S221263

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT NO. _____

In re ISAIAH W., A Person Coming Under The Juvenile Court Law.	Court of Appeal No. B250231
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondent, v. ASHLEE R. (Mother), Petitioner and Appellant.	Superior Court No. CK91018

APPEAL FROM THE JUVENILE COURT OF LOS ANGELES COUNTY
HONORABLE JACQUELINE H. LEWIS, JUDGE

PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, HOLDING THAT, ON DIRECT APPEAL FROM A POSTJUDGMENT ORDER TERMINATING PARENTAL RIGHTS, REVIEW OF A PARENT'S CLAIM THAT THE NOTICE PROVISIONS OF THE FEDERAL AND STATE ICWA WERE VIOLATED IS FORECLOSED BY THE PARENT'S FAILURE TO HAVE TIMELY APPEALED FROM THE JUVENILE COURT'S JUDGMENT OR PREJUDGMENT FINDING THAT ICWA DID NOT APPLY

Patti L. Dikes, Bar No. 131775
9116 E. Sprague Avenue #473
Spokane Valley, Washington 99206
(619) 559-2557

Attorney for Petitioner/Appellant Ashlee R.
by appointment of the Court of Appeal under the
Appellate Defenders, Inc., independent case program

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT NO. _____

In re ISAIAH W., A Person Coming Under The Juvenile Court Law.	Court of Appeal No. B250231
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondent, v. ASHLEE R. (Mother), Petitioner and Appellant.	Superior Court No. CK91018

APPEAL FROM THE JUVENILE COURT OF LOS ANGELES COUNTY
HONORABLE JACQUELINE H. LEWIS, JUDGE

PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, HOLDING THAT, ON DIRECT APPEAL FROM A POSTJUDGMENT ORDER TERMINATING PARENTAL RIGHTS, REVIEW OF A PARENT'S CLAIM THAT THE NOTICE PROVISIONS OF THE FEDERAL AND STATE ICWA WERE VIOLATED IS FORECLOSED BY THE PARENT'S FAILURE TO HAVE TIMELY APPEALED FROM THE JUVENILE COURT'S JUDGMENT OR PREJUDGMENT FINDING THAT ICWA DID NOT APPLY

Patti L. Dikes, Bar No. 131775
9116 E. Sprague Avenue #473
Spokane Valley, Washington 99206
(619) 559-2557

Attorney for Petitioner/Appellant Ashlee R.
by appointment of the Court of Appeal under the
Appellate Defenders, Inc., independent case program

Table of Contents

Table of Authorities

SUPREME COURT NO. _____

In re ISAIAH W., A Person Coming Under The Juvenile Court Law.	Court of Appeal No. B250231
LOS ANGELES COUNTY DEP'T OF CHILDREN AND FAMILY SERVICES, Respondent, v. ASHLEE R. (Mother), Petitioner and Appellant.	Superior Court No. CK91018

APPEAL FROM THE JUVENILE COURT OF LOS ANGELES COUNTY
HONORABLE JACQUELINE H. LEWIS, JUDGE

PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, HOLDING THAT, ON DIRECT APPEAL FROM A POSTJUDGMENT ORDER TERMINATING PARENTAL RIGHTS, REVIEW OF A PARENT'S CLAIM THAT THE NOTICE PROVISIONS OF THE FEDERAL AND STATE ICWA WERE VIOLATED IS FORECLOSED BY THE PARENT'S FAILURE TO HAVE TIMELY APPEALED FROM THE JUVENILE COURT'S JUDGMENT OR PREJUDGMENT FINDING THAT ICWA DID NOT APPLY

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Ashlee R. petitions for review following the published decision of the Court of Appeal, Second Appellate District, Division Three, *In re Isaiah W.*

(2014) 228 Cal.App.4th 981, filed August 8, 2014. A copy of the full opinion, which includes an order certifying the decision for publication, is attached to this petition as Appendix "A."

