S221263

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re ISAIAH W., A Person Coming Under Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondent, v. ASHLEE R. (Mother), Petitioner and Appellant.	Case No. S221263 Court of Appeal, 2d District Case No. B250231 Los Angeles County Superior Court Case No. CK91018

ANSWER BRIEF ON THE MERITS

From a Decision of the Court of Appeal, Second Appellate District,
Division Three

On Appeal from the Judgment of the Superior Court
for the County of Los Angeles, Juvenile Division
The Honorable Jacqueline Lewis, Commissioner Presiding

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FROM A DECISION ON APPEAL FROM THE SUPERIOR COURT, LOS ANGELES COUNTY

HONORABLE JACQUELINE LEWIS, COMMISSIONER

ANSWER BRIEF ON THE MERITS

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

STATEMENT OF SPECIFIED ISSUE TO BE BRIEFED

This Court's order granting review specifies one issue to be briefed and, pursuant to California Rules of Court, rule 8.520(b), this brief will contain arguments on the following issue, and related issues fairly included within it:

Does a parent's failure to appeal from a juvenile court order finding that notice under the Indian Child Welfare Act ("ICWA") was unnecessary preclude the parent from subsequently challenging that finding more than a year later in the course of appealing an order terminating parental rights?

INTRODUCTION

The Petitioner, Ashlee R. ("Mother"), Isaiah W.'s parent, contends that an appellate challenge to a juvenile court's ruling that the ICWA can be made at any time. In fact, she appealed findings made at the jurisdictional/dispositional hearing in an appeal from the hearing that terminated her parental rights. The Court of Appeal ruled that by failing to file a timely appeal, she had, in fact, forfeited the issue in the Court of Appeal. She now argues that the ICWA preempts state law, and the ICWA can be raised on appeal at any point in the proceedings. She is wrong.

Those cases holding that the ICWA can be raised in an appeal from the termination of parental rights are a deviation from well-established statutory and case law that limits the jurisdiction of an appellate court to matters raised in a timely notice of appeal. By permitting a challenge to the juvenile court's ICWA findings to languish months, even years, after the ruling deprives Indian families and children of the protection of the ICWA, as well as delaying permanency for those children. The issues concerning ICWA should be raised and resolved at the earliest possible time in the trial

court, and not be allowed lay dormant until trotted out at the appeal from termination of parental rights.

COMBINED STATEMENT OF THE CASE AND FACTS

Proceedings in the Dependency Case

Mother and Father[1] are the parents of Isaiah, born November 20, 2011. (1 Clerk's Transcript[2] ["1CT"] 1.) Isaiah was detained from Mother on December 5, 2011, and released to Father. On December 8, 2011, the Los Angeles County Department of Children and Family Services ("Department") filed a petition pursuant to Welfare and Institutions Code[3] section 300 alleging Isaiah needed the protection of the juvenile court because of his parents' drug use. (CT 1-4.)

On December 6, 2011, the social worker questioned Mother about American Indian ancestry. Mother provided no information that the child had American Indian heritage. (1CT 5.)

At the arraignment and detention hearing, held on December 8, 2011, the juvenile court detained Isaiah from both parents and ordered that he be detained in shelter care until the next hearing. (1CT 53.) The

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[1] Isaiah's father is not a party to this appeal.

[2] The Clerk's Transcript is contained in two consecutively paginated volumes, designated as 1CT and 2CT.

[3] All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

Department was given discretion to place Isaiah with any suitable relative. (1CT 59.)

At the detention hearing, Father signed a Parental Notification of Indian Status form indicating he had no Indian ancestry as far as he knew. (1CT 50.) Mother, however, indicated on the Parental Notification of Indian Status form that she had Cherokee heritage through the maternal grandmother, Willie Mae E., and Blackfoot on "dad's side" through mother's paternal grandmother, Hilda Henders. (CT 51.) The juvenile court had Mother sworn in. The court asked Mother why she believed she had American Indian heritage. Mother stated: "What my family told me. . . . That I have Indian in my family. But when my grandma was alive, she used to tell me she was a part Cherokee, if I'm not mistaken." (1 Reporter's Transcript[4] ["1RT"] 3.) The court then asked Mother if the grandmother was registered with any tribe and Mother replied "Not that I know of." Mother also testified that neither she nor any family members were registered with any tribe. (1RT 3.)

