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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re S.J., A Person Coming Under the Juvenile Court Law.	B295740 and B295905 (Los Angeles County Super. Ct. No. CK75088D)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DAYMOND J., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Natalie Stone, Judge. Conditionally affirmed and remanded with directions.

John L. Dodd, under appointment by the Court of Appeal, for Appellant Daymond J.

Mary C. Wickham, County Counsel, R. Kristin P. Miles, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

Daymond J. (Father), the father of minor S.J., appeals from the juvenile court's orders denying his petition for modification under Welfare and Institutions Code section 388 and terminating his parental rights under section 366.26. Father argues the juvenile court erred in issuing these orders because, among other reasons, he demonstrated the existence of a beneficial parent-child relationship between himself and S.J. Father also asserts the Department of Children and Family Services (DCFS) failed to comply with its obligations under the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) and related California law. We agree there was a lack of compliance with ICWA's notice and inquiry provisions, but reject Father's remaining arguments. We therefore affirm the order denying the section 388 petition, conditionally affirm the order terminating parental rights, and remand the matter to allow for compliance with ICWA.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Prior Child Welfare History

Father and Bridgetta L. (Mother) are the parents of S.J., a girl born in June 2016, and D.J., a boy born in August 2018. Father has two older children, SR.J. and JC.J., with his former wife, Shiequetti J. In 2012, SR.J. and JC.J. were detained from Shiequetti and released to Father because she was driving under the influence of alcohol while the children were in the vehicle. The juvenile court terminated its jurisdiction over the children in 2013. In April 2016, Father and Shiequetti were involved in a physical altercation during which Father pushed Shiequetti, threatened to kill her, and took her cell phone from her when she tried to call the police. Although Shiequetti obtained a

restraining order against Father following the incident, they continued residing together for a period of time.

Mother has three older children, S.T., M.J., and L.J., from prior relationships. In 2008, while Mother was a dependent of the juvenile court, S.T. was removed from Mother's custody based on Mother's history of running away and mental and emotional problems. Mother failed to reunify with S.T., and the child was adopted in 2011. In 2014, M.J. and L.J. were removed from the custody of their parents due to Mother's physical abuse of the children, substance abuse, and mental and emotional problems. Both Mother and the father of M.J. and L.J. were denied family reunification services.

On June 22, 2016, shortly after S.J.'s birth, the DCFS filed a dependency petition pursuant to Welfare and Institutions Code[1] section 300, subdivisions (a), (b), and (j). The petition alleged that S.J. was at substantial risk of harm based on Mother's history of physical abuse, substance abuse, and mental and emotional problems. The DCFS later amended the petition to add an allegation that Father had a history of engaging in violent physical altercations with Shiequetti. At the August 22, 2016 adjudication hearing, the juvenile court sustained the counts alleged as to Mother, dismissed the counts alleged as to Father, and declared S.J. a dependent of the court. The child was removed from Mother's custody and released to Father. On August 31, 2016, the court terminated its jurisdiction, and issued a custody order granting sole legal and physical custody of S.J. to

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

Father with monitored visitation for Mother to take place in a public setting.

II. Initiation of the Current Dependency Proceedings

The current matter came to the attention of the DCFS on December 24, 2016 based on a referral alleging an incident of domestic violence between Father and Mother in S.J.'s presence. According to the officer who responded to the scene, the police received a domestic violence call on the night of December 23, 2016. Father told the officer that, during an argument, Mother wanted to leave and call the police. Father chased Mother and they wrestled over her cell phone. Mother told the officer that she and Father were together with their baby on the bed. Father kicked Mother on her forearm and grabbed her cell phone from her. He then pushed Mother into a wall, causing her to hit her head. The officer observed that Mother had swelling and bruising around her left eye. Father was arrested; he was released the following day.

When the DCFS interviewed Father and Mother about the incident, they repeatedly denied that any physical altercation had taken place. They also denied that they were living together. Shiequetti, however, reported to the DCFS that Father was residing with Mother in Los Angeles. Shiequetti also stated that she and Father were in the process of getting a divorce.

On December 29, 2016, the DCFS filed a new dependency petition on behalf of S.J. pursuant to section 300, subdivisions (a) and (b). The petition alleged that S.J. was at substantial risk of harm because Father and Mother had engaged in a violent physical altercation in the child's presence. At the detention hearing held that day, the juvenile court found there was prima facie evidence that S.J. was a person described by section 300,

and ordered that the child be detained from her parents. The court granted monitored visitation to both parents on the condition that they not visit the child together, and set the matter for an adjudication hearing. S.J. was placed in the foster home of Mr. and Mrs. M.

III. Jurisdiction and Disposition Hearing

At the January 30, 2017 jurisdiction hearing, the juvenile court sustained the section 300 petition, as amended, under subdivision (b). The court found Mother and Father had engaged in a violent physical altercation in S.J.'s presence, which resulted in an injury to Mother. The court also found the parents were in violation of the custody order because the domestic violence incident showed that Father had allowed Mother to visit with S.J. in a non-public setting. The matter was continued for the disposition hearing.

At the March 16, 2017 disposition hearing, the juvenile court declared S.J. a dependent of the court, and ordered the child removed from parental custody and suitably placed by the DCFS. The court denied family reunification services for Mother, but granted services for Father, including parenting education, anger management, and individual counseling to address case issues. Both parents were granted monitored visitation with S.J. with an order that Father not serve as the monitor for Mother's visits.

