Filed 12/12/18 In re A.S. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re A.S. et al., Persons Coming Under the Juvenile Court Law.	B289760 (Los Angeles County Super. Ct. No. CK73185)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. BRENDA S. et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Rudolph Diaz, Judge. Conditionally affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and Appellant Brenda S.

Pamela Deavours, under appointment by the Court of Appeal, for Defendant and Appellant Tony M.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, Sarah Vesecky, Senior Deputy County Counsel, for Plaintiff and Respondent.

Brenda S. (mother) and Tony M. (father) appeal from the findings and order terminating their parental rights under Welfare and Institutions Code section 366.26.[1] Mother contends the court erred in finding inapplicable the parental relationship exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i). Father contends the court did not fulfill its continuing duty under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.), and sections 224 et seq. to inquire into a minor's status as an Indian child. Mother joins father's ICWA argument.

We find no abuse of discretion in the court's decision to deny application of the parental relationship exception to termination of mother's parental rights. We agree with father that further inquiry is necessary to determine whether the notice provisions of ICWA apply to the particular facts of this case, and so we remand with

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

directions to conduct further inquiry, and otherwise conditionally affirm the order terminating parental rights.

FACTS AND PROCEDURAL HISTORY

Mother and father's daughter, A.S., was born in May 2007. In an earlier dependency proceeding initiated in May 2008, the court declared A.S. a dependent child based on allegations of domestic violence between mother and father and mother's failure to provide adequate nourishment, care, and supervision. That case ended in late February 2009 with an order granting father full legal and physical custody of A.S. and granting mother monitored visits. The Los Angeles County Department of Children and Family Services (Department) initiated the current case in October 2012 after receiving information about possible physical and sexual abuse of A.S.

The factual and procedural history of A.S.'s current dependency case spans more than five years. In a prior unpublished opinion deciding an appeal filed by mother (*In re A.S.* (May 23, 2018, B286112) [nonpub. opn.]), we divided our case summary into three time frames: (1) from the October 2012 case initiation to the end of the court's adjudication hearing in September 2014, (2) from September 2014 until August 2016, when the Department recommended terminating mother's reunification services, and (3) from August 2016 until a September 2017 order denying mother's section 388 petition seeking placement of

A.S. and her two younger siblings. We excerpt the factual and procedural summary from that earlier opinion below; we then add a fourth time frame, summarizing case events from October 2017 through the March 2018 order terminating parental rights.

A.[2] *October 2012 to September 2014 – initial investigation and jurisdictional hearing*

Overview

During the first phase of this case, mother rarely visited A.S., and her participation in individual therapy was inconsistent. She gave social workers non-credible information about her health and her housing situation, and she expressed fear about reunifying with A.S. because she would need to interact with father.

Initial investigation

In October 2012, when A.S. was five years old, the Department detained her from father's custody, based on concerns she was being sexually abused. A.S. had been living with father and his girlfriend in a trailer with no electricity or running water. Father contacted police after A.S. was allegedly raped by a 15-year-old boy, but a DNA

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[2] The following sections A, B, and C are quoted from *In re A.S.*, *supra,* B286112.

sample of semen found on A.S.'s hand matched father's DNA. At the detention hearing, the court ordered the Department to offer reunification services to both parents pending further orders in the case. The Department contacted mother during its initial investigation, and mother disclosed that she suspected physical and sexual abuse based on father's treatment of mother before and during her pregnancy with A.S. Father had sexually abused mother and held her against her will for several months by locking her inside an abandoned auto parts shop. Mother denied contacting the police or pressing charges.

In March 2013, the Department filed a first amended petition, adding an allegation that mother had failed to establish a parent-child relationship because she had minimal contact with A.S. in the past three or four years, and only three or four visits since October 2012.

Visitation

Mother visited A.S. once a month from February to April 2013, and then only once between April and October, on July 22, 2013. Shortly after the Department arranged for twice weekly visits starting in August 2013, mother missed a scheduled visit, and A.S. reportedly told the social worker she was bored and wanted the visits to be at McDonalds, rather than the Department offices. She said "I want to go. I don't think she (mother) loves me. She never calls or visits me."

After visiting A.S. on two consecutive days in October 2013, mother did not visit again in October or November. Between November 2013 and March 2014, the record mentions only two visits. In March 2014, the Department met with mother and had mother sign an agreement for weekly visitation on Saturdays.

There is no evidence in the record about mother's visits during the first half of 2014. A review report from September 2014 summarized the dates of mother's visitation for June through August 2014, stating mother had six one-hour visits on specified Saturdays, and missed two other visitation dates. Both A.S. and her half-brother Je.S. appeared affectionate towards mother, but mother seemed disinterested in continuing the visits past one hour and appeared relieved when the visits concluded. Mother did tell the social worker that she would like to increase the visits to two hours.

Mother's services

By July 2013, mother had completed a domestic violence program, was close to completing parent education, and had started participating in individual counseling. A letter from mother's therapist to the Department stated that mother was always very late or did not show up for appointments at all. The therapist observed mother would lie about even trivial matters when anyone questioned her behavior. In the letter, the therapist stated she could not

imagine mother could get A.S. to school, and opined that there was not a secure attachment between mother and A.S. Mother stopped participating in counseling in March 2014, but was on the waiting list to begin counseling through a different provider.