The juvenile court ruled, "At this point the Court has no reason to know the child would fall under the Indian Child Welfare Act, but I will

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[4] The Reporters Transcript is contained in two volumes. Volume 1 ("1RT") contains the transcript of the proceedings heard on December 8, 2011 and January 20, 2012. Volume 2 ("2RT") contains the transcript of the proceedings heard on January 9, 2013 and April 10, 2013.

order the Department - - the mother needs to fill out a full ICWA 30 form, including all names, addresses, and phone numbers of any relatives that might have more information. ¶ The Department needs to do an investigation, provide that investigation to the Court in the PRC report. The Court will determine whether or not I have reason to know, and then we'll make a determination as to notice." (1RT 6.)

The Department submitted a Jurisdiction/Disposition report for the January 20, 2012 court date, and recommended that reunification services be offered for both parents. (1CT 71, 99.) On that date, the juvenile court sustained an amended section 300 petition. (1CT 129.) Mother was ordered to enroll in and participate in a drug rehabilitation program with weekly drug testing. The court directed her to participate in a developmentally appropriate parenting program, and to engage in individual counseling to address the case issues. (1CT 68.) Father was ordered into drug testing, and if any test was positive for drugs, then he was to participate in a drug rehabilitation program. He was also ordered to participate in parenting classes and individual counseling. (1CT 68.)

On January 20, 2012, the Department submitted a last Minute Information for the Court Report detailing the Department's investigation of Mother's alleged American Indian ancestry. (1CT 69.) Willie Mae, who Mother believed had Indian ancestry, was Isaiah's great great grandmother.

Her daughter, Thelma, was not registered with a tribe, nor was Thelma's daughter, Valerie, registered with a tribe. Valerie's daughter, Mother, was also not registered with a tribe. Valerie's father, Jessie, (Isaiah's great grandfather) might have had Blackfoot, but no one knows whether he was registered, as the maternal grandmother and her siblings never met him. (1CT 69.)

After having considered the information, the juvenile court stated:

> The Department seems to have done a thorough report, talked to all relatives that possibly had any information as to American Indian heritage. None of the information has pointed to any relative actually having American Indian heritage and certainly none having – being registered or eligible for enrollment. Any possibility here is really too attenuated and remote for it to suggest to this Court or – excuse me—for this court to know that the child would fall under the Indian Child Welfare Act.

(1RT 17-18.)

The juvenile court indicated that pursuant to the definition of "reason to know" defined by section 224.3, subdivision (b), it had no reason to know that Isaiah was an Indian child. The court, however, ordered Mother to keep the Department, her attorney, and the court aware of any new information relating to possible ICWA status. (1RT 18.)

Six months later, the Department reported that it did not know where Mother was residing. (1CT 158.) Immediately after the disposition hearing, Mother reported she had been accepted into a drug and alcohol

rehabilitation program. She was terminated from that program less than a month later for non-attendance. (1CT 159.) The social worker gave Mother referrals, and even scheduled an appointment for the parents at Prototypes, a drug rehabilitation program. The parents did not show up for their appointment. Neither parent participated in drug testing. (1CT 160.)

Father was living with the paternal grandmother, and was unemployed. (1CT 158.) Once he was released from jail, he visited with Isaiah two or three times, but then stopped visiting altogether, stating he was busy. (1CT 160.) He told the social worker that there was no point in drug testing, because the results would be positive for marijuana, which he used daily for his back pain. (1CT 160.)

The social worker opined that it was unlikely that the parents would make any efforts in the future, and she recommended that the juvenile court terminate family reunification services and proceed with a permanent plan. (1CT 170.)

Mother appeared for the six-month review hearing, and requested the matter be set for a contested hearing. (2CT 191.) However, Mother did not appear for the continued hearing, which was continued for notice to Father. (2CT 225-226.) Neither parent appeared for the next hearing, and the juvenile court terminated family reunification services and set the matter for a section 366.26 hearing.

Mother appeared for the section 366.26 hearing. (2 RT 1.) However, Father's whereabouts were unknown, and the Department had not yet received all the results of its due diligence inquiry. (2RT 2.) Mother requested that the maternal aunt, who had previously been homeless, be assessed for placement of Isaiah. (2RT 5.) However, Isaiah had been placed in an adoptive home. (2RT 3.) The matter was continued to give Father notice and for Mother's contest. (2CT 271-272.)

