Filed 10/9/12 In re Johnny N. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JOHNNY N. et al., Persons Coming Under the Juvenile Court Law.	B237468
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ALISHA R., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK65721)

APPEAL from an order of the Superior Court of Los Angeles County, Stephen Marpet, Commissioner. Reversed and remanded with directions.

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

Tarkian & Associates and Arezoo Pichvai for Plaintiff and Respondent.

Alisha R. appeals from an order of the juvenile court terminating her parental rights as to her sons Johnny N. and Steven R. She contends the court failed to comply with the notice provisions of the Indian Child Welfare Act (25 U.S.C. § 1901, et seq., ICWA). She also argues the court erred in ruling that she had not demonstrated the applicability of the beneficial parental relationship exception to termination of parental rights.

We find no basis for reversal on grounds other than ICWA, as to which we conclude that the notice provided was not in full compliance with the requisites of the statute. We reverse for the limited purpose of full compliance with ICWA, as explained below.

FACTUAL AND PROCEDURAL SUMMARY

Johnny N. was born to mother and Johnny N. Sr. on July 10, 2002. His half-brother, Steven R., was born to mother and Adam R. on November 20, 2005.[1] On November 10, 2006, police officers responded to a motel in El Monte because of a report of an argument between mother and Adam R. The police saw four-year old Johnny running around the motel parking lot in his underwear unsupervised. While they were present, Johnny picked up a knife and walked around with it. Mother appeared unconcerned that Johnny had a knife and did not attempt to take it away from him. Mother appeared to be under the influence of drugs. The only food in the motel room was a small box of cereal. Eleven-month-old Steven had a swollen bump and laceration on his forehead. Both children were dirty and unkempt and their clothes were dirty and tattered. Adam told the officers that he, mother and the children had been living in motels for the past two months, and that mother left the children for four days without warning. Mother was arrested for being under the influence of a controlled substance and for child endangerment. The officers referred the matter to the Department of Children

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[1] Neither father is a party to this appeal, and we therefore confine our discussion to the circumstances regarding mother.

and Family Services (DCFS). The children were examined at a hospital. Johnny had a large bump with a scab on his head. He told the nurse that Adam had thrown him against the wall.

DCFS detained the children and placed them in foster care. It filed a petition alleging that both children came within Welfare and Institutions Code section 300, subdivisions (a), (b), (i) and (j) based on physical abuse by Adam R., domestic violence between Adam R. and mother, drug use by mother and Adam R., and failure to protect the children. (All further statutory references are to this code.) The jurisdiction and disposition report for January 5, 2007 stated that mother admitted heavy methamphetamine use. She said Adam R. also used methamphetamine. Both mother and Adam R. admitted a history of verbal abuse and physical violence in the presence of the children. Johnny was quiet and withdrawn and had trouble articulating speech. Pursuant to a mediation agreement, mother and Adam R. waived trial and agreed to the amended petition. The juvenile court sustained allegations that mother and Adam R. are drug abusers and thus are unable to protect and provide for the children. The court also sustained amended allegations based on domestic violence between mother and Adam R. The children were ordered suitably placed. Mother and Adam R. were to have monitored visits with the children twice a week. Mother was ordered to complete a DCFS approved drug rehabilitation program with random drug testing and counseling, to participate in individual counseling to address the issues in the case, and to complete a 52-week domestic violence program.

Over the following 18 months, mother experienced some failures and some successes in completing her program. By 2008, both children had been returned to her home based on her compliance with her case plan. In June and August 2008 mother tested positive for alcohol use. In November 2008, DCFS filed a supplemental petition for a more restrictive placement under section 387, based on mother's positive tests for alcohol. Mother admitted she had relapsed, but said she had provided for care of the children. She had entered a six-month outpatient program and was enrolled in school full-time. The children were detained and mother was ordered to have monitored

visitation. The court sustained the section 387 petition in February 2009. Mother sought additional reunification services. Counsel for the children said that Johnny was "truly devastated" at losing his mother again. DCFS took the position that more than 18 months of reunification services had been offered and that services should not be continued. The court terminated reunification services, but told mother it would entertain a section 388 petition if she could demonstrate changed circumstances before the permanent planning and placement hearing.