IV. Status Review Hearings

In a status review report filed on August 23, 2017, the DCFS stated that S.J. remained placed in the home of Mr. and Mrs. M. The child was happy and healthy in her caregivers' home, and was particularly bonded with Mrs. M. Mother had not

made herself available for any visits with S.J. While Father was scheduled to have weekly monitored visits, he only saw the child an average of once per month. On one occasion, Father had an unmonitored visit with S.J., and he took her to see Mother when he was not allowed to do so. Father had enrolled in individual counseling and parenting education, but his attendance in these programs had been sporadic.

In a last minute information report filed on November 15, 2017, the DCFS indicated that Father had been visiting S.J. on a more consistent basis. During the most recent visit, the child appeared happy to see Father, ran to him when she heard his voice, and cried when he left. Father played well with S.J. and tended to her needs. The DCFS also reported that Father was actively participating in a parenting program, and had been regularly attending individual counseling since September 2017.

At the November 15, 2017 six-month review hearing, the juvenile court ordered that S.J. remain suitably placed in foster care. The court found that Father was in partial compliance with his case plan, and granted him further reunification services. The court also granted Father's request for weekend overnight visits with S.J.

In a status review report filed on April 26, 2018, the DCFS stated that Mr. and Mrs. M. continued to provide S.J. with a loving and caring home, and that the child had a healthy bond with her foster family. The DCFS also reported that Father was in compliance with his case plan. He had completed all of his court-ordered programs, and continued to be involved in a parenting group. According to the report, Father had made significant changes and was providing S.J. with a safe and stable home during their overnight visits. The case social worker had

observed that Father was attentive to S.J.'s needs, and that the child showed affection to Father by giving him hugs and kisses. The social worker believed there was a loving bond and nurturing relationship between Father and the child. Based on these facts, the DCFS recommended that S.J. be returned to Father's custody with family maintenance services.

However, in a last minute information report filed on May 16, 2018, the DCSF changed its recommendation. As set forth in that report, the case social worker was informed on May 6, 2018 that Father and Mother were still residing together, and that Mother was present during Father's unmonitored visits with S.J. On May 15, 2016, the social worker requested police logs for Father's last known address, which showed a number of domestic violence calls in the recent months. Specifically, on February 18, 2018, a woman called the police from Mother's phone, stating that a man had put his hands on her. On March 14, 2018, a women reported to the police that her child's father had thrown out her personal belongings and she wanted officers to standby while she retrieved them. The log also showed that a man had threatened to kill the officers if they responded to the home. On April 9, 2018, a woman again called the police from Mother's phone. The log indicated that the incident involved a man with a bottle assaulting a pregnant woman. When officers responded to the scene, Father stated that he had allowed the woman to stay with him because she was homeless, and that she became upset when he told her to leave. On April 26, 2018, a woman called the police from another phone belonging to Mother, and reported that a man had thrown oil on her. When the social worker made two unannounced visits to Father's last known address in May 2018, she was informed by the occupant that Father did not live there.

Father told the social worker, however, that he was still residing at that address. As a result, the DCFS reported that Father was not being honest about his living situation, and it was unclear where he was taking S.J. during their visits. In addition, it appeared Father was continuing to engage in domestic violence against Mother and to allow Mother to have unmonitored contact with the child. Based on this newly discovered information, the DCFS recommended that the juvenile court terminate Father's reunification services.

At the 12-month review hearing held on May 16, 2018, the juvenile court initially ordered that S.J. be returned to Father's custody under the continued jurisdiction of the court. However, after reviewing the DCFS's last minute information report, the court recalled the case and vacated its prior findings and orders. The court ordered that S.J. not be returned to Father's custody at that time, and continued the review hearing to June 22, 2018.

In a last minute information report filed on June 22, 2018, the DCFS continued to recommend that Father's reunification services be terminated. According to the report, Mother was pregnant with another child. On May 6, 2018, Father brought S.J. to Mother's visit with her older children, and the parents spent most of the time arguing with one another. On May 18, 2018, Father reported that he had moved into a new home at the beginning of the month even though he had made contrary statements to both the DCFS and the juvenile court a few days earlier. When questioned about the police logs showing a number of domestic violence incidents at his home, Father continued to deny Mother lived with him, and claimed that he was the one who called the police whenever Mother came to his home. The report also indicated that Father had violently assaulted another

individual a year earlier. Father was arrested for assault with a deadly weapon, but the case was later dismissed.

On June 22, 2018, the juvenile court ordered that Father's visits with S.J. be monitored. The court also ordered sibling visitation for S.J. At Father's request, the court set the matter for a contested 12-month review hearing.

In a last minute information report filed on August 20, 2018, the DCFS stated that Father had been inconsistent in his visitation with S.J., and had failed to attend seven of his last nine scheduled visits. When Father did visit the child, he was attentive to her needs. The caregiver for Mother's older children informed the DCFS that both Mother and Father had called her on several occasions and were upset she had disclosed that the parents spent time together with S.J. They wanted the caregiver to change her story, but she refused. The DCFS also reported that Mother recently had given birth to a baby boy, D.J., and that Father admitted he was the child's father at the hospital. In his statements to the DCFS, however, Father continued to deny his paternity of the child or that he had any contact with Mother. In its report, the DCFS stated that it believed Father and Mother were still involved in a relationship that was not stable and free from domestic violence. The DCFS also reported that, although Father had complied with his case plan, he had not demonstrated a change in his behavior and continued to engage in conduct that placed S.J. at substantial risk of harm.