The section 366.26 hearing went forward on April 10, 2013, sixteen-months after Isaiah was detained from the parents. (2RT 6.) The Department moved into evidence the reports it had previously submitted to the juvenile court. (2RT 6-7.) Mother objected to the termination of parental rights, and stated that she wanted Isaiah placed with the maternal aunt. (2RT 8.) The court proceeded to terminate the parents' parental rights. (2RT 9.)

For the April 10, 2013 section 366.26 hearing, the Department reported that the juvenile court had found it had no reason to know that Isaiah was an Indian child as defined under the ICWA, and did not order notice to any tribe or the Bureaus of Indian Affairs. The parents had been ordered to inform the Department, counsel, and the court if they had any new information that had any bearing on their Indian status. (2CT 283.) At

that hearing, the court reiterated that it had no reason to know Isaiah was an Indian child. (2CT 10.)

Mother filed her Notice of Appeal on June 5, 2013. (2CT 320.) The Second District Court of Appeal ruled that Mother's appeal of the juvenile court's findings regarding ICWA notice was barred due to her failure to file a timely notice of appeal. The Court stated:

> "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.) "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.)

(*In re Isaiah W.* (2014) 228 Cal.App.4th 981, review granted and opinion superseded.)

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ARGUMENT

I. A PARENT'S FAILURE TO APPEAL FROM A JUVENILE COURT ORDER FINDING THAT NOTICE UNDER THE INDIAN CHILD WELFARE ACT WAS UNNECESSARY PRECLUDES A PARENT FROM SUBSEQUENTLY CHALLENGING THAT FINDING MORE THAN A YEAR LATER IN THE COURSE OF APPEALING AN ORDER TERMINATING PARENTAL RIGHTS.

A. The Court of Appeal Correctly Ruled that It had Lost Jurisdiction to Review the Ruling of the Juvenile Court Regarding ICWA Rulings Due to the Parents' Failure to File a Timely Appeal.

The Second District Court of Appeal ruled that Mother's appeal of the juvenile court's findings regarding ICWA notice was barred due to her failure to file a timely notice of appeal. The Court stated:

> "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.) "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.)

(In re Isaiah W. (2014) 228 Cal. App. 4th 981, review granted and opinion superseded.) The Court of Appeal was correct.

Appellate courts in California derive their appellate jurisdiction from the California Constitution. (Cal. Const., art. VI, § 11.) The right to appeal, however, is defined by statute. "It is settled that the right of appeal

is statutory and that a judgment or order is not appealable unless expressly made so by statute." (*People v. Mazurette* (2001) 24 Cal.4th 789, 792.)

Dependency appeals are governed by section 395, which provides that "[a] judgment in a proceeding under [s]ection 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment." (§ 395(a)(1); *In re S.B.* (2009) 46 Cal.4th 529, 531-532.) In dependency cases, the first hearing from which an appeal may be taken is the disposition hearing. (*In re S.B., supra*, 46 Cal.4th at p. 532; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150; *In re Sheila B.* (1993) 19 Cal.App.4th 187, 196.) Disposition orders and "all subsequent orders are directly appealable without limitation," except for orders setting a hearing pursuant to section 366.26, which are subject to review by extraordinary writ. (*In re S.B., supra*, 46 Cal.4th at p. 532; *In re Meranda P., supra*, 56 Cal.App.4th at p. 1150.)

"'A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order.' [Citation.]" (*In re S.B., supra*, 46 Cal.4th at p. 532.) "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 Elizabeth M.* (1991) 232

Cal.App.3d 553, 563, citing *In re Elizabeth G., supra,* 205 Cal.App.3d at p.1331.)

The California Rules of Court establish the time limit to file a notice of appeal in dependency cases. "[A] notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed." (Cal. Rules of Court, rule 8.406(a)(1); See also *In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1253-1254; *In re Markaus V.* (1989) 211 Cal.App.3d 1331, 1337.) "Except as provided in rule 8.66,[5] no court may extend the time to file a notice of appeal. The superior court clerk must mark a late notice of appeal 'Received [date] but not filed,' notify the party that the notice was not filed because it was late, and send a copy of the marked notice of appeal to the district appellate court." (California Rules of Court, rule 8.406(c).)