Mother filed a petition under section 388 on June 1, 2009, seeking custody of the children. She claimed to have actively engaged in additional reunification services on her own, completing a six-month inpatient drug and alcohol treatment program, and testing clean. She had graduated from school and earned a certificate as a medical assistant. She was completing an externship at a chiropractic clinic which would turn into full-time paid employment at the conclusion of the externship. Mother had obtained her own one-bedroom apartment. She had consistently visited with the children. She asked for a home-of-mother order or reinstatement of reunification services with liberalized visitation. In September 2009, the court found changed circumstances and reinstated reunification services for mother.

Mother tested positive for cocaine in April 2010. Johnny's behavioral issues had been escalating as mother's situation destabilized. He was diagnosed with attention deficit hyperactivity disorder in May 2010 and placed on psychotropic medication. In June 2010 mother had a mental breakdown, was admitted to a psychiatric hospital, diagnosed with psychosis/depression and prescribed medication. At a contested section 366.22 hearing, mother requested the return of the children to her care. The court observed that mother had not been able to resolve her substance abuse issues in the three and one-half years the case had been pending. Mother's reunification services were terminated and a permanency planning hearing was set.

In June 2011, the children were placed in the home of prospective adoptive parents who had received an approved home study and were committed to adopting both boys. The children told their social worker that they did not want to visit or talk with mother on

the telephone. The prospective adoptive parents reported that the children acted out and had tantrums and outbursts after visits with mother. Mother did not ask the social worker about Steven. When asked why, mother said she had never bonded with the child and "does not 'really know him.'" DCFS recommended termination of parental rights and a permanent plan of adoption for both children. The foster care social worker who monitored visits documented visits where the children did not want to get out of the car to see mother. Mother paid little or no attention to Steven during visits. Johnny, aged 9, said he wanted to live with the prospective adoptive parents forever. Steven said he loved them.

At the contested section 366.26 hearing in November 2011, mother sought a continuance because she was "on the verge" of completing a program, although her attorney had explained that this was not a basis for a continuance at this stage of the proceedings. Mother wanted the court to know how much she loved her children and felt bonded to them. She objected to termination of parental rights and asked for a referral to "the consortium" for a post-adoptive contract. Counsel for the children said that adoption appeared to be the best plan for the children since mother's visits had been irregular and monitored, and her residence would not provide a stable home.

The juvenile court found by clear and convincing evidence that the children were likely to be adopted and found no exception under section 366.26, subdivision (c)(1)(B)(i) (beneficial parental relationship). Mother's parental rights were terminated. The matter was ordered into adoption planning. Mother filed a timely appeal from termination of her parental rights.

DISCUSSION

I

Mother argues the juvenile court erred because substantial evidence established that she had a beneficial parental relationship with both children under the section 366.26, subdivision (c)(1)(B)(i) exception to termination of parental rights.

"At a section 366.26 hearing, the court may select one of three alternative permanency plans for the dependent child—adoption, guardianship or long-term foster care. [Citation.] If the child is adoptable, there is a strong preference for adoption over alternative permanency plans. [Citations.]" (*In re Michael G.* (2012) 203 Cal.App.4th 580, 588-589 (*Michael G.*).) "If the court finds the child is likely to be adopted within a reasonable time, the juvenile court is required to terminate parental rights unless the parent shows that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1)(A) and (B). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343–1345.)" (*Ibid.*)

