

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re HAILEY J., a Person Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

MITCHEL J.,

Defendant and Appellant.

B281969

(Los Angeles County
Super. Ct. No. CK95527)

APPEAL from an order of the Superior Court of Los Angeles County, Julie Blackshaw, Judge. Affirmed in part, reversed in part.

Elizabeth Klippi, under appointment by the Court of Appeal, for Appellant Mitchel J.

Jack A. Love, under appointment by the Court of Appeal, for Appellant K.M.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Respondent.

Mitchel J. (Father) and K.M. (Mother) appeal a juvenile court order, which terminated their parental rights over their daughter, Hailey J. They contend the order should be reversed because the juvenile court erred in declining to apply the parent-child relationship exception. They further contend the Los Angeles Department of Children and Family Services (DCFS) failed to comply with the requirements of the Indian Child Welfare Act (ICWA). We conditionally reverse the order terminating parental rights to allow for proper ICWA notice, but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 28, 2012, a referral was made to DCFS involving a domestic violence incident between Mother and Father. In an interview with the case social worker, Father reported the dispute arose out of a child custody argument resulting in Mother pointing a gun at Father's chest. Father punched Mother in the face to retrieve and unload the gun. Father further contended Mother threatened his mother and aunt. Father's mother reported she feared Mother would kill them because she was in a gang.

Mother denied threatening anyone or owning a gun. She stated she had been in a gang when she was younger, but was no longer involved. She reported Father asked her for money when she brought Hailey to Father's home for a visit. When she said she had none, Father began hitting and choking her and pulling her hair. Mother believed Father was upset because Mother had another boyfriend.

At the detention hearing, the juvenile court found a prima facie case had been made for detaining 11-month-old Hailey and removed her. Family reunification services were ordered with

monitored visits for Mother and Father at least three times per week.

Hailey was placed with caregiver Linda J. soon after her removal. In its jurisdiction/disposition report, DCFS indicated Mother consistently visited Hailey for the entire time permitted. Father, on the other hand, only visited with Hailey twice in October 2012, missed one scheduled visit, and typically only stayed for one hour out of the one and a half hours scheduled per visit. The juvenile court sustained the dependency petition under subdivisions (a) and (b) of Welfare and Institutions Code section 300.¹

In March 2013, Mother gave birth to R.B., whose father is Jonathan B. A section 300 petition was filed on May 14, 2013, alleging Mother's domestic violence incident with Father and her failure to participate in court-ordered services endangered R.B.'s health and safety. R.B. was also declared a dependent of the court under section 300, subdivisions (a), (b), and (j).

Throughout the dependency proceedings, Hailey remained in her caregiver's home and thrived. Mother stopped visiting Hailey after R.B.'s birth, in part due to her incarceration.² Father began visiting Hailey with more regularity. DCFS noted Hailey appeared very bonded to Father and had a feeling of sadness when it was time for the visits to end. However, Father completed only two unmonitored visits before contacting Hailey's

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

² The record indicates Mother last visited with Hailey sometime in February or March 2013. From the record, it appears Mother has been incarcerated since then.

caregiver and DCFS to inform them he planned to relocate to Las Vegas for work. He continued to visit with Hailey until he moved and indicated he would be able to visit her once a month after his move.

Father expressed frustration to the case social worker in January 2015 that he had not visited with Hailey despite visiting Los Angeles approximately once per month. He indicated her caregiver made it challenging to visit and she threatened to call the police because she believed Father threatened her. The case social worker offered to arrange scheduled visits, but Father failed to respond to her offer.

On January 23, 2015, Hailey's caregiver reported Father had not visited with Hailey, had threatened the caregiver, and had not attempted to contact Hailey or her caregiver regarding visits. The case social worker again attempted to arrange a visitation schedule with Father with no success. Father had no visits with Hailey between February 2015 and December 2015. DCFS continued to report that Hailey was "stable and happy" in her caregiver's home and she had regular contact with brother R.B. DCFS continued to recommend termination of parental rights and adoption placement for Hailey and her brother.

In the interim, Father moved back to Los Angeles and resumed regular visits with Hailey. Father participated in a monitored visit with Hailey at DCFS offices on September 2, 2016. The case social worker observed that Hailey appeared to enjoy the visit and Hailey and Father appeared to have a relationship. A visit scheduled for the following week was cancelled by Hailey's caregiver. The juvenile court ordered monitored visits with Father twice a month and monitored phone calls twice a month. Father attended all scheduled visits and the

case social worker observed Hailey appeared to enjoy spending time with Father.

A contested section 366.26 hearing was held on March 13, 2017. Hailey was five years old at that time and she had not lived with Father since she was 11 months old. At the hearing, Father argued his parental rights should not be terminated under the parental relationship exception. He testified his visits with Hailey went well and she was sad when they ended. He wished his visits with Hailey were longer than the two hours allotted. He further testified they went to the Santa Monica pier to ride bumper cars and the roller coaster during one visit. In another, he took her to Chuck E. Cheese.