The 12-month review hearing concluded on September 4, 2018. The juvenile court found that the return of S.J. to parental custody would create a substantial risk of detriment, and that continued jurisdiction was necessary. The court also found that Father was only partially compliant with his case plan. The

court terminated Father's reunification services and set the matter for a permanency planning hearing.

V. Father's Section 388 Petition

On December 24, 2018, Father filed a section 388 petition, requesting that the juvenile court return S.J. to his custody, or alternatively, provide him with further reunification services. In support of his petition, Father asserted that he was continuing to participate in various programs because he wanted to prove he could keep S.J. safe in his care and custody. Father reported that he was actively engaged in a program called Project Fatherhood where he learned parenting skills that were tailored toward raising young children, discussed issues such as domestic violence, and gained insight into how he could become a better parent. Father also had enrolled in individual counseling and was waiting to be assigned a therapist. Father stated that, when the court vacated its prior order returning S.J. to his custody, it served as a "wake-up call" to Father about his ability to keep his daughter safe. He also stated that "[n]othing was a better reminder to prioritize [his] daughter's safety than not being able to live with [her]," and that he was committed to ensuring S.J. was never exposed to domestic violence or any other safety issue. Father reiterated that S.J.'s physical and emotional well-being were his priority.

On January 2, 2019, the juvenile court summarily denied Father's section 388 petition, finding that Father had not made a prima facie showing that there was a change in circumstances or that the requested order would be in S.J.'s best interests. Father filed a notice of appeal from the denial of his section 388 petition.

VI. Section 366.26 Permanency Planning Hearing

In its January 2, 2019 permanency planning report, the DCFS stated that S.J. remained in the home of Mr. and Mrs. M. S.J.'s younger brother, D.J., also had been placed with the M.'s following his removal from the custody of Mother and Father. S.J. was a client of the Regional Center and was receiving Early Start Services. Mrs. M. reported that S.J. had been displaying tantrums that were beyond age-appropriate for a toddler, but her behavior had improved once she began receiving services and her visits with her parents ceased. Mother had not attended any visits with S.J., and Father had not visited the child in over two months. The parents also had not contacted the M.'s to inquire about S.J., although they were appreciative when Mrs. M. sent them photographs of the child. The DCFS reported that S.J. was doing well in her placement and was a happy and energetic two-year-old. She had a strong bond with the M.'s, was affectionate toward them, and referred to them as "mama" and "daddy." The M.'s had created a safe and caring environment for S.J. and were meeting all of her physical and emotional needs. They also were committed to adopting S.J. and providing her with a stable and loving home. The DCFS recommended the juvenile court terminate the parental rights of both Mother and Father, and select adoption as S.J.'s permanent plan.

The DCFS submitted two additional reports prior to the permanency planning hearing. In a status review report filed on February 20, 2019, the DCFS stated that S.J. continued to do well in the care of Mr. and Mrs. M. During her visits to the home, the case social worker observed the child playfully running around and calling out "mommy." Father's visitation with S.J. continued to be minimal. He told the DCFS, however, that he

was ready for S.J. to be returned to his home and that he did not want her to be adopted. In a last minute information report filed on February 22, 2019, the DCFS noted that Father had not had any visits with S.J. at the foster care agency since October 12, 2018. Father had made arrangements with Mrs. M. to see S.J. and D.J. on December 23, 2018, which was his last visit with the children. Father reported to the DCFS that he was having car problems, and that he intended to resume his visits with the children in the near future.

On February 25, 2019, the juvenile court held the permanency planning hearing. The court admitted into evidence the DCFS's various reports and took judicial notices of all sustained petitions, minute orders, and case plans in the case. Father was the sole witness to testify at the hearing. According to his testimony, Father last lived with S.J. on December 24, 2016. He initially had monitored visits with the child twice a week. During the visits, Father read books to S.J., played with her, and attended to her needs. He tried to spend his time bonding with S.J. and showing her love. When the visits became unmonitored, Father often took S.J. to see her half-siblings and to spend time with the paternal family. They also went to parks, museums, fast-food restaurants, and other child-friendly activities.

Father testified that, at the start of their visits, S.J. would be happy to see him and would run into his arms. At the end of the visits, the child would be sad and try to hide so that she did not have to leave Father's home. Father acknowledged, however, that S.J. had a similar reaction when she was separated from her foster parents. Father had rented a two-bedroom house so that S.J. could reside with him and had purchased clothing, books,

and other essential items for the child. He believed his role as a father was to nurture, educate, and provide for his children. He wanted to teach S.J. that a woman should be treated respectfully and provide her with the necessary tools to be successful in life. Father believed S.J. would benefit from having him in her life because every child deserved to be with his or her parents. S.J. also would benefit from having a relationship with her siblings. Father admitted he had not visited S.J. in the past two months. He explained that his car engine had blown up, and that he was unable to afford another vehicle. Father also admitted he had not attended S.J.'s doctor's visits, and was not involved with any of her Regional Center services.

Father's counsel requested that the juvenile court not terminate parental rights over S.J. Father's counsel asserted that Father had maintained regular visitation with S.J. and that the child would benefit from having a continued relationship with him. S.J.'s counsel joined with the DCFS in requesting that parental rights over S.J. be terminated. S.J.'s counsel noted that the child had not lived with Father for more than two years, and that Father had not made any significant attempts to visit S.J. in the past several months. County counsel argued that Father had not shown the existence of a beneficial parent-child relationship, and that S.J. was entitled to permanency.