California courts have disagreed about the applicable standard of review for a ruling rejecting the exception to adoption under section 366.26. (*In re K.P.* (2012) 203 Cal.App.4th 614, 621 [acknowledging that some courts have applied the substantial evidence standard while at least one has reviewed the ruling for abuse of discretion.].) The court in *In re Bailey J.* (2010) 189 Cal.App.4th 1308 (*Bailey J.*), recently harmonized the authority. "In our view, both standards of review come into play in evaluating a challenge to a juvenile court's determination as to whether the parental or sibling relationship exception to adoption applies in a particular case. Since the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental or sibling relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court's determination. Thus, as this court noted in *In re I.W.* (2009) 180 Cal.App.4th 1517, a challenge to a juvenile court's finding that there is no beneficial relationship amounts to a contention that the 'undisputed facts lead to only one conclusion.' (*In re I.W.*, at p. 1529.) Unless the undisputed facts established the existence of a beneficial parental or sibling relationship, a substantial evidence challenge to this component of the juvenile

court's determination cannot succeed."[2] (*Id*. at p. 1314.) We follow the approach adopted by the court in *Bailey J*.

Mother had the burden of showing that termination of parental rights would be detrimental to the children under section 366.26, subdivision (c)(1)(B)(i). (*In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p.1345.) "Section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights only when '[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.'" (*Michael G.*, *supra*, 203 Cal.App.4th at p. 594.) "Sporadic visitation is insufficient to satisfy the first prong of the parent-child relationship exception to adoption. [Citation.]" (*In re C.F.* (2011) 193 Cal.App.4th 549, 554.)

The phrase "benefit from continuing the relationship" has been interpreted to mean "'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 re Autumn H.* [(1994)] 27 Cal.App.4th [567,] 575 [*Autumn H.*].) A substantial positive attachment from the child to the parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. (*Ibid.*) '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*.)" (*Michael G.*, *supra*, 203 Cal.App.4th at p. 594.)

More than frequent and loving contact or pleasant visits is required to satisfy the beneficial parental exception. (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 555.) "'Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from the day-to-day interaction, companionship and shared experiences.' (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The parent must

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[2] The *Bailey J.* court also held that a finding on the second prong of the adoption exception, that the parent-child relationship is a "compelling reason" for finding detriment to the child, is reviewed for abuse of discretion. (*Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315.) The juvenile court here did not make such a finding.

show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Elizabeth M.* [(1997)] 52 Cal.App.4th [318,] 324.)" (*Ibid*, fn. omitted.) After *Autumn H.* was decided, the Court of Appeal clarified that "[d]ay-to-day contact is not necessarily required, although it is typical in a parent-child relationship. A strong and beneficial parent-child relationship might exist such that termination of parental rights would be detrimental to the child, particularly in the case of an older child, despite a lack of day-to-day contact and interaction.'" (*Id*. at p. 555, fn. 5, quoting *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

Mother contends that she maintained regular contact and visitation with both children, noting that they were returned to her custody for a time before she relapsed and lost custody of them again. She cites a report from 2008 which stated that Johnny was happy to see his mother and that she was attentive and loving toward the children. She also cites the detention report for November 2008 which states that Johnny wanted to live with mother. Mother relies on a statement by counsel for the children at the hearing on the adjudication and disposition of the section 387 petition after she relapsed and the children were detained again. At that hearing, held in early 2009, counsel for the children said that Johnny was "truly devastated at losing his mother again. He would not benefit from being separated from her." Mother also relies on a report by the conjoint therapist in February 2010 that Johnny and mother were excited to see each other, mother took a parental role and appropriately redirected the child, and often guided the child to display positive behaviors. Johnny told the therapist that he "'does not want mom to lose him.'" In October 2010, the children told the children's social worker that they looked forward to and enjoyed visits with mother. In the status review report for March 2011, the foster parent said the children had an appropriate bond with mother.

Mother acknowledges that by September 2011 when the section 366.26 report was written, the children were telling their social worker that they did not want to visit with mother or talk with her on the telephone. But she argues that "the children's short-lived rejection of Mother does not negate the years of bonding they shared, prior to their

prospective adoptive placement just five months prior to the order terminating parental rights." She contends that nine-year-old Johnny had years of a child-parent relationship with her, and would not forget his mother. Mother argues that although she had relapsed into substance abuse, she consistently visited her children. She contends: "And though mother may never be ready to assume care of her children, they maintain a bond worthy of preserving."