Issue Presented

WHETHER, ON DIRECT APPEAL FROM A POSTJUDGMENT ORDER TERMINATING PARENTAL RIGHTS UNDER WELFARE AND INSTITUTIONS CODE SECTION 366.26, REVIEW OF A PARENT'S CLAIM THAT THE NOTICE PROVISIONS OF THE FEDERAL INDIAN CHILD WELFARE ACT AND CALIFORNIA ICWA WERE VIOLATED IS FORECLOSED BY THE PARENT'S FAILURE TO HAVE TIMELY APPEALED FROM THE JUVENILE COURT'S JUDGMENT OR PREJUDGMENT FINDING THAT ICWA DID NOT APPLY?

Grounds for Review

California Rules of Court, rule 8.500(b)(1), states this Court may review a Court of Appeal decision, "[w]hen necessary to secure uniformity of decision or to settle an important question of law." With the decision issued by the Second Appellate District, Division Three, in this case, a clear split of authority has been established as to whether, on direct appeal from a postjudgment order terminating parental rights under Welfare and Institutions Code section 366.26, review of a parent's claim that the notice provisions of the federal Indian Child Welfare Act, 25 U.S.C. §§ 1901, et seq., and California ICWA, Welfare and Institutions Code sections 224, et seq., were violated is foreclosed by the parent's failure to have timely appealed from the juvenile court's judgment or prejudgment finding that ICWA did not apply.

This issue has been percolating in the intermediate appellate courts since 1995 and a clear split of authority exists among the different districts.[1] The Fifth District held in 1995 that a parent was untimely in raising the issue of the juvenile court noncompliance with ICWA notice requirements "as she could have made such a challenge at the dispositional hearing but failed to do so" and therefore had forfeited the right to raise the issue on appeal from an

[1] Research has revealed a plethora of unpublished decisions on this issue which indicate conflict exists not only between but also within districts.

order terminating her parental rights. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 189-191.)

Since then, the *Pedro N.* decision has been criticized and rejected. For example, in *In re Marinna J.* (2001) 90 Cal.App.4th 731, the Sixth District held that "it would be contrary to the terms of the Act to conclude, as the court did implicitly in *In re Pedro N., supra,* 35 Cal.App.4th 183, that parental inaction could excuse the failure of the juvenile court to ensure that notice under the Act was provided to the Indian tribe named in the proceeding." (90 Cal.App.4th at p. 739.) Instead, the *Marinna J.* court concluded that, "where the notice requirements of the Act were violated and the parents did not raise that claim in a timely fashion, the waiver doctrine cannot be invoked to bar consideration of the notice error on appeal. . . To the extent *In re Pedro N., supra,* 35 Cal.App.4th 183, 41 Cal.Rptr.2d 819 reached a different result, we respectfully disagree with it." (*In re Marinna J., supra,* 90 Cal.App.4th at p. 739.) The court reversed the order terminating parental rights in that case and remanded the matter for notice to be provided. (*Id.* at p. 740.)

All three divisions of the Fourth District have expressly rejected the *Pedro N.* decision. (See *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247 [Division One]; *In re Jonathon* S. (2005) 129 Cal.App.4th 334, 342 [Division

Two]; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 849 [Division Three].) In *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, the court held in a writ proceeding challenging the scheduling of a selection and implementation hearing under section 366.26 that the parents could raise ICWA notice issues even though they did not appeal the jurisdictional and dispositional order in which the juvenile court addressed the ICWA issue, and they never raised the issue at the juvenile court. (103 Cal.App.4th at pp. 253, 260, citing *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.) The court explained that "[w]hen the court has reason to know Indian children are involved in dependency proceedings ... it has the duty to give the requisite notice itself or ensure the social services agency's compliance with the notice requirement. [Citations.] In our view, the court's duty is sua sponte, since notice is intended to protect the interests of Indian children and tribes despite the parents' inaction." (*Dwayne P. v. Superior Court, supra*, 103 Cal.App.4th at p. 261, citing *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1425.)

The *Dwayne P.* court included broad language, such as "[b]ecause the court's duty continues until proper notice is given, an error in not giving notice is also of a continuing nature and may be challenged at any time during the dependency proceedings," and "[t]hough delay harms the interests of dependent children in expediency and finality, the parents' inaction should

not be allowed to defeat the laudable purposes of the ICWA." (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 261.)