The juvenile court found by clear and convincing evidence that S.J. was adoptable. The court also found that Father had not met his burden of establishing that the parent-child relationship exception to the termination of parental rights applied. The court stated: "In order to not terminate parental rights, the court has to find a compelling reason to find that the termination would be detrimental to the child. I don't think I can

make that finding. [Father's counsel] has the burden of proof on that. And this is a two-year-old child. And so it's hard to find it would be detrimental to her to not have contact with Father given her extremely young age and given that she's been in a very stable placement. . . . So I don't believe that Father's met the burden of proof. I don't believe it's compellingly detrimental to terminate the contact." The court terminated the parental rights of both Mother and Father, and ordered adoption as the permanent plan for S.J. Father filed a separate notice of appeal from the order terminating his parental rights.[2]

DISCUSSION

I. Denial of the Section 388 Petition

In Appeal B295740, Father argues the juvenile court erred when it summarily denied his section 388 petition for an order returning S.J. to his custody, or alternatively, reinstating his family reunification services. Father asserts he was entitled to an evidentiary hearing on his petition because he made a prima facie showing that changed circumstances existed and that the relief sought was in S.J.'s best interests.

A. Governing Law

Section 388 is a general provision permitting the juvenile court, "upon grounds of change of circumstance or new evidence . . . to change, modify, or set aside any order of court previously made. . . ." (§ 388, subd. (a).) The statute allows the modification

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[2] This court previously ordered that Father's appeal from the denial of his section 388 petition (B295740) and his appeal from the termination of his parental rights (B295905) be considered concurrently for purposes of oral argument and decision.

of a prior order only when the moving party establishes that (1) changed circumstances or new evidence exists; and (2) the proposed modification would promote the best interests of the child. (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1193; *In re Y.M.* (2012) 207 Cal.App.4th 892, 919-920.)

To be entitled to relief under section 388, "[t]he change of circumstances or new evidence 'must be of such significant nature that it requires a setting aside or modification of the challenged prior order.' [Citation.]" (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615.) Moreover, "'[i]t is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child. [Citation.]'" (*In re S.J.* (2008) 167 Cal.App.4th 953, 960.) "[A]fter reunification services have terminated, a parent's [section 388] petition for either an order returning custody or reopening reunification efforts must establish how such a change will advance the child's need for permanency and stability." (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.) We review a summary denial of a section 388 petition for abuse of discretion, and will not reverse the juvenile court's ruling unless it "exceeded its limits of legal discretion by making an arbitrary, capricious or patently absurd determination." (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.)

B. The Juvenile Court Did Not Err In Summarily Denying Father's Section 388 Petition

In denying Father's section 388 petition, the juvenile court found that Father had not stated a prima facie case that there was a change in circumstances or that the requested order was in the best interests of S.J. On appeal, Father contends he made an adequate showing of changed circumstances because he offered

evidence that he continued to participate in programs even after the court terminated his family reunification services. Father also claims he sufficiently demonstrated that reunification with Father would promote S.J.'s best interests because he presented evidence of a significant parent-child bond between them. Based on the record before us, however, we conclude the juvenile court acted within its discretion in denying Father's petition.

First, Father failed to make a prima facie showing of changed circumstances. Although Father continued to attend a parenting education group and individual counseling after the reunification period had ended, the circumstances that led to the termination of his reunification services was not a failure to complete his court-ordered programs. Indeed, in recommending that reunification services be terminated in May 2018, the DCFS readily acknowledged that Father had satisfied these requirements of his case plan. The agency's concern was that, despite participating in various court-ordered programs, Father still had not demonstrated a significant change in the behavior that had led to the dependency proceedings and the removal of S.J. from his custody. As of May 2018, Father had been receiving reunification services for more than a year. At the same time, however, the DCFS was informed that Father and Mother were still residing together, and that Father was allowing Mother to have unmonitored contact with S.J. in violation of the court's visitation order. When asked about his ongoing relationship with Mother, Father repeatedly denied having any contact with her. Father also made conflicting statements about his current living situation, and as a result, the DCFS did not know where he was taking S.J. during their unmonitored weekend visits.

The DCFS further discovered that, during the time that Father was receiving reunification services, there were a number of police reports regarding domestic violence at Father's home. Three of the four calls that were made to the police between February and April 2018 originated from Mother's phone, and the reported conduct concerned acts or threats of violence by Father. When questioned about these incidents, however, Father denied any culpability, and insisted he was the one who had contacted the police despite the logs showing that the calls were made by a female victim about a male perpetrator. While Father alleged in his section 388 petition that his failure to regain custody of S.J. had served as a "wake-up call" about the need to prioritize his child's safety, he did not make any showing that he had gained insight into his prior violent behavior and the substantial risk of harm that it posed to his young daughter. Rather, the evidence demonstrated that, even as Father was participating in his court-ordered programs, he was still engaging in the very conduct that had resulted in S.J.'s removal from his care. The fact that Father chose to continue his participation in these programs after his reunification services had ended did not satisfy his burden of showing the existence of changed circumstances.

Second, Father failed to make a prima facie showing that the requested order would promote S.J.'s best interests. At the time Father filed his section 388 petition, S.J. was two and a half years old, and had been in the home of her foster parents, Mr. and Mrs. M., since she was an infant. The DCFS reported that S.J. was happy, healthy, and thriving in her foster parents' care. The M.'s were able to meet all of the child's needs and to provide her with a caring and nurturing home. Although Father initially visited S.J. on a regular basis and had a loving relationship with

her, his contact with the child became more sporadic after June 2018, when the court ordered that Father's visits be monitored. As of December 24, 2018, when Father filed his petition, he had visited S.J. on only one occasion in the prior two months. Although Father was nurturing and attentive to S.J. when he did visit her, he did not present any evidence to establish that the reinstatement of his reunification services would advance any of the child's needs. Under these circumstances, the juvenile court did not abuse its discretion in summarily denying Father's section 388 petition.