DCFS argues the order terminating parental rights should be affirmed because mother lost custody of the children, regained custody, and then lost custody as a result of her relapse into drug use. This instability and turmoil took a toll on the children. Johnny struggled with issues of trust, anger, encopresis, and enuresis. In April 2010, Johnny's therapist reported that he had regressed in the prior three weeks, with recent episodes of encopresis and an increase in defiant behavior. During one therapy session, Johnny was so angry he threw blocks. He said "'I don't' want to be in the home [foster placement at the time] and my mom lies.'" The therapist observed that Johnny's behaviors escalated when mother was experiencing instability in her life. She recommended that he be placed in a different foster home and move forward with permanency because the child would benefit from stability. In May 2010, Johnny was diagnosed with attention deficit hyperactivity disorder. He and Steven were moved to a different foster home in October 2010, and then to the home of the prospective adoptive parents in June 2011.

By the time of the report for the section 366.26 hearing, visits with mother were having a negative effect on the children. They returned home and acted out, having tantrums and outbursts. When asked by the children's social worker why mother did not inquire about Steven, mother said "she never really bonded with him and does not 'really know him.'" Johnny said that he wanted to live forever with the prospective adoptive parents. Although Steven, at age four, was too young to make a statement regarding adoption, he did say that he loved the prospective adoptive parents. At some visits with mother, the children did not want to get out of the car. During visits, mother was observed to be interested only in Johnny and gave little or no attention to Steven. The children were assessed as being well-bonded with the prospective adoptive parents.

"'The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs.' (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467, fn. omitted.)" (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315.)

Mother did not testify at the section 366.26 hearing and thus we have no information about her interaction with the children during visits beyond what is stated in the DCFS reports. The evidence does not establish that mother played a parental role with the children or that they would benefit from a continuing relationship with her. After years of turmoil and instability caused by mother's relapses and mental health issues, by the time mother's parental rights were terminated, the children wanted nothing to do with her. Steven had spent most of his life out of mother's care. They had bonded with the prospective adoptive parents. Substantial evidence supports the juvenile court's conclusion that mother failed to demonstrate that her relationship with the children promotes the well-being of the children to such a degree as to outweigh the well-being they would gain in a permanent home with new, adoptive parents. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Mother did not carry her burden of proving the beneficial parental relationship exception applied.

II

Mother argues that DCFS failed to comply with the notice provisions of ICWA. DCFS does not oppose a limited reversal of the termination of mother's parental rights and remand to procure proper notice to any appropriate tribe under ICWA. It asks the court to reinstate the order terminating parental rights if no tribe deems the children to be Indian children.

"The purpose of ICWA is to '"protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."'[Citations.]" (*In re H.B.* (2008) 161 Cal.App.4th 115, 120.) "Notice given under ICWA must . . . contain enough

information to permit the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership. [Citations.] [¶] Although both the federal ICWA regulations (25 C.F.R. § 23.11(d)(3) (2008)) and section 224.2, subdivision (a) require the agency to provide all known information concerning the child's parents, grandparents and great-grandparents without distinguishing between Indian and non-Indian relatives, it does not follow that the omission of information concerning non-Indian relatives is necessarily prejudicial." (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576.) If known, names (maiden, married, former, and aliases), current and former addresses, birthdates, places of birth, and death, tribal enrollment numbers, and any other information is to be provided. (*Id*. at p. 575, fn. 3.) "[W]here notice has been received by the tribe, . . . errors or omissions in the notice are reviewed under the harmless error standard. [Citations.]" (*Id*. at p. 576.)

The detention report of November 15, 2006 stated that ICWA did not apply. The children's social worker interviewed Adam, who denied Indian ancestry and said he did not believe mother had Indian ancestry either. But at the detention hearing, maternal grandfather George R. said he had American Indian heritage, but was not registered with a tribe. When asked what tribe he belonged to, George R. said he would have to ask his grandmother or aunt. The court said that the maternal grandfather would have to be investigated under ICWA. The statement by Adam that mother did not have Indian ancestry was repeated in the Jurisdiction/Disposition Report of January 5, 2007. That report stated that mother was asked on December 20, 2006 whether she had American Indian ancestry. She said she did not know. The maternal grandfather, George R., said that as far as he knew, he did not have American Indian heritage, but he would have to ask relatives.