In *In re B.R.* (2009) 176 Cal.App.4th 773, the First District explicitly rejected the department's claim that a mother waived the issue of ICWA notice on appeal from an order terminating her parental rights by failing to raise it earlier. (176 Cal.App.4th at p. 779.) In discussing the case of *Pedro N.*, the *B.R.* court stated it agreed with the view taken in *Marinna J.*, "which questioned the conclusion reached in *Pedro N.* and observed that 'it would be contrary to the terms of the [ICWA] to conclude ... that parental inaction could excuse the failure of the juvenile court to ensure that notice ... was provided to the Indian tribe named in the proceeding.'" (*In re B.R., supra,* 176 Cal.App.4th at p. 779.) The *B.R.* court affirmed the decision in *Dwayne P.*, which "rejected *Pedro N.* and held that the juvenile court had a sua sponte duty to ensure compliance with ICWA notice requirements since notice is intended to protect the interests of Indian children and tribes despite the parents' inaction.'" (*In re B.R., supra,* 176 Cal.App.4th at p. 779, also citing *In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231–232.)

The Third District, while not discussing the *Pedro N.* decision, has also held that the forfeiture doctrine does not bar consideration of ICWA notice

issues not raised in the juvenile court. (See, e.g., *In re Z.W.* (2011) 194 Cal.App.4th 54, 63-67.)

The Fifth District itself has distinguished the rule in *Pedro N.* under certain circumstances, including two cases which involved an appeal was taken from an order terminating parental rights. (See, e.g., *In re Joseph P.* (2006) 140 Cal.App.4th 1524, 1529 [distinguishing *Pedro N.* and finding no forfeiture because the parent challenged the court's decision not to reopen the ICWA issue at the termination hearing rather than the earlier ICWA finding]; *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 993 [finding no forfeiture from failing to appeal an earlier ICWA ruling under *Pedro N.* because the department failed to perfect notice until later and the parent had not received discovery of information concerning the other parent's Indian heritage or the earlier ruling prior to the termination hearing].)

Now, in this case, Division Three of the Second District has revived *Pedro N.* and held that a parent is foreclosed from raising the issue now on appeal because she failed to timely appeal from the ICWA finding in the juvenile court's dispositional order. (*In re Isaiah W.* (2014) 228 Cal.App.4th 981, 988.) The *Isaiah W.* court then certified for publication its decision after recognizing that other cases, such as *Marinna J.* and *Dwayne P.* have disagreed with *Pedro N.* (*In re Isaiah W., supra,* 228 Cal.App.4th at p. 986.) Given split

of authority which exists on this issue, this Court has grounds for reviewing the Court of Appeal's decision in this case.

Necessity for Review

Review is necessary to secure uniformity of decision regarding this state's compliance with the Indian Child Welfare Act, 25 U.S.C. §§ 1901, et seq. (ICWA or the Act), and its own statutes incorporating the Act (Welf & Inst. Code §§ 224, et seq.). There is a pressing need for state-wide consistency on this important issue. (Cal. Rules of Ct., rule 8.500(b)(1).)

This Court has previously denied review in other ICWA cases (see, e.g., *In re Bridget R.* (1996) 41 Cal.App.4th 1483, review denied May 15, 1996, S052021 [regarding the existing Indian family criterion]), but has more recently granted review to examine the California and federal ICWA statutes, and the related California Rules of Court (see *In re W.B.* (2012) 55 Cal.4th 30, 58 [invalidating the rule of court applying ICWA procedures in delinquency proceedings involving criminal conduct because the statute chose to employ ICWA definition, which excludes such proceedings from its reach]; *In re Abbigail A.*, review granted September 10, 2014, S220187 [regarding whether, when a child has been found to be eligible for tribal membership, the juvenile court must treat the child as an Indian child and apply the substantive provisions of ICWA or whether formal registration required).

Thus, Court has recognized ICWA as sufficiently important for review and discussed its vital application to juvenile dependency proceedings in

deciding its application to juvenile delinquency proceedings. (*In re W.B., supra,* 55 Cal.4th at pp. 42-60.) California's application of the time frames for direct review by appeal and its forfeiture doctrine to ICWA is of equal importance.