The notice of appeal is a prerequisite to the appellate court's power to entertain the appeal. (*Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864.) "Appellate jurisdiction to review an appealable order is dependent upon a timely notice of appeal." (*In re Elizabeth G., supra,* 205 Cal.App.3d at p. 1331.) "The time for appealing a judgment is

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[5] California Rules of Court, rule 8.66, allows for an extension of the time to file a notice of appeal when it is made necessary by reasons not applicable here, such as an earthquake, fire, or other public emergency. (California Rules of Court, rule 8.66.)

jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Servs., Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56, citing *Hollister Convalescent Hosp. v. Rico* (1975) 15 Cal.3d 660, 666.)

"[T]he requirement as to the time for taking an appeal is mandatory, and the court is without jurisdiction to consider one which has been taken subsequent to the expiration of the statutory period." (*Estate of Hanley* (1943) 23 Cal.2d 120, 122.) "If it appears that the appeal was not taken within the 60-day period, the court has no discretion but must dismiss the appeal of its own motion even if no objection is made." (*Id.* at p. 123.)

"Conventional appeals have long been governed by the 'fundamental precept that the timely filing of an appropriate notice of appeal or its legal equivalent is an absolute prerequisite to the exercise of appellate jurisdiction.'" (*Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 835, quoting *Hollister Convalescent Hosp., Inc.* v. *Rico, supra,* 15 Cal.3d at p. 670.) "The first step, taking of the appeal, is not merely a procedural one; it vests jurisdiction in the appellate court and terminates the jurisdiction of the lower court." (*Estate of Hanley, supra,* 23 Cal.2d at p. 123.)

"Accordingly, in conventional appeals it has long been the rule that '[in] the absence of statutory authorization, neither the trial nor appellate courts may extend . . . the time for appeal, even to relieve against mistake,

inadvertence, accident, or misfortune. Nor can jurisdiction be conferred upon the appellate court by the consent or stipulation of the parties, estoppel, or waiver. If it appears that [an] appeal was not taken within the [statutory time], the court has no discretion but [to] dismiss the appeal . . . .'" (*Pressler v. Donald L. Bren Co., supra,* 32 Cal.3d at p. 835, quoting *Estate of Hanley, supra*, 23 Cal.2d at p. 123; internal citations and italics omitted.)

"An untimely notice of appeal is an 'absolute bar' to appellate jurisdiction. [Citation.] We have no jurisdiction to act on an untimely appeal and must dismiss the appeal without reaching the merits. [Citation.]" (*Faunce v. Cate* (2013) 222 Cal.App.4th 166, 170.) "This court is without power to bestow jurisdiction on itself, nor may the parties create jurisdiction by consent, waiver, or estoppel." (*Mid-Wilshire Associates v. O'Leary* (1992) 7 Cal.App.4th 1450, 1455.) "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.)

Thus, appellate court jurisdiction is a matter of law and dependent on a timely notice of appeal challenging an order within 60 days of the rendition of the order. (*People v. Mazurette, supra*, 24 Cal.4th at p. 792; *In*

re Elizabeth G. supra, 205 Cal.App.3d at p. 1331; Cal. Rules of Court, rule 8.406(a)(1).) Accordingly, an appellate court lacks jurisdiction to entertain a challenge to an order for which the statutory time for filing a notice of appeal had expired. (*In re S.B., supra*, 46 Cal.4th at p. 532.; *In re Elizabeth M., supra*, 232 Cal.App.3d at p. 563.) As such, the Second District Court of Appeal's decision to apply the California appellate time frames was sound because a timely notice of appeal vests jurisdiction in the appellate court and is an absolute prerequisite to the appellate court's power to hear the appeal. (*Van Beurden Ins. Servs., Inc. v. Customized Worldwide Weather Ins. Agency, Inc., supra,* 15 Cal.4th at p. 56; *Adoption of Alexander S., supra*, 44 Cal.3d at p. 864.)

When a Court of Appeal disregards the applicable time period for filing a notice of appeal and endeavors to entertain the appeal regardless, it exercises jurisdiction it does not have. (*Van Beurden Ins. Servs., Inc. v. Customized Worldwide Weather Ins. Agency, Inc, supra,* 15 Cal.4th at p. 56, citing *Hollister Convalescent Hosp. v. Rico, supra*, 15 Cal.3d at p. 666.) Without jurisdiction, the appellate court has no power to hear the appeal and the appeal must be dismissed. By extending the appellate time frame to allow a parent to wait until the termination of parental rights to assert a challenge to a two-year-old ICWA finding, the appellate court not only

exercises power it does not have, it inadvertently assists the parent in stalling that child's adoption.