After the children were removed from mother's custody, in July 2009, the social worker said she had reviewed the court minute orders and DCFS reports and found no ICWA ruling by the court. The social worker called mother, who said she did not believe there was American Indian heritage in her family, but could not say whether the fathers of the children had such ancestry. DCFS called George R., who reported that he had

heard that his grandfather, name unknown, was from the Blackfeet tribe, but said he was uncertain about this information. DCFS also planned to query the maternal grandmother.

Notices were sent by DCFS on July 24, 2009 by certified mail, to (1) the Secretary of the Interior in Washington, D.C., (2) the Area Director of the Bureau of Indian Affairs in Sacramento, California, (3) the Bureau of Indian Affairs in Browning, Montana, (4) Raquel Vaile of the Blackfeet Tribe in Browning, Montana, and (5) the Blackfeet Tribal Business Council in Browning, Montana. The notices stated that the children could be eligible for membership in the Blackfeet Tribe, "maternal grandfather's side only." On the notice for Johnny, the names, birthdates and birth states for mother and Johnny N. Sr. were given. It listed the names of maternal grandmother (Yvonne F.R.), maternal grandfather (George R.), maternal great grandmother (Alice N.F.V.), Mary A. (other maternal great-grandmother) and Thomas T. (maternal great grandfather), Jose R. (other maternal great-grandfather). Birthdates were given for maternal grandmother (listed as born in Los Angeles) and grandfather (listed as born in California). Partial information was provided on the birthdates and birthplaces for the maternal great grandparents. The notices for Steven listed the names, birthdates, and birthplaces for mother and his father, Adam R. The information about other maternal relatives was the same as on the form for Johnny.

The United States Department of the Interior, Bureau of Indian Affairs, returned the notices to DCFS because no action was required since the county already had provided an appropriate notice to the tribe. The Blackfeet Tribe in Browning Montana notified DCFS that a search of Blackfeet Tribal Enrollment records had found no match for the children, or for mother, Adam R., George R., Alice N. F. V, Yvonne F.R., or Thomas T. As a result, the tribe concluded that the children were not "Indian" children as defined by ICWA. On September 3, 2009, the court found ICWA did not apply.

Mother contends DCFS failed to conduct a proper ICWA inquiry and provided inaccurate information to the tribe. She bases this argument on the absence of evidence in the record that DCFS followed-up with either maternal great-grandmother or maternal great-aunt after George R. indicated that they would know the name of the tribe in which

he had ancestry. In addition, she argues that the notices sent out by DCFS gave an incorrect birth date for her. Mother also asserts that no information, even names, for the maternal great grandparents were provided on the notices. She contends that information was given for the maternal grandmother and grandfather of maternal grandmother Yvonne, but not for the grandparents of George R., who said he had Indian heritage.

There is a strong indication that additional information could have been sought by DCFS before the notices to the Blackfeet tribe and Bureau of Indian Affairs were sent. In light of the concession by DCFS, and under these circumstances, we cannot find the deficiencies in the notice harmless. "When a parent indicates he or she may have Indian heritage, '"it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child."' [Citation.]" (*In re A.B.* (2008) 164 Cal.App.4th 832, 843.) We reverse for the limited purpose of proper compliance with ICWA.

DISPOSITION

The November 11, 2011 order terminating mother's parental rights is reversed. The case is remanded to the juvenile court with directions to order DCFS to complete notice to the appropriate tribe or tribes in accordance with ICWA. If, after proper notice, the court finds the children are Indian children, the court shall proceed in conformity with ICWA. If, after proper notice, the court finds the children are not Indian children, the order terminating parental rights and selecting adoption as the permanent plan shall be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.