II. Termination of Parental Rights

In Appeal B295905, Father challenges the juvenile court's order terminating his parental rights over S.J. Father contends the court misapplied the law in finding that the parent-child relationship exception (§ 366.26, subd. (c)(1)(B)(i)) to the termination of parental rights did not apply. He also claims the error was prejudicial because the evidence showed the existence of a significant parent-child bond between Father and S.J.

A. Governing Law

At a hearing under section 366.26, the juvenile court must select and implement a permanent plan for a dependent child. Once the court has decided to terminate reunification services, adoption is the preferred permanent plan. (§ 366.26, subd. (b)(1); *In re S.B.* (2009) 46 Cal.4th 529, 532; *In re K.P.* (2012) 203 Cal.App.4th 614, 620.) To implement adoption as the permanent plan, the juvenile court must find, by clear and convincing evidence, that the child is likely to be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) Then, in the absence of evidence that a relative guardianship should be considered

(§ 366.26, subd. (c)(1)(A)) or that termination of parental rights would be detrimental to the child under one of six statutorily-specified exceptions (§ 366.26, subd. (c)(1)(B)(i)-(vi)), the juvenile court "shall terminate parental rights." (§ 366.26, subd. (c)(1).)

Section 366.26, subdivision (c)(1)(B)(i) provides that the juvenile court may decline to terminate parental rights if it "finds a compelling reason for determining that termination would be detrimental to the child" because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." A beneficial parent-child relationship within the meaning of the statute is one that "'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 re K.P.*, *supra*, 203 Cal.App.4th at p. 621.) "A showing the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption. [Citation.] No matter how loving and frequent the contact, and notwithstanding the existence of an '"emotional bond"' with the child, '"the parents must show that they occupy 'a parental role' in the child's life."' [Citations.]" (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 646.) "'Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement.' [Citation.]" (*In re K.P.*, *supra*, at p. 621.)

The parent has the burden of proving that the parent-child relationship exception applies. (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 646; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) "The court's decision a parent has not satisfied this

burden may be based on any or all of the component determinations—whether the parent has maintained regular visitation, whether a beneficial parental relationship exists, and whether the existence of that relationship constitutes 'a compelling reason for determining that termination would be detrimental to the child.' [Citations.] When the juvenile court finds the parent has not maintained regular visitation or established the existence of the requisite beneficial relationship, our review is limited to determining whether the evidence compels a finding in favor of the parent on this issue as a matter of law. [Citations.] When the juvenile court concludes the benefit to the child derived from preserving parental rights is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption, we review that determination for abuse of discretion. [Citations.]" (*In re Breanna S.*, *supra*, at pp. 646-647; see also *In re K.P.*, *supra*, 203 Cal.App.4th at pp. 621-622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

B. The Juvenile Court Did Not Err In Terminating Father's Parental Rights Over S.J.

In terminating parental rights over S.J. and freeing the child for adoption, the juvenile court determined that Father had failed to meet his burden of establishing that the parent-child relationship exception applied. The court specifically found that Father had failed to show his relationship with S.J. constituted a compelling reason for determining that the termination of his parental rights would be detrimental to the child. Father asserts this finding was erroneous because the court did not apply the proper legal standard to its determination and the evidence established that Father had a significant parent-child bond with S.J. Based on the totality of the record, we conclude the juvenile

court did not abuse its discretion in determining that the benefit S.J. would derive from continuing her relationship with Father was not sufficiently compelling to outweigh the benefit the child would achieve in a permanent home with new, adoptive parents.[3]

The evidence presented at the section 366.26 hearing demonstrated that, although S.J. derived some benefit from her relationship with Father, he did not occupy a parental role in the child's life such that S.J. would suffer detriment from its termination. S.J. had spent the majority of her young life outside of Father's care and custody. She was six months old when she was placed in the home of her prospective adoptive parents, Mr. and Mrs. M., and was two and a half years old when parental rights were terminated. Although Father initially had a nurturing and loving relationship with S.J., his bond with the child significantly diminished after the court changed his visits from unmonitored to monitored in June 2018. At the time of the February 25, 2019 section 322.26 hearing, Father had not visited S.J. in the prior two months. He also had not made any attempt

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[3] In its minute order for the section 366.26 hearing, the juvenile court also found that Father "has not maintained regular visitation with the child and has not established a bond with the child." Father argues these specific findings should be stricken from the minute order because they were not part of the court's oral pronouncement of its ruling. We need not decide, however, whether these written findings were inconsistent with the juvenile court's oral pronouncement. We conclude the court properly found that the parent-child relationship exception did not apply because Father failed to establish that his relationship with S.J. constituted "a compelling reason for determining that termination would be detrimental to the child." (§ 366.26, subd. (c)(1)(B).)

to speak to S.J. on the telephone, and or to reach out to the M.'s to inquire about the child's well-being. The evidence also showed that S.J. was thriving in the home of her prospective adoptive parents, whom she referred to as "mama" and "daddy," and that she had developed a strong and loving bond with them. The M.'s consistently had demonstrated that they were able to meet S.J.'s needs, and were committed to adopting the child and providing her with a stable and permanent home.