The application of California's time frames for direct review by appeal and the forfeiture doctrine is not a new issue. (*People v. Simon* (2001) 25 Cal.4th 1082, 1097-1103 [discussing forfeiture in civil actions and noting a number of criminal cases in the previous decade in which the Court discussed the basic rationale of the forfeiture doctrine].) This Court's decision in *In re S.B.* (2004) 32 Cal.4th 1287 established the application of the forfeiture doctrine in juvenile dependency cases. (32 Cal.4th at p. 1293; *In re Aaron B.* (1996) 46 Cal.App.4th 843.) In an appeal by an Indian tribe which had intervened in a juvenile dependency case, an appellate court held that the tribe had forfeited certain legal arguments which it had failed to raise before the trial court. (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1323.)

However, the conflict over its application to noncompliance with ICWA notice provisions in a parent's appeal from an order terminating parental rights had been circulating among the various intermediate appellate courts for almost 20 years and the emerging conflict is now at a critical juncture with the published decision in *In re Isaiah W.* This split of authority

means that a review of ICWA errors are permitted or foreclosed depending on the appellate district in which the violation occurs. The need for uniformity is necessary to prevent unequal review.

"Congress has recognized 'there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.' (*25 U.S.C. § 1901*(3).)" (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1407. Accord Welf. & Inst. Code § 224, subd. (a)(1); *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 35.) Congress passed ICWA to cure "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Mississippi Choctaw Indian Band v. Holyfield, supra,* 490 U.S. at p. 32.)

"In 2006, with the passage of Senate Bill No. 678 (2005–2006 Reg. Sess.) (Senate Bill No. 678), the Legislature incorporated ICWA's requirements into California statutory law." (Stats. 2006, ch. 838, § 1, p. 6536.)" (*In re W.B., supra,* 55 Cal.4th at p. 52.) Our State Legislature adopted Welfare and Institutions Code section 224 through 224.6 "to encourage full compliance with ICWA by codifying its requirements into state law.

[Citations omitted]" (*In re W.B, supra,* 55 Cal.4th at p. 55.)

This Court stated in *W.B.*, "The primary objective of Senate Bill No. 678 was to increase compliance with ICWA." (*Ibid.*) Because "courts and county agencies still had difficulty complying with ICWA 25 years after its enactment," it was believed that "codification of the Act's requirements into state law would help alleviate the problem. (Sen. Judiciary Com., Analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) as amended Aug. 22, 2005, p. 6.)" (*In re W.B., supra,* 55 Cal.4th at p. 52.)

Under ICWA, if there is reason to believe that the child that is the subject of the dependency proceeding is an Indian child, ICWA requires notice to the child's Indian tribe of the proceeding and of the tribe's right of intervention. (25 U.S.C. § 1912(a); see also Welf. & Inst. Code, § 224.2, subd. (b).) "Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under [ICWA] irrespective of the position of the parents, Indian custodian or state agencies." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.)

The application of the forfeiture doctrine under Division Three's decision in this appeal potentially means that an Indian tribe may never receive notice that its children are subjects in a juvenile dependency

proceeding in California. The tribe thus lacks the ability to protect its children, the most valuable resource the tribe has and the very purpose for which Congress enacted ICWA. (25 U.S.C. § 1903(3).)

Ensuring full compliance with ICWA is of such significance that the ususal rules do not apply. For example, ICWA provides that the ordinary principles of standing do not apply; ICWA allows a non-Indian parent to raise error. (25 U.S.C. §§ 1903(9) ["Parent" for purposes of ICWA proceedings means "any biological parent. . . of an Indian child"], 1911(c) [any Indian child, parent or tribe may petition to invalidate the proceedings upon a showing the ruling violated any of the provisions of ICWA]; §§ 224.1, subd. (c), 224.4, subd. (a)(5)(G)(i); *In re Jonathan S.* (2005) 129 Cal.App.4th 334; *In re Riva M.* (1991) 235 Cal.App.3d 403, 411, fn. 6.)

And, the time frame to raise ICWA error is limitless. An order terminating parental rights and any subsequent adoption order lacks finality because ICWA allows an Indian tribe to petition to invalidate an order at any time, even after an adoption has been finalized. (25 U.S.C. § 1914; Welf. & Inst. Code § 224.4; *Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at pp. 53-54; *In re Christian P.* (2012) 207 Cal.App.4th 1266, 1281-1282; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 473; *In re Alicia S.* (1998) 65 Cal.App.4th 79, 82.)

