitting as trier of fact, can properly consider the credibility of the parents. There is much in this record that undermines Father's credibility. In addition to his self-denial about his drug problem and refusal to participate in court-ordered services, Father engaged and enlisted Robert in a dishonest scheme to contravene the original order removing the child from his custody.

II. *ICWA*

Father contends Agency did not comply with ICWA even though Agency was on notice from the beginning of the case that he had Cherokee heritage. We agree, and find the case must be remanded for the limited purpose of securing compliance with ICWA.

In 1978, Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." (25 U.S.C. § 1902.) ICWA allows a tribe to intervene in dependency proceedings involving an Indian child because the law presumes it is in the child's best interests to retain tribal ties

and heritage and that it is in the tribe's interest to preserve future generations. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.)

ICWA sets forth specific notice requirements:

> "[W]here 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." (25 U.S.C. § 1912(a).)

If the identity of the tribe cannot be determined, notice must be given to the Bureau of Indian Affairs. (*Ibid*.; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253.)

The Indian tribe determines whether the child is an Indian child. (*In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 470.) "'A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive.'" (*Dwayne P. v. Superior Court*, *supra*, 103 Cal.App.4th at p. 255.)

Notice must be sent whenever there is reason to believe the child may be an Indian child. (*In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 471.) "[T]he juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement." (*In re Nikki B.* (2003) 106 Cal.App.4th 844, 848.)

Because "'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, [ICWA] notice requirements are strictly construed.'" (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174.) The notice sent to the Indian tribes must contain enough identifying information to be meaningful. (*Id*. at p. 175.) A "social worker has 'a duty to inquire about and obtain,

if possible, all of the information about a child's family history'" required under regulations promulgated to enforce ICWA. (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1116.)

To enable the juvenile court to review whether sufficient information was supplied, Agency must file with the court the ICWA notice, return receipts and responses received from the tribes. (*In re Karla C.*, *supra*, 113 Cal.App.4th at pp. 175, 178-179.)

The notice requirements of ICWA are mandatory and cannot be waived by the parties. (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707.)

Agency's argument below that ICWA notice was not necessary because foster care placement was not being sought (see fn. 4 and accompanying text, *ante*) is now moot.

On appeal, Agency concedes that it should have provided ICWA notice when Robert was removed from parental custody pursuant to the section 387 petition. Nonetheless, Agency argues the error was harmless.

Agency does so based on its motion to augment the record with ICWA notices and documents filed in the separate dependency case of Robert's half-sibling.[8] However, the half-sibling's dependency case was heard by the juvenile court in El Cajon and presided over by a different judicial officer than the one who presided over Robert's case. Further, Father's notice of appeal in Robert's case predated the ICWA notices in the half-sibling's case. The orders that are challenged in this appeal were issued two months before the

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8 Both Robert and the half-sibling have the same biological father.

ICWA notices in the half-sibling's case were mailed to the Indian tribes. Also, the ICWA documents from the half-sibling's case were not filed in Robert's dependency case.[9]

We deny Agency's motion to augment the record. Appellate courts rarely accept postjudgment evidence or evidence that is developed after the challenged ruling is made. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405, 413-414.) This is so in part because an appeal court reviews the correctness of a record that was before the trial court at the time it made its ruling. (*Id*. at p. 405.) Because the ICWA documents from the half-sibling's case were not before the juvenile court at the time of the proceedings in question nor part of the juvenile court case file, it is inappropriate to augment the record with them. (See *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 703-704.) "Making the appellate court the trier of fact is not the solution." (*Id*. at p. 703.) (See fn. 9, *ante*.) "[I]t is up to the juvenile court to review the information concerning the notice given, the timing of the notice, and the response of the tribe, so that it may make a determination as to the applicability of the ICWA, and thereafter comply with all of its provisions, if applicable." (*Id*. at p. 705.)

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9 The augment request did not include a finding by the court in the half-sibling's dependency case concerning whether it found the notices met the requirements of ICWA. Therefore, the proposed augment is of ICWA notices that have never been reviewed below for ICWA compliance.

Moreover, we reject Agency's attempt to bootstrap this case to the half-sibling's case for ICWA purposes and thereby find the admitted ICWA error here was harmless. It is important to not lose sight of the fact that ICWA notices in separate dependency cases are not fungible evidence — even when the separate cases involve half-siblings who share the same parent with Indian heritage. Agency had the duty in Robert's case to provide ICWA notice to the Cherokee tribes to allow the tribes to determine if Robert is an Indian child. Agency also had the duty to file with the juvenile court, which heard Robert's case, those notices, any responses it received and proof of required postal receipts to allow the court to determine if there was proper and adequate notice before deciding the ultimate issue — whether ICWA applied. Agency did none of these things in Robert's case and therefore the court's finding that ICWA did not apply cannot stand.

Accordingly, the case must be remanded with directions that Agency and the court comply with ICWA in accordance to ICWA statute and caselaw interpreting it.

DISPOSITION

The section 387 order is reversed and the matter is remanded to the juvenile court with directions to order Agency to comply with the notice provisions of ICWA, the relevant case law interpreting ICWA and the views expressed in this opinion, and to file all required documentation with the juvenile court for the court's inspection. If, after proper inquiry and notice, a tribe claims that Robert is an Indian child, the juvenile court

shall proceed in conformity with all provisions of ICWA. If, on the other hand, no response is received or no tribe claims that Robert is an Indian child, the orders shall be reinstated.

IRION, J.

I CONCUR:

McDONALD, J.

I CONCUR IN THE RESULT:

HUFFMAN, Acting P. J.

Filed 2/20/07

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ROBERT A., Defendant and Appellant.	D048994 (Super. Ct. No. J515635) ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION

THE COURT:

The opinion filed January 25, 2007, is ordered certified for publication with the exception of part I.

The attorneys of record are:

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant and Appellant.

John J. Sansone, County Counsel, John E. Philips and Katharine R. Bird, Deputy County Counsel, for Plaintiff and Respondent.

Michael D. Randall, under appointment by the Court of Appeal, for Minor.

HUFFMAN, Acting P. J.

Copies to: All parties