B. The Doctrine of Federal Preemption does not confer Jurisdiction on the Court of Appeal Where None Exists.

The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law. (U.S. Const., art. VI, cl. 2; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407; *Jevne v. Superior Court* (2005) 35 Cal.4th 935.) There are four types of federal preemption: express, conflict, obstacle, and field. (See *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955.)

First, express preemption arises when Congress "define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." (*English v. General Electric Co.* (1990) 496 U.S. 72, 78-79, accord, *Jevne v. Superior Court, supra*, 35 Cal.4th at p. 949, 28 Cal.Rptr.3d 685, 111 P.3d 954.) Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. (*Hillsborough County v. Automated Medical Labs.* (1985) 471 U.S. 707, 713; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815.) Third, obstacle preemption arises when "

'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (*Crosby v. National Foreign Trade Council* (2000) 530 U.S. 373, 120 S.Ct. 2288, quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581; accord, *Bronco Wine Co. v. Jolly*, *supra*, 33 Cal.4th at p. 955.) Finally, field preemption, i.e., "Congress' intent to pre-empt all state law in a particular area," applies "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." (*Hillsborough County*, at p. 713, 105 S.Ct. 2371, quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447.)

In cases such as *In re Marinna J.* (2001) 90 Cal.App.4th 731, the Court of Appeal reasoned that the federal act required there be a mechanism to review ICWA errors. (*Id.* at p. 739.) Mother likewise contends that the ICWA preempts state law, at least as far as the authority of the appellate law is concerned. (Mother's Opening Brief on the Merits ["MOB"] 8.) But they never indicate exactly what provision of federal law invalidates the California judicial system, at least as far as the ICWA is concerned.

The federal statute mandating notice to Indian Tribes states:

> (a) 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 in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. 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: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(25 USC § 1912.)

The only federal statute contained in the ICWA dictating court proceedings is 25 United States Code section 1914. That section states:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition *any court of competent jurisdiction* to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

(25 U.S.C. § 1914, emphasis added.) Thus, the federal law dictates that a petition to right an ICWA wrong must be heard in a court of competent jurisdiction, it does not change the existing jurisdiction of state courts.

An appellate court is not a "court of competent jurisdiction" for purposes of such a petition. In *In re Jonathon S.* (2005) 129 Cal.App.4th

334, the court held that an appellate court, is not a "court of competent jurisdiction" within the meaning of the enforcement provision of the ICWA because, among other reasons, "in many instances, a petition under the enforcement provision will require the resolution of disputed factual issues. We are just not the right kind of court." (*Id.* at p. 341.) "Any petition under the enforcement provision to invalidate an order in an open dependency [proceeding] must be filed in the juvenile court; only after the juvenile court renders an appealable ruling on the petition can we review the issues on appeal." (*Id.* at p. 342 [disagreeing with courts which have suggested that an appeal regarding an ICWA violation is itself a petition under the Act's enforcement provision].)

C. The ICWA Does not Require the Court of Appeal extend its Jurisdiction, it Merely requires there Exist Some Mechanism to Address the ICWA issues, if need be.

Mother states that the generally accepted rule in dependency cases is that the forfeiture doctrine does not bar consideration of ICWA notices on appeal. (MOB 26.) But to the extent that existing case law confused the issue of forfeiture and lack of appellate jurisdiction, existing case law is wrong. ICWA, like any other issue, is subject to the forfeiture rule.

The early case of *In re Marinna J., supra,* 90 Cal.App.4th 731, stands for the general proposition that where notice requirements are

violated and parents do not raise that claim in a timely fashion, the waiver doctrine cannot be invoked. (*Id.* at p. 736.)

In that case, the parents alleged Cherokee heritage at the beginning of the case. There was no evidence the Agency noticed the Cherokee tribes. (*Id.* at p. 736.) The case proceeded to the section 366.26 hearing where the juvenile court terminated parental rights. (*Id.* at p. 733.) At no point in the proceedings did the parents object to the finding ICWA did not apply. The parents raised the issue for the first time on appeal, and the Court found the parents did not waive that issue because, without notice to the tribe, the tribe is unable to assert its rights under ICWA. (*In re Marinna J., supra,* 90 Cal.App.4th 731, 736.) Similarly, the cases of *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247 and *In re Nikki R.* (2003) 106 Cal.App.4th 844 held the parent did not waive the issue of an ICWA noticing defect when they raised the issue for the first time on appeal from the termination of parental rights.

