Filed 1/28/15 In re S.B. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re S.B., a Person Coming Under the Juvenile Court Law.	B256789 (Los Angeles County Super. Ct. No. CK97462)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.B. et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Philip L. Soto, Judge. Affirmed.

Lori N. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant M.B.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant R.P.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel for Plaintiff and Respondent.

Angela T. Torres, for minor S.B.

M.B. (father) and R.P. (mother) appeal from the orders terminating their parental rights to their son, S.B. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 25, 2013, the Department of Children and Family Services ("DCFS" or the "Department") filed a petition pursuant to Welfare and Institutions Code[1] section 300, subdivision (b) alleging that the newborn S.B. needed the protection of the juvenile court. The allegations of the petition centered on mother's inability to care for the infant due to mental health and drug issues. The arraignment and detention hearing, at which both parents appeared, was held that day.

At the initial hearing, the court found that father was the presumed father of S.B. The court received into evidence the DCFS report which indicated that father was homeless and mother had recently been placed on a 72-hold for a psychiatric evaluation. The court found that there was a prima facie case for detention from both parents (while noting that father was nonoffending under the petition), that reasonable efforts had been made to prevent or eliminate the need for the child's removal from the parents, and that continuance in the home was contrary to the child's welfare. The court ordered S.B. detained and ordered reunification services for both parents.

The jurisdiction and disposition hearing was held on March 25, 2013. The court received in evidence the social worker's reports, which recounted interviews conducted with both mother and father. Mother stated that she had been diagnosed with bipolar disorder and ADHD and had taken the prescription medications Wellbutrin and Abilify in the past, but stopped taking them during her pregnancy and while nursing; she reported no illicit drug use for the last two years. She used marijuana, for which she had a medical marijuana card, to help her with her mental health issues. Father reported that he had no family support and lived temporarily with a friend while seeking suitable housing. He was an unemployed music student. He used medical marijuana, for which he had a card,

[1] Unless otherwise indicated, further statutory references are to the Welfare and Institutions Code.

to help him with back pain he acquired while sleeping on pavements when he was homeless. If employed, he would financially support his child.

The court sustained the petition,[2] declared S.B. a dependent of the court and ordered him removed. DCFS was ordered to provide housing and financial assistance referrals for father. Mother was ordered to participate in individual counseling and to take all prescribed medications and undergo a psychological assessment. Father's plan consisted of seeking referrals for housing. The six-month review hearing pursuant to section 366.21, subdivision (e) was calendared for September 20, 2013.

On that date, DCFS filed a section 385 petition requesting that mother's visits be reduced to one day a week for two hours, due to her inconsistent visitation. The court granted that petition and continued the section 366.21, subdivision (e) hearing to October 29, 2013, for contest.

At the October 29, 2013 hearing, the court found that return of S.B. to the parents' custody would create a substantial risk of detriment, that DCFS had complied with the case plan by making reasonable efforts to reunite the family, that mother was in partial compliance with the case plan but that there was not a substantial probability of the child's being returned to the parents within six months. Consequently, the court

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[2] As sustained, the petition states:

b-1: The child, S[.] B[.]'s mother . . . has a history of mental and emotional problems, including a diagnosis of bi-polar disorder and ADHD, which render the mother incapable of providing regular care and supervision of the child. On 1/22/2013, the mother was involuntarily hospitalized for the evaluation and treatment of the mother's psychiatric condition. Such mental and emotional condition on the part of the mother endangers the child's physical health and safety and places the child at risk of physical harm and damage.

b-2: The child, S[.] B[.]'s mother . . . has a history of illicit drug use and is a current abuser of marijuana, which renders the mother unable to provide regular care and supervision of the child. The mother abused marijuana during her pregnancy with the child and had a positive toxicology screen for marijuana, on 9/22/12. Such marijuana abuse by the mother, during the mother's pregnancy with the child, endangers the child's physical health and safety and places the child at risk of physical harm and damage.

terminated reunification services and set a section 366.26 hearing for February 25, 2014. The parents were not orally advised of their right to file a writ petition to challenge the setting of the section 366.26 hearing.