The juvenile court found Father loves Hailey and maintained visitation as permitted by the court. The juvenile court stated, “The visits are enjoyable for both of them. [Father] and Hailey go on what are very fun play dates. The two of them have fun. They go to parks. They play. Go to Chuck E. Cheese. I have no reason to believe that Hailey doesn’t have a great time with [Father].” However the court determined that Father is not involved in Hailey’s daily life and “[e]ven though their interaction is enjoyable, it is not the type of emotional attachment that would prevent me from severing those parental bonds today.” The court found by clear and convincing evidence Hailey was adoptable and it would be detrimental to return her to her parents. Mother and Father’s parental rights were terminated and Hailey’s caregiver was designated her prospective adoptive parent. Mother and Father separately appealed.

DISCUSSION

On appeal, Father argues the juvenile court erred in refusing to apply the parent-child relationship exception to preserve his parental rights. Mother joins in this argument.³ Additionally, Mother argues the ICWA notices issued by DCFS were deficient and urges us to reverse and remand on this basis. DCFS does not oppose a limited reversal and remand for ICWA compliance.

I. The Parent-Child Relationship Exception Does Not Apply

Father claims the beneficial parent-child relationship exception applies to preserve his parental rights as to Hailey. Yet, substantial evidence supports the juvenile court's finding that his relationship with Hailey is not that of a parent and child. As a result, the juvenile court did not abuse its discretion in determining the benefit of maintaining Father's relationship with Hailey did not outweigh the benefit to her of a stable and permanent home.

³ Mother joins in Father's contention that the parent-child relationship exception applies to Father's relationship with Hailey. However, there is no contention that Mother enjoys the same relationship with Hailey. Mother instead argues that if the order terminating Father's rights is reversed, the order terminating Mother's rights must also be reversed pursuant to rule 5.725, subdivision (g) of the California Rules of Court, which prohibits termination of the rights of only one parent since the purpose of termination is to free the child for adoption. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 208; *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 110.) Because we affirm the order terminating Father's parental rights, we reject Mother's argument.

A. Applicable Law

The juvenile court must terminate parental rights if it finds by clear and convincing evidence it is likely the child will be adopted if parental rights are terminated. (§ 366.26 (c)(1).) However, the juvenile court may not terminate parental rights if it finds doing so would be detrimental to the child based on one of many statutory exceptions, including the beneficial parent-child relationship exception. (§ 366.26 (c)(1)(B).) The party challenging the termination of parental rights under the beneficial parent-child relationship exception bears the burden of proving the exception applies. (*In re C.F.* (2011) 193 Cal.App.4th 549, 553.)

To establish the exception, the parent must demonstrate: 1) he maintained regular visitation with the child and 2) the benefit of maintaining the parent-child relationship outweighs the benefit of adoption. (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) Satisfying the second prong of the exception requires the parent to prove that “ ‘severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent.’ [Citation.]” (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643 (*Marcelo B.*)).

Courts have found that interactions between a biological parent and child will usually confer some benefit. However, in order for the exception to apply, the attachment between child

and parent must be that of a parent rather than a friendly visitor or non-parent relative. (*In re Jason J.* (2009) 175 Cal.App.4th 922, 937–938.) The existence of this relationship may be determined by considering “[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 parent and child, and the child’s particular needs.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

“Because a parent’s claim to . . . an exception [to termination of parental rights] is evaluated in light of the Legislature’s preference for adoption, it is only in exceptional circumstances that a court will choose a permanent plan other than adoption. [Citation.]” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.)

B. Standard of Review

“[T]he review of an adoption exception incorporates both the substantial evidence and the abuse of discretion standards of review. [Citation.] . . . [T]he juvenile court’s decision whether an adoption exception applies involves two component determinations: a factual and a discretionary one. The first determination—most commonly whether a beneficial parental or sibling relationship exists . . . is, because of its factual nature, properly reviewed for substantial evidence. [Citation.] The second determination in the exception analysis is whether the existence of that relationship or other specified statutory circumstance constitutes ‘a compelling reason for determining that termination would be detrimental to the child.’ [Citations.] This ‘“quintessentially” discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be

expected to have on the child and to weigh that against the benefit to the child of adoption,’ is appropriately reviewed under the deferential abuse of discretion standard. [Citation.]” (*In re K.P.* (2012) 203 Cal.App.4th 614, 621-622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315.)

C. Analysis

Father failed to meet his burden to demonstrate the second prong of the beneficial parent-child relationship test.⁴ Hailey was five years old at the time of the section 366.26 hearing and had spent four of those years with her caregiver. Substantial evidence supports the juvenile court’s finding that Father and Hailey have “fun playdates,” but their interactions do not amount to a parental relationship. The record shows Father does not meet Hailey’s daily needs and he has been an inconsistent presence in her life, having failed to maintain contact with her for almost an entire year in 2015. Father’s visits never progressed beyond monitored weekly visits and were reduced to monthly visits when he lived in Las Vegas. Thus, Father’s relationship with Hailey lacks the necessary hallmarks of a parental relationship to meet the beneficial parent-child relationship exception.