California, by applying its state time frame of 60 days to file for direct review by appeal and by applying the doctrine of forfeiture, is at odds with ICWA. Its actions are superceded by ICWA's preemption of state law in this regard. (See *California Coastal Comm'n v. Granite Rock Co.* (1987) 480 U.S. 572, 581 [state law is pre-empted to the extent it actually conflicts with federal law]; *In re Desiree F., supra,* 83 Cal.App.4th at p. 469 [recognizing "[t]he courts of this state must yield to governing federal law." in juvenile dependency appeals involving ICWA issues].)

The decision in this case recognizes the controversial nature of its decision (*In re Isaiah W., supra,* 228 Cal.App.4th at pp. 986, 988), but its rationale for adopting *Pedro N.* is faulty. Division Three reasoned in its decision that, to allow a parent unlimited time within which to raise this challenge would violate the child's constitutional right to a stable and permanent home. (*Id.* at p. 986.)

Such reasoning falls short under the overriding mandate of ICWA compliance. In *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, the United States Supreme Court invalidated an adoption decree issued three years earlier because it was entered in violation of ICWA. (490 U.S. at p. 53.) The Supreme Court recognized that separation of the children from their adoptive parents "would doubtless cause considerable pain." (*Ibid.*)

The Court refused to allow this fact defeat the purposes of ICWA, stating that, had the mandate of the ICWA been followed, "much potential anguish might have been avoided." (*Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at pp. 53-54.)

The decision by Division Three purports to limit its application of time frames and forfeiture by claiming it was "only addressing the rights of mother, not the rights of a tribe under the ICWA." (*In re Isaiah W., supra,* 228 Cal.App.4th at p. 988.) Nevertheless, its resolution is illusory. Foreclosing a parent's review of the juvenile court's noncompliance is not the answer. In reality, the parent whose child is the subject of the dependency proceeding is the originating source of notification to the tribe that the subject of that proceeding may be an Indian child. And, the parent is typically the procedural conduit through which a violation of ICWA is raised on appeal. Certainly, neither the courts nor the county agencies would appeal their own error. Any benefit a parent gains from raising the issue, be it incidental or significant, fails to detract from the importance of ensuring compliance.

More importantly, for all intents and purposes, Division Three's conclusion that a dilatory parent can foreclose review of ICWA compliance in effect addresses and ignores the federal and state right of the tribe to notification. If the tribe has no notice of that dependency proceeding is

pending, the tribe lacks any ability to exercise its rights protect its children. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253 ["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."].) As such, the tribe is effectively denied its rights under the line of authority expressed in the *Isaiah W.* decision.

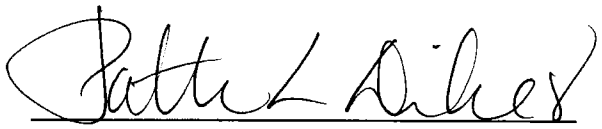
After the decision in this appeal, which itself recognizes that this right has been inconsistently recognized throughout the state, uncertainty exists as to whether, on direct appeal from a postjudgment order terminating parental rights, review of a parent's claim that ICWA notice provisions were violated is foreclosed by the parent's failure to have timely appealed from the judgment or postjudgment finding that ICWA did not apply. Thus, review by this Court is needed to secure uniformity of decision on a state-wide basis.

Conclusion

For the foregoing reasons, review is required to correct the Court of Appeal's erroneous decision that, on direct appeal from a postjudgment order terminating parental rights under Welfare and Institutions Code section 366.26, review of a parent's claim that the notice provisions of the federal Indian Child Welfare Act, 25 U.S.C. §§ 1901, et seq., and California ICWA were violated is foreclosed by the parent's failure to have timely appealed from the juvenile court's judgment or prejudgment finding that ICWA did not apply.

DATED: September 15, 2014

Respectfully submitted,

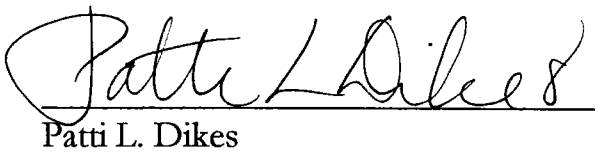


Patti L. Dikes
Attorney for Petitioner Ashlee R.