On January 20, 2014, father filed a section 388 petition asking the court to change its October 29, 2013 order to a "home of parent" order, since father remained nonoffending and had obtained housing which had been verified by the social worker. The court set a hearing on father's petition for February 25, 2014.

On that date, the court set the section 366.26 hearing for contest and ordered a supplemental report, to include an interview with father's apartment manager to determine whether father's housing permitted the minor to live there.

On March 11, 2014, the court heard father's section 388 petition. Father, S.B.'s foster mother and the social worker were sworn and testified. The court continued the hearing to April 14, 2014 and ordered that S.B. have a 29-day visit with father; DCFS was ordered to prepare a report at the conclusion of the 29-day visit.

At the continued hearing on April 14, 2014, the court returned S.B. to the custody of the foster parents, based on father's smoking in the vicinity of S.B., who had respiratory problems. The court also noted that father had not met with the foster family agency worker to discuss S.B.'s needs, nor taken parenting classes to improve his parenting skills. DCFS was ordered to advise father of any medical appointments for the child so that he could attend them, and to set up counseling and random drug and alcohol testing for father. The contested section 388 and 366.26 hearings were continued to May 22, 2014.

At the May 22, 2014 hearing, father, S.B's babysitter, and father's support group were present in court, but mother was not. The court received in evidence father's and the Department's exhibits. Father testified on his own behalf, and also called a social worker investigator from his counsel's law firm to testify concerning his observations from a visit to father's home as well as a two-hour visit between father and S.B. at a play area. After hearing arguments of counsel, the court denied father's section 388 petition,

ruling that there was no change in father's circumstances and that the proposed change in order would not promote the child's best interests.

The court then proceeded to the section 366.26 hearing. Mother's counsel objected to termination of mother's parental rights but noted that no exceptions applied. Father's counsel argued that section 366.26, subdivision (c)(1)(B)(i), the so-called "beneficial relationship" exception, applied. The court found by clear and convincing evidence that the child was adoptable, that it would be detrimental to return him to the parents, and that no exceptions under section 366.26, subdivision (c)(1)(B) applied, and terminated parental rights.

Both mother and father timely filed notices of appeal. Mother maintains that DCFS failed to give notice as required under ICWA, and joins in father's arguments to the extent they inure to her benefit. Father contends that the juvenile court erred by (1) failing to comply with the notice requirements of ICWA; (2) failing to return S.B. to his custody at the six-month review hearing in October 2013, since father had by that time secured a job and suitable housing; (3) finding that DCFS provided father with reasonable services; (4) denying his section 388 petition; and (5) terminating his parental rights. DCFS maintains that father is precluded from challenging the findings and orders made at the section 366.21, subdivision (e) six-month review hearing in October 2013, since he failed to apply for writ relief. We consider each of these contentions below.

DISCUSSION

1. *Father's failure to challenge the findings and orders made at the section 366.21, subdivision (e) review hearing*

We begin with the Department's challenge to father's appeal of the October 29, 2013 order terminating his reunification services and setting the section 366.26 hearing. The Department acknowledges that the court was required to orally advise father of his right to writ review, and concedes that it did not do so. It maintains, however, that the error was cured when the clerk served the parents with a written writ advisement.

"When at the disposition hearing the juvenile court denies family reunification services and sets a section 366.26 hearing, '"the traditional rule favoring the appealability of dispositional orders yields to the statutory mandate for expedited review."' (*In re Athena P.* (2002) 103 Cal.App.4th 617, 625; Cal. Rules of Court, rule 8.450.) 'An order setting a section 366.26 hearing "is not appealable; direct appellate consideration of the propriety of the setting order may be had only by petition for extraordinary writ review of the order. (§ 366.26, subd. (*l*); [citations].)" [Citation.] When the juvenile court orders a hearing under section 366.26, the court must orally advise all parties present that if the party wishes to preserve any right to review on appeal of the order setting the hearing under section 366.26, the party is required to seek an extraordinary writ. [Citations.]' (*Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, 259.) This rule applies to all orders [] made contemporaneously with the setting of the hearing. (Cal. Rules of Court, rule 8.450; *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1023.)" (*Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 671 (*Maggie S.*).)