But other than a discussion of the mandatory nature of notice under the ICWA, none of the cases explain why a Court of Appeal would retain jurisdiction to review a final decision over the provisions of the ICWA, when it could not retain jurisdiction over any other issue, including those detailing fundamental liberty interests, such as a parents liberty interest in a parental relationship.

What the various Courts of Appeal have held is that ICWA is just too important to allow a party's lack of diligence prevent its application. But they are incorrect, parents and children can and do waive the protections of the ICWA all the time. If they do not inform the juvenile court of any American Indian heritage, any issues concerning the ICWA are forfeited. If they never appeal from any of the orders or findings made by the trial court, any possible ICWA issues are forfeited. Yet no one has proposed a rule stating that the Court of Appeal must *sua sponte* review every case in which the trial court finds it has no reason to believe the children are Indian children in order to ensure that no parent has inadvertently waived an American Indian Tribe's rights under the ICWA. Nor has any Court of Appeal determined that the right to appeal ICWA issues is not bound by any time frame.

The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400; 6 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Reversible Error, § 37.) The rule is designed to advance efficiency and deter gamesmanship. As explained in *People v. Simon* (2001) 25 Cal.4th 1082, " ' " 'The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .' " [Citation.] " 'No procedural principle

is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' . . ." [Citation.] [¶] "The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . . : ' "In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." ' " [Citation.]' (Fn. omitted; [citations].)" (*People v Simon, supra*, 25 Cal.4th at p. 1103.)

But the forfeiture rule presumes a final judgment and the loss of jurisdiction in the trial court. In dependency, the juvenile court retains jurisdiction over the child until and adoption is finalized, the child is returned to a parent or placed with a legal guardianship, or the child ages out of the system. (§§ 364, subd. (c), 362.4, 366.26, 366.23.) Even if the Court of Appeal has lost jurisdiction over an issue, the juvenile court has not.

D. Delaying ICWA Determinations Until an Appeal From the Orders Terminating Parental Rights Enervates the ICWA, and Requiring ICWA issues to be Resolved in a Timely Fashion Protects Both the Indian Family and the Tribes Rights.

Congress enacted the ICWA in 1978 in response to a rising concern about the plight of Indian children, Indian families, and Indian tribes involved in state child-welfare proceedings. (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32.) The legislation's purpose is to protect the best interests of Indian children and promote the stability and security of Indian tribes and families. (*Ibid.*) In furtherance of these goals, the ICWA contains procedural and substantive mandates.

Procedurally, when there is reason to know a child is Indian, Title 25 United States Code section 1912, subdivision (a), notice requirements are triggered and mandate that the Department notify the relevant tribe(s) or the Secretary of the Interior of the proceedings in order to ascertain whether the child is an "Indian Child" as defined by the ICWA. (25 USC §§ 1902, 1903.) In 2007, California adopted identical language with regard to ICWA notice requirements and the definition of "Indian Child." (§§ 224.1, subd. (a), 224.2, subd. (a).)

"Indian Child" is defined under federal and California law as an unmarried person under the age of 18 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 purpose of sending ICWA notice is to determine whether a child is "Indian" as defined by the ICWA. This is important because the substantive portions of the ICWA apply to Indian children, but only those Indian children as defined by the ICWA - "children who are members of a tribe or eligible for membership and have a parent who is a tribal member." (See 25 U.S.C. §§ 1903(4), 1914-1916; § 224.1, subd. (a).)

If the juvenile court "knows or has reason to know that an Indian child is or may be involved," the agency is not required to send formal notice, but rather is required only to further investigate the child's Indian status. (Cal. Rules of Court, rule 5.481(a)(4).) "The circumstances that may provide probable cause for the court to believe the child is an Indian child include, but are not limited to, the following: [¶] (A) A person having an interest in the child informs the court or the county welfare agency or provides information suggesting that the child is an Indian child; [¶] (B) The residence of the child, the child's parents, or an Indian custodian is in a predominantly Indian community; or [¶] (C) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service." *(In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538-1539, citing § 224.3, subd. (b)(2), (3), internal quotation marks omitted.)

If these or other circumstances indicate a child may be an Indian child, the Department must further investigate the child's possible Indian status. (§ 224.3, subd. (c).) If the investigation leads the Department or the court to know or have reason to know the child is Indian, the ICWA notice mandates are triggered. (§§ 224.3, subd. (d), 224.2, subd. (a)(5)(A)-(G).)