As the juvenile court observed, the evidence showed that Father had a "very nice relationship" with S.J., particularly in the time before his visits were changed from unmonitored to monitored. Such evidence, however, fell far short of demonstrating the existence of a substantial emotional attachment between S.J. and Father that would cause the child to suffer great harm if the relationship was severed. (See, e.g., *In re Anthony B.* (2015) 239 Cal.App.4th 389, 396 [parent-child relationship exception requires parent to demonstrate "relationship remained so significant and compelling in [the child's] life that the benefit of preserving it outweighed the stability and benefits of adoption"]; *In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315 [juvenile court determines "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"]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 [statutory exception applies only if the severance of the parent-child relationship would "deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed"].)

Father argues the juvenile court applied the incorrect legal standard in terminating parental rights because the court stated at the hearing that "continued jurisdiction is necessary" and that "it would be detrimental for [S.J.] to be returned to her parents." As Father points out, the relevant inquiry at the section 366.26 hearing was not whether the return of S.J. to the custody of her parents would be detrimental to the child, but whether the termination of parental rights would be detrimental because of the existence of a beneficial parent-child relationship. However, when the juvenile court's findings at the hearing are considered as a whole and in context, the court applied the correct legal standard. Prior to making its ruling, the court expressly stated that the issue before it was whether the parent-child relationship exception precluded the termination of parental rights, and that Father had the burden of establishing the exception applied. The court also correctly noted that, for the exception to apply, it had to determine that the parent-child relationship constituted "a compelling reason to find that the termination would be detrimental to the child." In deciding to terminate parental rights, the court found that S.J. was adoptable, and that S.J.'s relationship with Father did not provide a sufficiently compelling reason for finding that the severance of that relationship would be detrimental to the child. This was a proper application of the law. (See § 366.21, subd. (c)(1)(B) ["the court shall terminate parental rights unless . . . [it] finds a compelling reason for determining that termination would be detrimental to the child" under a specified exception]; *In re S.B.*, *supra*, 46 Cal.4th at p. 532 ["[i]f adoption is likely, the court is required to terminate parental rights, unless specified circumstances compel a finding that termination would be detrimental to the child"]; *In re*

Celine R. (2003) 31 Cal.4th 45, 53 ["if the child is adoptable, . . . the court must order adoption and . . . termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination . . . would be detrimental to the child"].)

Father also asserts the juvenile court did not apply the proper factors in deciding whether the benefit that S.J. would derive from preserving parental rights outweighed the benefit she would achieve by the permanency of adoption. He specifically contends the court improperly injected the prospective adoptive parents' willingness for continued contact between Father and S.J. into the weighing process. We disagree. The record reflects the court did not base its decision to terminate parental rights on the possibility that the M.'s would allow S.J. to have future visits with Father. (See *In re C.B.* (2010) 190 Cal.App.4th 102, 128 [juvenile court "cannot . . . terminate parental rights based upon an unenforceable expectation that the prospective adoptive parents will voluntarily permit future contact between the child and a biological parent"].) The court merely noted that it was "pleased" that Father and the M.'s had "maintained a civil relationship," and that it would "encourage" the parties to consider a post-adoption plan for contact so that S.J. could "know where she came from." The totality of the court's statements and findings at the hearing make clear that it decided to terminate Father's parental rights because he failed to meet his burden of demonstrating the existence of a beneficial parent-child relationship that would be detrimental to S.J. if severed.

Father further claims the juvenile court abused its discretion in assessing the strength of the parent-child bond by improperly focusing on S.J.'s age and stability in her current

placement, and failing to consider other relevant factors. We see no abuse of discretion, however, in the court's ruling. "'To trigger the application of the parental relationship exception, the parent must show the parent-child relationship is sufficiently strong that the child would suffer detriment from its termination.' [Citation.]" (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643.) "Factors to consider 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 parent and child, and the child's particular needs."" [Citation.]" (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 646.) Here, the juvenile court properly considered S.J.'s tender age and the fact that she had spent the majority of her life away from Father in deciding whether a beneficial parent-child relationship existed. The court also properly considered the stability of S.J.'s current placement in determining whether Father's relationship with the child outweighed the well-being S.J. would gain in a permanent home with her prospective adoptive parents. (*In re Marcelo B.*, *supra*, at p. 643 ["[a] beneficial relationship 'is one that "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"'"].) While the court specifically referenced S.J.'s age and current placement in explaining the basis for its ruling, the record does not support Father's claim that the court failed to consider other relevant factors in assessing the strength of his bond with S.J. Rather, the record reflects that the court carefully considered the evidence presented at the section 366.26 hearing as well as the arguments of counsel, and acted well within its discretion in finding that the parent-child relationship

exception did not apply. The juvenile court accordingly did not err in terminating Father's parental rights over S.J.

III. Compliance with ICWA

In both appeals, Father challenges the juvenile court's finding that ICWA did not apply to the dependency proceedings. Father contends the DCFS failed to comply with ICWA's inquiry and notice provisions, and thus, the orders denying his section 388 petition and terminating his parental rights must be reversed and the matter remanded for compliance with ICWA.