Here, father was present at the October 2013 hearing at which the court terminated reunification services and set the section 366.26 hearing, but the court failed to orally advise him of the writ requirement. As was the case in *In re Maggie S., supra,* 220 Cal.App.4th 662, the minute order for the referenced hearing recites that "parent(s) is/are served Notice of Intent to File Writ Petition pursuant to California Rules of Court 39.1B and 1436.5," and a certificate of mailing dated the day after the hearing states that the minute order and an advisement of rights was sent to father at his last known address. But "'[t]he court must give an oral advisement to parties present at the time the order is made,' and the court failed to do so in this instance. (*In re A.H.* (2013) 218 Cal.App.4th 337, 347, 159 Cal.Rptr.3d 891.)" (*Maggie S., supra,* at p. 671.) Thus, we excuse father's lack of compliance with the writ requirement, and consider his challenge to the October 29, 2013 orders.

2. *Section 366.21, subdivision (e) hearing*

At the six-month review hearing on October 29, 2013, mother requested another six months of reunification services. Father reported that he had recently secured housing and a job, but had not informed the social worker of these new circumstances before the hearing date because he had lost his phone. His counsel stated, "I would ask that the court either put this matter over to have all of this information checked out or, maybe, put it over three months for a shorter review period." In response to this suggestion, the court stated, "Even if I were to have somebody check the house out today, you would still need to have somebody to be able to take care of the child during the day while you're at work. Daycare has to be set up and all of the other things that are necessary for a single parent have to be made, arrangements have to [be] made. And you don't have any of that. And I have to make a call today because today is the day to make that decision." The court concluded that it would be detrimental to S.B. to be returned to father under the then-current circumstances, and suggested that father file a section 388 petition if and when those circumstances changed.

Father challenges this ruling. He also asserts that the court abused its discretion by denying his counsel's request for a continuance, and contends there is not substantial evidence for the finding that DCFS provided him with reasonable services. We consider each of these rulings below.

a. *Finding of detriment to S.B. if he were placed in father's custody*

In assessing whether returning the child to his or her parent would create a risk of detriment, the juvenile court may consider, among other things: "compliance with the reunification plan" (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704 (*Constance K.*)); the child's expressions and feelings about returning to the parent (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 974 (*Alvin R.*)); "properly supported psychological evaluations which indicate return to a parent would be detrimental to a minor [citations]" (*Constance K.*, *supra*, 61 Cal.App.4th at p. 705); "the opinion of the [investigating] social worker" (*Alvin R.*, *supra*, 108 Cal.App.4th at p. 947; § 366.22, subd. (a) [the court "shall

review and consider the social worker's report and recommendations"]); and "limited awareness by a parent of the emotional and physical needs of a child." (*Constance K.*, *supra*, at p. 705.) However, "[t]he question whether to return a dependent child to parental custody is not governed solely by whether the parent has corrected the problem that required count intervention; rather the court must consider the effect such return would have on the child." (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 894; see also *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1344.) As explained by one court, "[c]ompliance with the reunification plan is certainly a pertinent consideration at the section 366.22 hearing; however, it is not the sole concern before the dependency court judge." (*Constance K.*, *supra*, at p. 704.)

Here, there was no evidence that father had a job and a place to live. The report prepared for the six-month review hearing indicated that he was homeless, and did not have a job. He had applied for low income housing, and his paperwork was being processed. He had hoped to move into a studio apartment. The social worker made arrangements to meet with the parents, but they did not appear for the meeting.

At the hearing, father's counsel opted not to present any evidence, but rather to proceed on argument. During that argument, she stated that father now had a job and housing. But "[i]t is axiomatic that the unsworn statements of counsel are not evidence." (*In re Zeth S.* (2003) 31 Ca1.4th 396, 414.) The only evidence admitted at the hearing were the reports prepared by the Department, and those reports indicated that father was homeless and still staying in the same place as mother. Substantial evidence supported the juvenile court's finding that it would be detrimental to return S.B. to father, as he did not have suitable housing.

b. *Denial of continuance*

Father contends that the juvenile court erred when it denied his request for a continuance. We see no error.