Certification of Word Count

I certify that the foregoing brief complies with California Rules of Court, rule 8.504(d) and contains 3250 words, including footnotes, according to the word count feature of Word Perfect X4, the computer program used to prepare the brief.

Executed on September 15, 2014 at Spokane Valley, Washington.



Patti L. Dikes

APPENDIX A

Filed 8/8/14 Opn filed after rehearing

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re ISAIAH W., A Person Coming Under the Juvenile Court Law.	B250231
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ASHLEE R., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK91018)

APPEAL from orders of the Superior Court of Los Angeles County, Jacqueline H. Lewis, Judge. Affirmed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

Ashlee R. (mother) appeals from the order terminating her parental rights to the now two-year-old Isaiah W. She contends that the juvenile court erred in finding that the Indian Child Welfare Act (ICWA) did not apply. We hold that mother failed to timely appeal the juvenile court's order.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2011, Isaiah was born with a positive toxicology for marijuana and exhibited withdrawal symptoms. The Department of Children and Family Services (Department) filed a petition alleging that mother's and father's illicit drug use placed Isaiah at risk of harm.[1] At the detention hearing, the juvenile court removed Isaiah from his parents' care and ordered reunification services for them.

Mother told the juvenile court that she may have American Indian ancestry, and the court ordered the Department to investigate mother's claim. The Department interviewed maternal relatives and reported to the court that maternal grandfather may have had Blackfoot ancestry and maternal great-great-grandmother may have been part of a Cherokee tribe.

At the jurisdictional and dispositional hearing on January 20, 2012, the juvenile court reviewed the Department's report and concluded that there was no "reason to know" that Isaiah was "an Indian child as defined under ICWA." Accordingly, the court did not order that the Department provide notice to any tribe or the Bureau of Indian Affairs. Neither mother nor father objected or argued that the ICWA was applicable. The court adjudged Isaiah a dependent and ordered him placed in foster care. The court ordered the parents to participate in counseling and drug testing. Mother did not appeal that order.

---

1 Father is not a party to this appeal.

Mother did not attend her scheduled drug tests or drug treatment program. Although she visited with Isaiah on a weekly basis, she never remained for the full two hours scheduled for the visits. Father only visited Isaiah two or three times. On September 12, 2012, the juvenile court terminated the parents' reunification services and set a hearing on the termination of parental rights.

On November 5, 2012, the Department placed Isaiah with a prospective adoptive family. On April 10, 2013, the juvenile court terminated mother's and father's parental rights. At the hearing, the court repeated its prior finding that there was no reason to know Isaiah was an Indian child. On June 5, 2013, mother appealed from the termination of parental rights.

CONTENTIONS

Mother contends the juvenile court erred in finding that it had no "reason to know" Isaiah was an Indian child, and in failing to order the Department to comply with the ICWA's notice requirements.

DISCUSSION

The ICWA "protect[s] the best interests of Indian children and [] promote[s] the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . . " (25 U.S.C. § 1902.) "In general, the ICWA applies to any state court proceeding involving the foster care or adoptive placement of, or the termination of parental rights to, an Indian child. (25 U.S.C. §§ 1903(1), 1911(a)-(c), 1912-1921.)" (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 338.) An "Indian child" is defined as a child who is "either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).)

The ICWA provides that "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 . . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . . " (25 U.S.C. § 1912(a).)

Here, mother argues the court had "reason to know" that Isaiah was an "Indian child," and, thus, should have ordered the Department to comply with the ICWA's notice requirements. This argument relates to the court's dispositional order of January 2012. At that point, all of the information provided by mother and her relatives about their American Indian heritage was before the juvenile court, and the court considered the Department's report on its investigation into mother's heritage. Therefore, according to mother's argument, because the Department should have provided notice under the ICWA, it was error for the juvenile court to proceed with its disposition of removal and foster care placement. Instead, the court should have continued the dispositional hearing until at least ten days after the Department had served notice on the identified tribes or Secretary of the Interior. (See 25 U.S.C. § 1912(a).) We reject mother's argument.