A. Relevant Background

On June 22, 2016, Father signed a Judicial Council Parental Notification of Indian Status form in which he indicated that he might have Blackfoot and Apache ancestry. At the June 23, 2016 detention hearing, the juvenile court asked Father which family members he believed might have Indian ancestry. Father stated: "Our grandmother, who passed away, Mary J[.] Mary Elizabeth J[.] She was an Apache Indian. Our family roots are Apache and Blackfoot. However, the current living family, we're trying to access and get those records. But we have tons of historical things such as dreamcatchers, pictures, all the things that my grandmother left behind when she passed away. So that's what led us to believe that we do have Apache and Blackfoot." Father provided Mary J.'s birthdate and stated that both of his parents were living. He also indicated his father would have the most information about his Indian ancestry, but noted the paternal family recently had been unable to locate his father or to reach him by telephone. When the court asked if there was anyone else who could provide the information, Father did not respond. The court ordered the DCFS to conduct a full

ICWA investigation and to provide notice to both the Apache and Blackfoot tribes.

On August 12, 2016, Father told the DCFS he had Apache and Blackfoot ancestry on the paternal great-grandmother's side. Father also stated, "[W]e have pictures but I do not have any documents that say we are in the tribe."

On December 26, 2016, Father signed another Judicial Council Parental Notification of Indian Status form in which he again indicated that he might have Indian ancestry in the Blackfoot and Apache tribes. Father also wrote the name of his cousin, Tonnetta S., on the form. At the December 29, 2016 detention hearing, the juvenile court asked Father why he had included his cousin's name on the form and if he was enrolled in any tribe. Father explained: "No. I am not enrolled in any tribe. The purpose of bringing up the cousin is my cousin is the one who gathered all of our ancestry from our native land and for us to contact. So we don't have 100 family members looking and gathering documents." Father also stated that his grandmother "definitely was Apache," but he did not have any further details. The court ordered the DCFS to provide notice to the Apache Nation "as close as you can get to the information the father is able to provide."

On January 19, 2017, Father reported to the DCFS that he had been told his family members belonged to the Apache and Blackfoot tribes. He also stated that his first cousin, Tonnetta S., would know more about the family's Indian ancestry, and provided her telephone number. At the January 30, 2017 adjudication hearing, the juvenile court again ordered the DCFS to send ICWA notices to both the Apache and Blackfoot tribes.

On March 7, 2017, the DCFS spoke to Father's first cousin, Tonnetta S., about the paternal family's possible Indian ancestry. She stated that she recently had moved, and that all of her family's information was in one of many boxes she still needed to unpack. She also indicated that she would be traveling to another country and returning on April 5, 2017, and that she would look for her family's information once she returned. In a last minute information report filed on March 9, 2017, the DCFS stated that it was unable to send ICWA notices to the Blackfoot and Apache tribes "as there was no family history information at this time."

On September 27, 2018, Father again reported to the DCFS that he had Blackfoot and Apache ancestry, which he knew from his "family history and roots." He added that his family member, Tonnetta S., knew the family's history. Father agreed to provide Tonnetta's telephone number to the dependency investigator at a later time, but he did not so.

On October 2, 2018, the DCFS sent ICWA notices to the Secretary of the Interior, the Bureau of Indian Affairs (BIA), the Blackfoot Tribe of Montana, and eight Apache tribes. The ICWA notices contained the parents' identifying information, the names of the maternal grandparents, the names of the paternal grandparents, and the birthdate of the paternal grandmother. The notices did not include any other information about the paternal grandparents, or any information about the paternal great-grandparents. As of December 17, 2018, the DCFS had received responses indicating that S.J. was not a member or eligible for enrollment in six Apache tribes. The DCFS had not received responses from two Apache tribes and the Blackfoot

Tribe of Montana. On January 2, 2019, the juvenile court found that ICWA did not apply to the proceedings.

B. Governing Law

ICWA provides that "[i]n any involuntary proceeding in a [s]tate court, where the court knows or has reason to know that an Indian child is involved, the party seeking 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 the right to intervene. (25 U.S.C. § 1912(a).) Similarly, California law requires notice to the child's parent or Indian custodian and the child's tribe in accordance with section 224.3 if there is reason to know that an Indian child is involved in the proceedings. (§ 224.2, subd. (f).) Both juvenile courts and child protective agencies "have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . may be or has been filed, is or may be an Indian child." (§ 224.2, subd. (a); see also Cal. Rules of Court, rule 5.481(a); *In re Isaiah W.* (2016) 1 Cal.5th 1, 15 ["juvenile court has an affirmative and continuing duty in all dependency proceedings to inquire into a child's Indian status"].)

California law provides that if the juvenile court or the child protective agency "has reason to believe that an Indian child is involved in a proceeding, the court [or] social worker . . . shall make further inquiry regarding the possible Indian status of the child . . . as soon as practicable." (§ 224.2, subd. (e).) "Further inquiry includes, but is not limited to . . . "[i]nterviewing the parents, Indian custodian, and extended family members," and "[c]ontacting the tribe or tribes and any other person that reasonably can be expected to have information regarding the child's membership, citizenship status, or eligibility." (§ 224.2,

subd. (e)(1),(3); see also Cal. Rules of Court, rule 5.481(a)(4)(A).) Circumstances that may provide reason to know that the child is an Indian child include when a person having an interest in the child, such as a member of the child's extended family, provides information suggesting that the child is an Indian child to the court or child protective agency. (§ 224.2, subd. (d)(1); Cal. Rules of Court, rule 5.481(a)(5)(A).)[4] "[A]n adequate investigation of a family member's belief a child may have Indian ancestry is essential to ensuring a tribe entitled to ICWA notice will receive it." (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 787.)