The section 366.21, subdivision (e) hearing was originally set for September 20, 2013. The matter was continued at the parents' request for an evidentiary hearing. The

social worker attempted to meet with the parents prior to the hearing, but neither of them appeared for the scheduled appointment, both claiming to have lost their bus passes.

Father did not file a motion requesting the matter be continued, nor did he request a continuance before the commencement of the hearing. It was only after the Department rested and during argument that his attorney requested that the court delay its ruling "to have all of this information checked out."

A decision to deny a continuance is reviewed for an abuse of discretion. (*In re Giovanni F*. (2010) 184 Cal.App.4th 594, 605.) Section 352 governs continuances in dependency hearings. Continuances must be requested in writing at least two court days prior to the hearing date, unless the court for good cause entertains an oral motion for a continuance. (§ 352, subd. (a).) A continuance may be granted only upon a showing of good cause, and only if it is not contrary to the interests of the minor. (*Ibid*.) In considering the minor's interests, the court is to give weight to the minor's need for prompt resolution of his or her custody status, the need to provide the child with a stable environment, and the damage to a minor of prolonged temporary placements. (*Ibid*.)

Here, father's counsel did not establish good cause for not filing a written motion. While father complains that the Department had not checked out his home, he had missed the appointment scheduled with the social worker to discuss the case, and admitted he did not inform the social worker about his new residence. Therefore, there was no showing of good cause to continue the matter.

c. *Finding that DCFS provided father with reasonable services*

Father argues that DCFS did not provide him reasonable services, because he did not receive assistance with his housing needs. Thus, he maintains that the juvenile court's finding that DCFS provided him with reasonable services is not supported by substantial evidence.

"In reviewing the reasonableness of the services provided, this court must view the evidence in a light most favorable to the respondent. We must indulge in all legitimate and reasonable inferences to uphold the verdict. If there is substantial evidence

supporting the judgment, our duty ends and the judgment must not be disturbed. [Citations.] '"'[W]hen two or more inferences can reasonably be deduced from the facts,' either deduction will be supported by substantial evidence, and 'a reviewing court is without power to substitute its deductions for those of the trial court.' [Citations.]" [Citation.]' (*In re Eric J.* (1979) 25 Cal.3d 522, 527.)" (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.)

Here, the court ordered the Department to provide father with referrals for housing. On March 5, 2013, after being unable to meet with father, the social worker mailed him referral information. The information included internet job sites, information about the Job Corps, and the San Fernando Valley Resource Guide, which provided information about agencies that assist with housing. The housing referrals included information on Hope of the Valley Rescue Mission, Beyond Shelter, the Fair Housing Council of the San Fernando Valley, Habitat for Humanity, the Housing Authority of the City of Los Angeles, the Independent Living Center of Southern California, and the Los Angeles Family Housing Corporation. At no time did father complain that the housing referrals were insufficient, or that he needed additional referrals. Consequently, the juvenile court's finding that the Department provided reasonable services is supported by substantial evidence.

3. *Section 388 petition*

Father contends that the juvenile court erred in denying his section 388 petition. We disagree.

Section 388 provides that the juvenile court may, in its discretion, modify a prior order on the request of any interested person, if the court finds both (1) new evidence or a material change in circumstances justifying modification of the order, and (2) that the requested modification would be in the child's best interests. (§ 388, subd. (a).) Accordingly, it was father's burden to show by a preponderance of the evidence that there was a change in circumstances which made modification of a prior order in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

When a party having the burden of proof on an issue challenges a finding that reflects the trier of fact's rejection of that party's evidence, "the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support [the] finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Thus, to prevail, father must show that the "undisputed facts lead to only one conclusion." (*Id*. at p. 1529; see also *In re A.A.* (2012) 203 Ca1.App.4th 597, 612.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479; see also *In re Stephanie M*., *supra*, 7 Cal.4th at pp. 318-319.)