Mother had the right to appeal the juvenile court's order at the dispositional hearing. She did not do so, and only challenged the court's failure to provide notice under the ICWA approximately one and a half years later which was after the court terminated parental rights. However, the juvenile court's dispositional findings and orders had become final 60 days after the court's announcement of the order. (Cal. Rules of Court, rule 8.406(a)(1).) "Appellate jurisdiction to review an appealable order is dependent upon a timely notice of appeal. [Citation.]" (*In re Elizabeth G.* (1988)

205 Cal.App.3d 1327, 1331.) "An appeal from the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed." (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 189.) Here, because mother failed to timely appeal from the ICWA finding in the juvenile court's dispositional order, "she is foreclosed from raising the issue now on appeal from the order terminating her parental rights." (*Ibid.*; see also *In re Elizabeth G,, supra,* 205 Cal.App.3d at p. 1331.)

Although cases such as *In re Marinna J.* (2001) 90 Cal.App.4th 731 and *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247 have disagreed with *Pedro N.*, we are not persuaded by their reasoning. Those cases held that "parental inaction" cannot "excuse the failure of the juvenile court to ensure that notice under the Act was provided to the Indian tribe named in the proceeding." (*In re Marinna J., supra,* 90 Cal.App.4th at p. 739; see also *Dwayne P., supra,* 103 Cal.App.4th at p. 261.) We decline to adopt the implied conclusion in *Marinna J.* and *Dwayne P.* that there is no time limit on a parent's right to raise the issue of ICWA compliance. To allow a parent unlimited time within which to raise this challenge would violate the child's constitutional right to a stable and permanent home. (See *In re Jasmon O.* (1994) 8 Cal.4th 398, 421.) Children have a constitutional interest in stability, *ibid.*, and in California, the courts have held that this includes the "right to a reasonably directed early life, unmarked by unnecessary and excessive shifts in custody . . . ." (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 241, fn.6.) Accordingly, in the context of dependency proceedings, "where a child has formed familial bonds with a de facto family with whom the child was placed owing to a biological parent's unfitness [citation] . . . and where it is shown that the child would be harmed by any severance of those bonds, the child's constitutionally protected interests outweigh those of the biological parents." (*In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1506, superseded by statute on another ground as stated in *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1311-1312.)

In accordance with these principles, we adopt *Pedro N.'s* conclusion that the ICWA does not authorize a parent to delay in challenging a trial court's determination

on the applicability of ICWA until after the disputed decision is final. (*In re Pedro N., supra,* 35 Cal.App.4th at p. 190.) In *Pedro N.*, the mother informed the juvenile court at the detention hearing for her two children that she was "a full-blooded member of the Mono Indian Tribe." (*In re Pedro N., supra,* 35 Cal.App.4th at p. 186.) The Department sent ICWA notice to the Bureau of Indian Affairs, and the Bureau responded that it needed the identity of the reservation or rancheria with which the mother was associated in order to confirm the family's tribal membership. (*Id.* at p. 187.) When county counsel raised this issue at the disposition hearing, the mother volunteered the name " 'North Fork.' " (*Ibid.*) However, there was no further discussion regarding ICWA notice and the juvenile court removed the children from the mother's care at the conclusion of the hearing. (*Ibid.*) After reunification efforts with the mother failed, the court terminated her parental rights. (*Id.* at p. 185.) The mother appealed from the order terminating her parental rights and argued that the Department had given inadequate notice under the ICWA. (*Ibid.*)

The *Pedro N.* court held that the mother was foreclosed from raising ICWA compliance issues because she did not raise this challenge until approximately two years after the juvenile court's decision not to proceed under the ICWA. (*Id.* at p. 189.) The court also found that Congress did not indicate an intent to permit a parent to delay in raising an ICWA violation until after the disputed action is final. (*Id.* at p. 190.) The court cited to an ICWA provision that "confers standing upon a parent claiming an ICWA violation to petition to invalidate a state court dependency action," and noted that this provision does not state that a parent may claim an ICWA violation at any point in the proceeding. (*Ibid.* [citing to 25 U.S.C. § 1914].) In fact, in another provision the ICWA does authorize a tribe to intervene in a dependency action "at any point in the proceeding." (25 U.S.C. § 1911(c).) Accordingly, the *Pedro N.* court concluded that, "We assume from the absence of such language in [the provision authorizing a parent to raise ICWA violations], that the Congress did not intend to preempt, in the case of appellate review, state law requiring timely notices of appeal from a parent who

appeared in the underlying proceedings and who had knowledge of the applicability of the ICWA." (*In re Pedro N., supra,* 35 Cal.App.4th at p. 190.)