Both federal and state law set forth specific requirements for providing ICWA notice once there is reason to know that an Indian child is involved in the proceedings. Under the applicable federal regulations, the juvenile court must ensure that the party seeking a foster care placement or termination of parental rights promptly send notice to the child's tribe, the child's parents, and if applicable, the child's Indian custodian. (25 C.F.R. § 23.111(a)-(c).) California law likewise requires that ICWA notice be sent to the child's parents or legal guardian, the Indian custodian, if any, and the child's tribe. (§ 224.3, subd. (a); see also Cal. Rules of Court, rule 5.481(b)(1) ["[i]f it is known or there is reason to know that an Indian child is involved . . ., the social worker . . . must send Notice of Child Custody Proceeding for Indian Child (form ICWA-030) to the parent or legal guardian and Indian custodian

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[4] The federal regulations implementing ICWA state that a court has "reason to know" that the child is an Indian child if "[a]ny participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child." (25 C.F.R. § 23.107(c)(2).)

of an Indian child, and the Indian child's tribe"].) "If the court makes a finding that proper and adequate further inquiry and due diligence . . . have been conducted and there is no reason to know whether the child is an Indian child, the court may make a finding that [ICWA] does not apply. . . ." (§ 224.2, subd. (i)(2).) However, "any finding of ICWA's inapplicability before proper and adequate ICWA notice has been given is not conclusive and does not relieve the court of its continuing duty . . . to inquire into a child's Indian status in all dependency proceedings." (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 11.)

C. The DCFS Failed to Comply with ICWA's Inquiry and Notice Requirements

Father argues the DCFS failed to properly discharge its duties under ICWA. He contends the DCFS did not adequately inquire whether S.J. might be an Indian child because Father identified potential sources of information about his Indian ancestry, and the DCFS did not conduct a proper investigation of his claim. Father also asserts the ICWA notices sent by the DCFS were defective because they did not include the full name and birthdate of the paternal great-grandmother even though Father provided this information. The DCFS concedes that the requirements of ICWA have not been satisfied in this case and that a limited remand for ICWA compliance is proper. We agree.

The record reflects that Father repeatedly identified his first cousin, Tonnetta S., as an individual who would have the most information about the paternal family's Indian ancestry. Father provided the dependency investigator with Tonnetta's telephone number on January 19, 2017, and Tonnetta returned the investigator's call on March 7, 2017. At that time, Tonnetta explained to the investigator that she would need to find the family's information after she returned from an overseas trip in

early April 2017. However, there is no indication in the record that the DCFS made any effort to follow up with Tonnetta after this call to determine if she had been able to locate any records or had any other relevant information about the family's possible Indian ancestry. Instead, the record shows that the next time the DCFS had any communication with the paternal family about Father's claim of Indian ancestry was on September 27, 2018, when Father told a different dependency investigator that he had "Native American Heritage with the Blackfoot Tribe and Apache Tribe." Father also stated that Tonnetta S. knew the family's history. Although Father did not provide the DCFS with Tonnetta's telephone number at that time, the agency already had that number and had used it in the past. Instead of following up with Tonnetta or taking any other action to investigate Father's claim, the DCFS sent out ICWA notices to the Blackfoot and Apache tribes with very limited information about the paternal family. Under these circumstances, the DCFS did not satisfy its affirmative and continuing duty of inquiry.

The record further reflects that the notices sent by the DCFS omitted information required under ICWA and state law. As Father correctly points out, at the June 23, 2016 detention hearing, he identified the paternal great-grandmother as the family member he believed had Indian ancestry. At that time, Father also provided the paternal great-grandmother's full name and date of birth. Yet in the ICWA notices, the DCFS stated that this information was unknown. "'It is essential to provide the Indian tribe with all available information about the child's ancestors, especially the ones with the alleged Indian heritage. [Citation.] Notice to the tribe must include available information about the maternal and paternal grandparents and great-

grandparents, including maiden, married and former names or aliases; birth dates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data. [Citation.]'" (*In re Christian P.* (2012) 207 Cal.App.4th 1266, 1281; see also 25 C.F.R. § 23.111(d); § 224.3, subd. (a)(5)(C).) Because the paternal great-grandmother was the person with the alleged Indian ancestry, it was critically important that the DCFS provide all known identifying information about her to the tribes. The agency's failure to do so precluded the juvenile court from finding that ICWA did not apply to these proceedings.

We therefore remand the matter for the juvenile court to direct the DCFS to conduct a further investigation of Father's claim of Indian ancestry by making a genuine effort to locate and interview family members, including Tonnetta S., who might have information bearing on the issue. Once that investigation is completed, new notices must be provided to the relevant tribes, the BIA, and the Secretary of the Interior. The DCFS thereafter is to notify the court of its actions and file certified mail return receipts for the new ICWA notices, together with any responses received. The court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether S.J. is an Indian child. If the court finds that S.J. is an Indian child, it shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and related California law. If not, the court's original section 366.26 order remains in effect.[5] (*In re Elizabeth*, *supra*, 19 Cal.App.5th at p. 788; *In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 655.)

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[5] Father asserts that the lack of compliance with ICWA requires the reversal of both the order summarily denying his

DISPOSITION

The juvenile court's order denying Father's section 388 petition is affirmed. The order terminated parental rights under section 366.26 is conditionally affirmed, and the matter is remanded to the juvenile court for full compliance with the inquiry and notice provisions of ICWA and related California law and for further proceedings not inconsistent with this opinion.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.

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section 388 petition and the order terminating his parental rights. We disagree. The proper remedy in this case is to affirm the order denying the section 388 petition and to conditionally affirm the order terminating parental rights with a limited remand for compliance with ICWA.