Father maintains that the court denied his modification petition based on its findings that he introduced either cigarette or marijuana smoke to the child's environment knowing that S.B. had a respiratory health issue, did not attend S.B.'s medical appointments, and failed to regularly visit the minor following his removal from father's custody after the 29-day visit. Father answers that he was never ordered to desist from smoking marijuana, nor was he ever found to have a drug or alcohol problem; rather, his only "fault" was a lack of housing, which he had remedied. He also argued the mere fact that he smoked did not create a risk of detriment to the child. Indeed, both the court and DCFS knew that he smoked when they permitted him unmonitored day visits and the 29-day home visit. "Father maintained he was not smoking marijuana around his son and would stop if ordered by the court. However, Father was never ordered to drug test, he was simply *invited* to test. Such passive-aggressive ordering by the court cannot be used to deny Father custody of his son."

Father fails to establish that the juvenile court abused its discretion in denying his section 388 petition. Parent and child share a fundamental interest in reuniting up to the

point at which reunification efforts cease. (*In re R.H.* (2009) 170 Ca1.App.4th 678, 697.) By the time of a section 366.26 hearing to select and implement a child's permanent plan, however, the interests of the parent and the child have diverged. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.) Indeed, children have a fundamental independent interest in belonging to a family unit and they have compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) Adoption gives a child the best chance at a full emotional commitment from a responsible caretaker. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

Therefore, after reunification efforts have terminated, the court's focus shifts from family reunification toward promoting the child's needs for permanency and stability. (*In re Marilyn H., supra*, 5 Cal.4th at p. 309.) In fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. (*Id*. at p. 302.) "A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

Father testified that he had stable housing and work as a sign spinner. However, the Department reported that when it visited father's apartment, there was a strong odor of cigarette smoke. Mother reported that father had been smoking and drinking during this time. None of his drug tests were negative in the weeks immediately preceding the section 388 hearing; at a time when he knew that it was his last chance to impress the juvenile court that he was a fit and capable parent, he tested positive for alcohol, marijuana, and amphetamines. Father's explanation for the positive test for amphetamines was that he had been lifting weights and taking supplements. The juvenile court rejected this explanation.

In addition, Father did not demonstrate a commitment to ensuring that S.B.'s medical needs were being met. While S.B. was visiting father, there was a "Needs and Services" meeting scheduled to address the child's development. The social worker asked father to attend, but father said "he had a lot of things going on." He finally agreed

to attend the meeting, and the social worker even texted him to remind him about the meeting. Father nevertheless did not attend the meeting, or call to say he could not make it. Later, he said he had been very busy and did not have time to attend the meeting. After S.B. went back to reside with the caregivers, the juvenile court ordered that father was to be notified about S.B.'s medical appointments, so that he could attend them, but he chose not to do so because he did not want to "take any risk or chance at feeling like I was being sabotaged." In addition to skipping his son's medical appointments, father did not follow up with S.B.'s caretakers to determine the results of the appointments. Given his failure to participate in S.B.'s ongoing medical care, his alcohol and drug use, and his use of tobacco around a baby with respiratory problems, the juvenile court did not err in denying father's section 388 petition.

4. *Order terminating parental rights*

Father argues that the court erred in terminating his parental rights, because the "beneficial relationship" exception to adoption described in section 366.26, subdivision (c)(1)(B)(i) applies in this case. We affirm the juvenile court's finding that the exception does not apply.

The substantial evidence standard of review applies to the juvenile court's ruling on the beneficial relationship exception to adoption. (*In re Autumn H.* (1994) 27 Cal.App.4th 567; see also *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643.) When the sufficiency of the evidence to support a juvenile court's finding or order is challenged on appeal, the reviewing court must determine if there is substantial evidence, contradicted. or uncontradicted, that supports it. (*In re Savannah M*. (2005) 131 Cal.App.4th 1387, 1393.) "If there is any substantial evidence to support the findings of the juvenile court, a reviewing court must uphold the trial court's findings. All reasonable inferences must be drawn in support of the findings and the record must be viewed in the light most favorable to the juvenile court's order. [Citation.]" (*In re Jeannette S.* (1979) 94 Cal.App.3d 52, 58.) As stated by one court, "[i]n reviewing the jurisdictional findings and the disposition, we look to see if substantial evidence, contradicted or uncontradicted,

supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court. [Citation.]" (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court." (*In re Matthew S.* (1988) 201 Ca1.App.3d 315, 321.)