"Congress's intent to not cause unnecessary delay in dependency proceedings is evidenced by the [ICWA] provision allowing a hearing on the termination of parental rights within a relatively short time, 10 days, after the [Secretary of the Interior] or tribe receives ICWA notice. (25 U.S.C. § 1912(a).)" (*In re X.V.* (2005) 132 Cal.App.4th 794, 804.) Such an intent is supported by the maxim that "[b]ecause juvenile dependency proceedings 'involve the well-being of children, considerations such as permanency and stability are of paramount importance. (§ 366.26.)' [Citation.]" (*Ibid.*)

In *X.V.*, the parents of a dependent child filed two appeals, each time challenging the Department's failure to provide adequate notice under ICWA. The court, on the first appeal, remanded the matter for the limited purpose of complying with ICWA notice requirements, and, on the second appeal, held that "the parents ha[d] forfeited a second appeal of ICWA notice issues." (*In re X.V., supra,* 132 Cal.App.4th at p. 804.) The court reasoned that, "[b]alancing the interests of Indian children and tribes under the ICWA, and the interests of dependent children to permanency and stability," there must be a limit to a parent's ability to "delay permanence for children" through "numerous belated ICWA notice appeals and writs." (*Id.* at pp. 804-805.)

The principles enunciated in *X.V.* support our conclusion that a dependent child's interest in permanency and stability requires that there be a time limit to a parent's right to raise the issue of ICWA compliance. In addition, we do not believe Congress intended to authorize a parent to wait for over a year before challenging a trial court's decision on the applicability of the ICWA. Accordingly, we conclude that mother has forfeited her right to raise a challenge to the juvenile court's finding that the ICWA did not apply here. However, we note that, as in *Pedro N.,* we are only addressing the rights of mother, not the rights of a tribe under the ICWA. (*In re Pedro N., supra,* 35 Cal.App.4th at p. 191; see also 25 U.S.C. § 1902 [the ICWA protects the interests of Indian children, their families and Indian tribes].)

DISPOSITION

The orders of the juvenile court are affirmed.

CERTIFIED FOR PUBLICATION

KITCHING, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.

Patti L. Dikes, Bar No. 131775
9116 E. Sprague Ave. #473
Spokane Valley, Washington 99206

Case Number: B250231

Declaration of Service by Mail

I, Patti L. Dikes, declare that: I am over 18 years of age, employed in the County of Spokane, Washington, in which county the within-mentioned mailing occurred, and not a party to the subject cause. My business address is 9116 E. Sprague Ave. #473, Spokane Valley, Washington 99206. I served the Petition for Review in Case No. B250231 of which a true and correct copy of the document filed in the cause is affixed, by e-submission as B250231_PR_Ashlee R.pdf on this Court's website: http://www.courts.ca.gov

In addition, I served by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Court of Appeal, State of California
Second District, Division Three
Ronald Reagan State Building
300 S. Spring Street, 2nd Flr, N. Tower
Los Angeles, California 90013

Clerk of the Superior Court
Juvenile Court Appeals Desk
201 Centre Plaza Drive
Monterey Park, California 91754

California Appellate Project
520 S. Grand Ave., 4th Floor
Los Angeles, California 90071

Helen Yee
P.O. Box 5818
Santa Monica, CA 90409

Ashlee R. (Appellant Mother)

Tiffany Marie Rodriguez
Los Angeles Dependency Lawyers
1000 Corporate Center Drive Suite 430
Monterey Park, CA 91754

Office of County Counsel
Edelman's Children Court
201 Centre Plaza Dr., Ste 1
Monterey Park, CA 91754

Kineta Shorts
Law Office of Katherine Anderson
1000 Corporate Center Drive, Ste. 410
Monterey Park, California 91754

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Spokane Valley, Washington, on September 15, 2014.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 15, 2014, at Spokane Valley, Washington.

Patti L. Dikes