By contrast, Hailey has thrived at her foster home, where her physical and emotional needs have been met for the past four years. DCFS case workers have observed the strong relationship between Hailey and her caregiver; Hailey calls her foster parents “Mommy and Daddy.” The record shows Hailey’s caregiver takes her to the doctor, takes her to pre-school, and takes care of her

⁴ We thus find it unnecessary to reach the merits of the first prong—whether Father maintained consistent visitation with Hailey.

daily needs. Given these facts, the juvenile court did not abuse its discretion when it decided that the benefit of adoption outweighed the detriment to Hailey of the termination of Father's parental rights.

Father contends Hailey is very bonded to him because she enjoys her time with him, is sad when their time together is over, and has a connection with his mother, her paternal grandmother. While these are signs that there is an attachment between Father and Hailey, it is not proof that he has a parental relationship with her rather than one of a friendly visitor or non-parent relative.

Father excuses his failure to create a parent-child relationship with Hailey by arguing his move to Las Vegas to "better his life for Hailey" derailed his attempts to reunify with her, and by the time he moved back to Los Angeles, "time had run out." Father's motivation to move to Las Vegas is irrelevant to whether he had a parent-child relationship with Hailey. In fact, Father had almost five years to reunify with Hailey. He failed to do so and " 'may not derail an adoption merely by showing [Hailey] would derive *some* benefit from continuing a relationship maintained during periods of visitation with [him].' " (*Marcelo B.*, *supra*, 209 Cal.App.4th at p. 643.)

II. There is No Dispute the ICWA Notices Were Defective

Mother and Father contend, and DCFS concedes, that proper notice was not provided to the Indian tribes under ICWA. We agree, and conditionally reverse and remand for proper compliance with the law. During the initial proceedings, Mother reported that both her grandmothers were full-blooded Indian as well as her great-grandmother. She believed they were Apache

from Albuquerque, New Mexico. When DCFS interviewed Mother, she stated, “I think I was told Apache heritage but I don’t really know. I can’t ask my Mother because we aren’t talking and this is none of her business.”

As a result of Mother’s comments, the ICWA notice sent to the Bureau of Indian Affairs, the Secretary of the Interior, and several Apache tribes failed to include Hailey’s maternal grandmother’s contact information. On the form, DCFS indicated Mother refused to provide this information. It is undisputed, however, that DCFS had maternal grandmother’s contact information, did not include it in the notice, and did not attempt to interview her about Hailey’s ancestry. It also did not interview Mother’s other relatives about Hailey’s status, including a maternal grand-aunt with whom DCFS was in contact.

When the juvenile court ordered DCFS to conduct a further investigation of Mother’s claim of Indian ancestry, DCFS issued a corrected ICWA notice form. In this second notice, Mother’s grandmothers’ names (with no contact information or dates of birth) were erroneously put in the space requesting information on “Mother’s biological Mother.” In the space requesting information on “Mother’s biological grandmother,” the maternal grandmother’s name was erroneously listed. DCFS again failed to include her contact information, despite having that information on file.

Under ICWA, “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 . . . of the pending proceedings and of their right of intervention.” (25 U.S.C. § 1912(a).) Once notice is

triggered, the tribe must be alerted to a wide range of information about the child's relatives, including information about grandparents and great-grandparents to enable the tribe to correctly identify the child. (*In re J.D.* (2010) 189 Cal.App.4th 118, 124.)

To that end, California requires DCFS to make a further inquiry into the child's Indian status, including interviewing the parents and extended family members, contacting the Bureau of Indian Affairs and the California Department of Social Services to identify the names and contact information of the tribes of which the child may be a member, and contacting the tribes or any other person who reasonably can be expected to have information regarding the child's membership status or eligibility. (Cal. Rules of Court, rule 5.481(a)(4).)

"Any violation of this policy requires the appellate court to vacate the offending order and remand the matter for further proceedings consistent with ICWA requirements." (*In re J.D.*, *supra*, 189 Cal.App.4th at p. 124.) However, the reversal is limited to a determination of the ICWA issue only. If no tribe deems the child to be a member on remand, the juvenile court shall reinstate the order terminating parental rights. If the child is deemed a member of an Indian tribe, the juvenile court shall proceed in accordance with ICWA. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 705–711.)

Here, DCFS had the information to include maternal grandmother's and maternal grand-aunt's contact information and birthdates, but failed to do so. Moreover, DCFS had the opportunity to reach out to Mother's family members, including the maternal grandmother and the maternal grand-aunt, regarding Hailey's Indian ancestry, but failed to do so.

Because DCFS' inquiry and notice were deficient under ICWA, we conditionally reverse the order terminating Mother and Father's parental rights and remand to allow compliance with ICWA, including interviewing Mother's relatives as well as providing corrected notice to the relevant tribes and agencies.

DISPOSITION

The order terminating Mother and Father's parental rights is conditionally reversed and the matter is remanded to the juvenile court with directions to DCFS to conduct a full inquiry and provide proper notice under ICWA. If the contacted tribes indicate Hailey is not an Indian child, or if the tribes do not respond to the notice within the prescribed time, the juvenile court shall reinstate the order terminating parental rights. If it is determined Hailey is an Indian child, the juvenile court shall proceed in accordance with ICWA.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.