For the beneficial relationship exception to apply, the parent must have maintained regular visitation with the child, and the juvenile court must determine that the parent/child relationship "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer." (*In re Autumn H.*, *supra*, 27 Cal.App.4th 567, 575.) A parent must establish more than merely some benefit to the child by continuing the parent/child relationship. That relationship must be "a substantial, positive emotional attachment such that the child would be greatly harmed" if the relationship were severed. (*Ibid.*) To overcome the benefits associated with a stable, adoptive family, the parent seeking to continue a relationship with the child must prove that severing the relationship will cause not merely some harm, but great harm to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.)

Section 366.26, subdivision (c)(1)(B)(i), does not define the type of parent-child relationship that will trigger the exception. However, courts have required more than just "frequent and loving contact" to establish the requisite benefit for this exception. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.) Father was required to show that his relationship with S.B. contributed to his well-being "to such a degree as to outweigh the well-being the child would gain in a permanent home." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) "Interaction between natural parent and child will always confer

some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*Ibid*.) In other words, "If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid*.)

According to the log submitted by the caretakers, in a span of 27 weeks, father had only five full length visits and seven partial visits with S.B. He either cancelled or rescheduled visits 22 times. Given that father missed well over half of his visits, he cannot claim to have had consistent visitation.

Father did not establish that his relationship with S.B. was such that the detriment caused by the termination of that relationship outweighed the benefit to S.B. of being adopted by the people who had cared for him his entire life. The factors to be considered when looking for whether a relationship is important and beneficial include: "'[t]he age of the child, the portion of the child's life spent in the parent's custody, the "positive" or "negative" effect of interaction between the parent and the child, and the child's particular needs. . . .' [Citation.]" (*In re Jerome D.* (2000) 84 Ca1.App.4th 1200, 1206.)

S.B. was ordered detained in shelter care within two weeks of his birth in January 2013. Except for the 29-day visit in March and April of 2014, the child spent his entire life with his foster parents. Father's visits to S.B. were sporadic. While father presented letters from his various service providers, none had seen him more than three times. The most positive report came from Dr. Veenstra. However, that letter was undated and unsigned. The social worker testified that when she monitored a visit in March 2014, father mostly played on his phone. An investigator from father's attorney's office also monitored a visit for two hours, and observed positive interaction. But the juvenile court

found his testimony did not establish that father had a relationship with S.B. other than as a "nice friend." Given the dearth of evidence regarding a parent-child bond between father and son, the juvenile court did not abuse its discretion when it found that father had not proven the exception to adoption found in section 366.26, subdivision (c)(1)(B)(i).

5. *Compliance with the Indian Child Welfare Act*

Finally, both parents contend that notice pursuant to the Indian Child Welfare Act, or ICWA, was defective, and the juvenile court erred when it found that it had no reason to know that S.B. was an Indian child. We conclude the juvenile court did not violate ICWA's mandates.

A juvenile court's finding that there is no reason to know ICWA applies is reviewed for substantial evidence. (*In re Rebecca R*. (2006) 143 Ca1.App.4th 1426, 1430.) The record is reviewed to determine if there is any substantial evidence, whether or not contradicted, which supports the juvenile court's decision. (*In re Kristin H*. (1996) 46 Cal.App.4th 1635, 1649.) "All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible." (*In re Katrina C*. (1988) 201 Cal.App.3d 540, 547.)

Under ICWA, notice is required only "where the court knows or has reason to know that an Indian child is involved. . . ." (25 U.S.C. § 1912(a).) For purposes of ICWA, an Indian child is defined as an unmarried person under the age of 18 who is either (1) "a member of an Indian tribe" or (2) "eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe[.]" (25 U.S.C. § 1903(4).) Conversely, if the child is not a tribal member, and the mother and the biological father are not tribal members, the child simply is not an Indian child.