Because Indian families are afforded special protections, the ICWA envisions that they be identified at the beginning of any dependency proceeding. (§224.2, subd (d).) However, at any time in the case, if new information sheds light on the families' American Indian ancestry, the juvenile court shall revisit the issue. Section 224.2, subdivision (b) provides that notice shall be sent *whenever* it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter, including, but not limited to, the hearing at which a final adoption order is to be granted, unless it is determined that the Indian Child Welfare Act (25 U.S.C. 1901 et seq.) does not apply to the case in accordance with section 224.3. (Emphasis added.) In addition, section 388 provides a vehicle for revisiting the findings in the juvenile court. Thus, any issues concerning the ICWA should be litigated in the juvenile court before they can be

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considered on a timely appeal.[6] As a last resort, the parties may resort to an action in federal court. (*Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038.)

The rule allowing ICWA issues to be determined in an appeal from a hearing to terminate parental rights encourages the practice of ignoring ICWA violations for years while a dependency case creeps through the proceedings. In the calendar year 2014, of the 138 appeals decided in California concerning ICWA, 86 were appeals from the termination of parental rights.[7] In 62 percent of the cases where the juvenile court's ICWA determination challenged, that challenge did not come until after the child was declared a dependent, removed from his/her parents, family reunification services terminated, and parental rights terminated. Should a child actually be an Indian Child as defined by the act, the child and the family will not have enjoyed any of the protections they are entitled to under the act. The passage of time in foster care for an Indian Child that was not afforded the protections of the ICWA cannot be undone. If

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[6] Although section 366, subdivision (n), does deprive the juvenile court from changing an order terminating parental rights, it does not deprive the court jurisdiction to revisit ICWA concerns. And should the child in question actually be an Indian child, then 25 United States Code section 1914 would come into play. Thus, if any California statute is preempted by the ICWA, it would be section 366.26, subdivision (n).

[7] Those numbers are derived from ruling a search of ICWA cases on WestLawNext, then filtering for termination of parental rights, and then manually reviewing the cases to eliminate those in which parental rights were not terminated, such as cases involving guardianships.

violations of the act are not challenged by either the parents' counsel or counsel for the children when such violations occur, and do not seek prompt appellate review, then counsel was ineffective. But there is a remedy in the trial court for violations of the ICWA.

CONCLUSION

For all the foregoing reasons, the Department requests that this Honorable court affirm the holding of *In re Isaiah W.*, and rule that if an ICWA issue is not timely appealed, the Court of Appeal loses jurisdiction to review the decision of the juvenile court.

DATED: February 6, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.360

The text of this brief consists of 6,254 words as counted by the Microsoft Office Word 2010 program used to generate this brief.

DATED: February 6, 2015

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DECLARATION OF SERVICE (Mail)

STATE OF CALIFORNIA, County of Los Angeles:

LINDA C. KAPPELER states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 201 Centre Plaza Drive, Suite 1, City of Monterey Park, County of Los Angeles, State of California; that I am readily familiar with the business practice of the Los Angeles County Counsel for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business.

That on February 9, 2015, I served the attached **ANSWER BRIEF ON THE MERITS IN THE MATTER OF ISAIAH W., SUPREME COURT NO. S221263, 2d JUVENILE NO. B250231, LASC NO. CK91018** upon Interested Parties by depositing copies thereof, enclosed in a sealed envelope and placed for collection and mailing on that date following ordinary business practices in the United States Postal Service, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 9, 2015, at Monterey Park, California.

LINDA C. KAPPELER

DECLARATION OF SERVICE (Personal)

STATE OF CALIFORNIA, County of Los Angeles:

LINDA C. KAPPELER states: I am employed in the County of Los Angeles, State of California, over the age of eighteen years and not a party to the within action. My business address is 201 Centre Plaza Drive, Suite 1, Monterey Park, California 91754-2142.

On February 9, 2015, I personally served the attached **ANSWER BRIEF ON THE MERITS IN THE MATTER OF ISAIAH W., SUPREME COURT NO. S221263, 2d JUVENILE NO. B250231, LASC NO. CK91018** to the persons and/or representative of the court as addressed below:

For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a secretary or an individual in charge of the office, between the hours of 9:00 a.m. and 5:00 p.m.

For the court, delivery was made to the Clerk of the Superior Court by leaving the documents in an envelope or package, clearly labeled to identify the hearing officer being served, with the counter clerk in that office, between the hours of 8:30 a.m. and 4:30 p.m.

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