When Father appeared in the juvenile court on January 25, 2013, he indicated on the parental notification form that he had possible Cherokee heritage. In court, father's

attorney stated that father was not a member of a tribe, but had an inclination he might be affiliated through his mother, who lived in Wisconsin. The clerk of the court then interjected: "Your honor, if I could save time. I was in 412 when the father was on this case and he was a dependent. It was not an ICWA case at that time per the case number." The court then found that this case was not subject to ICWA. Later in the case, Father explained that he was a foster child but was never reunited with his family.

S.B. was not a member of a tribe. Mother did not claim Indian heritage. The child's biological father, appellant, had previously been found by the juvenile court not to be an Indian child, which meant he was not a member of a tribe or the biological child of a tribal member. Thus, S.B. is not an Indian Child within the meaning of ICWA. As a consequence, the juvenile court did not violate the mandates of ICWA.

Father also challenges the termination of his parental rights based on the holding of *In re G.S.R.* (2008) 159 Cal.App.4th 1202. In that case, the court held that the parental rights of a nonoffending, noncustodial father could not be terminated solely due to "his inability to obtain suitable housing for financial reasons" (*id.* at p. 1212) but rather required a finding of parental unfitness. The court reversed the order terminating parental rights and remanded the case to the juvenile court with instructions to "revisit the issue of whether, based on [the] facts and circumstances as they exist at the time, there were legally sufficient grounds to find it detrimental to return the boys to the father, recognizing poverty is not such a ground." (*Id.* at p. 1215; see also *In re Frank R.* (2011) 192 Cal.App.4th 532 [juvenile court erred in terminating parental rights of non-offending non-custodial father without finding of unfitness].)

Father argues that the only reason he did not obtain custody of his son "was his inability to obtain suitable housing," and that the juvenile court made a fitness finding at the May 22, 2014 section 366.26 hearing without affording him the opportunity to defend the issue. We hold there was no violation of father's due process rights.

At the April 14, 2014 hearing following the minor's 29-day visit with father, the juvenile court returned S.B. to the foster parents. The court reviewed the evidence before it, including the social worker's report of the heavy odor of cigarette smoke in the child's presence and father's failure to attend medical appointments in order to learn to attend to his son's medical needs. The court then stated that father has "nothing more than the most rudimentary ability to take care of this child. That's been clear from the very outset, and he hasn't shown any interest in going to parenting classes or anything else to change the situation from what it was in January of 2013. Now I'm going to give six more weeks to see whether or not he changes it, but I told him when we were here last time that we would give him a 29-day visit to see how things go. I needed to have him show me that he's the adult in the room; that I wouldn't have to worry about this child's safety and health if he were to take over this child, the child's care. And that's not what I'm getting. [¶] Frankly, I could go forward with the 388 today and deny it and go on to the .26. And the only reason I'm not is that I feel out of a sense of compassion to at least give him a chance, but I'm not going to extend services to him. All I'm going to do is this: I can't order him to do anything. But I am going to send him over to the infoline office after today's hearing for low-, no-cost referrals for drug/alcohol programs, smoking cessation programs, parenting programs. And if he wants to test and work it out with the county workers, the county will be obligated to make sure that he is able to test weekly on demand and include those in the next report. [¶] So I'll give him the chance to prove himself. The ball is in his court."

Thus, on April 14, 2014, the juvenile court made a preliminary finding of unfitness. It then gave father six weeks' notice of the hearing at which the court would make a final finding regarding father's fitness to parent S.B. Father appeared at the May 22, 2014 hearing and presented documentary and testimonial evidence regarding his ability to care for his son. Contrary to father's contention, he not only had the

opportunity to contest the issue of his fitness, but in fact vigorously defended his position that S.B. was at no risk of detriment if he were returned to father's care. We conclude that there was no violation of father's due process rights.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

TURNER, P. J.

MOSK, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.