Mother's lack of candor and fears surrounding reunification

The Department was concerned that mother had not been forthcoming about her living situation. She was living with a boyfriend who frequently came home very drunk, and mother would leave her three-year-old son, Je.S., in the boyfriend's care. When mother's boyfriend was hospitalized and mother was acting erratically, the Department began investigating whether Je.S. was at risk of harm. Mother also gave the Department conflicting explanations about the cause of a head injury she had suffered, which required hospitalization.

When the Department confronted mother about inconsistencies regarding her health and her living situation, she began to cry and stated the reason she has not been visiting A.S. is that she is scared to reunify with her because she does not know A.S. well and is terrified that if she reunifies with A.S., she will have to interact with father.[3]

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[3] During the same time frame, mother's visits with Je.S. were also only intermittent. Mother also explained

Father's aggressive attitude

Father frequently violated the Department's expectations during visits with A.S., impermissibly discussing case issues with her and acting in a manner that was at times disrespectful and at times threatening towards the caregivers and social workers.

After an incident in March 2014, where father allegedly blocked the social worker's car with his van and physically and verbally threatened her, the Department obtained a restraining order against father, and the court ordered his visits with A.S. to take place at a police station.

In June 2014, the Department sought Wraparound[4] services five days a week for A.S. to salvage the child's current placement. A.S. was in her fourth foster placement,

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that the most important thing to her is Je.S., but she was not visiting him so he could get used to the idea of being in foster care.

[4] According to information on the Department's Child Welfare Mental Health Services Division website, "Wraparound" is "an integrated, multi-agency, community-based planning process grounded in a philosophy of unconditional commitment to support families to safely and competently care for their children." (Los Angeles County Department of Children and Family Services, *Wraparound Overview*, <http://www.lacdcfs.org/katieA/wraparound/index.html> [as of May 18, 2018].)

after her second caregiver asked to have A.S. removed because the caregiver was afraid of father's threatening behavior. Father had requested the current caregiver, but even she was considering whether she could continue caring for A.S. in the face of father's verbal threats. The Department's request for services documented the nature of father's threats and stated the Department was "extremely concerned regarding the father's escalating behaviors and threats, as well as, the negative impact to the child, A.S.'s, regarding exposure to the father's intimidating behaviors to the adults around her, including the fear that father engenders in the caregivers and social workers."

A.S.'s mental health

A.S. began Wraparound services in July 2014. She was diagnosed with chronic post-traumatic stress disorder, anxiety disorder, and attention deficit hyperactivity disorder, and has continued receiving therapy during the remainder of the case.

By September 2014, A.S.'s placement had changed again, and she was living with a paternal cousin. The court approved the administration of Zoloft, a psychotropic medication.

Adjudication hearing

Even though the trial court initially scheduled the adjudication hearing to begin June 18, 2013, it did not begin until July 15, 2013, and did not conclude until September 3, 2014.[5] Ultimately, the court found A.S. to be a dependent under section 300, subdivisions (b) and (d).

In the interim, the Department filed a separate petition concerning 3-year-old Je.S. in November 2013, alleging domestic violence and mother's failure to protect Je.S. The court found those petition allegations to be true as well.

B. September 2014 to August 2016 – active reunification efforts

Overview

After the adjudication hearing ended, mother's situation slowly improved. Her third child was born, and she gradually increased visitation with A.S. and Je.S. She was assigned a social worker from Casey Family Services in August 2015 and began searching for stable housing. By July 2016, mother was ready to sign a lease and the Department was ready to place A.S. with her in the new

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[5] During that time, two of father's attorneys were relieved as his counsel, and father unsuccessfully brought two motions for mistrial and to disqualify Judge Diaz.

home. But one month later, mother had terminated her lease and the Department had recommended terminating mother's reunification services.

Detailed summary of events

By September 2014, mother had completed parenting and domestic violence courses. She was visiting A.S. once a week on Saturdays. She was 33 weeks pregnant with her third child. A.S. was in the second phase of a seven-phase therapy program called Trauma Focused Cognitive Behavior Therapy.

Mother's third child, Jo.S., was born in October 2014. The Department detained the infant from mother's custody, citing concerns about mother's prior actions and decisions and her description of the infant's father as a "one night stand." Mother submitted to the petition allegations. Mother sought to have Jo.S. placed with her grandparents (maternal great grandparents), but the Department discovered several child abuse referrals involving maternal great grandmother abusing mother, including at least one that was substantiated for physical abuse and another substantiated for caretaker incapacity. Based on this information the Department decided against placing Jo.S. with maternal relatives.

Mother continued monitored visits with A.S. and Jo.S. once a week on Saturdays. The visits were initially one hour long, increasing to two hours in late November 2014.

Despite having completed the parenting program, mother appeared unable to apply any of the tools learned and did not have quality interactions with the children during visits.

The Department assessed father's home as a possible placement option for A.S. in November 2014. The home was a trailer parked in front of a residence father previously owned, and the social worker determined that it would not be safe for A.S. to be placed with father. In December 2014, A.S.'s caregiver reported that she had to repeatedly redirect father and sometimes end monitored telephone calls with A.S. because he was repeatedly asking A.S. about statements made in court and A.S.'s stated desire not to return to his home. A.S. reported being scared about returning to father, asking if she could return to the caregiver after one week. A.S.'s therapist recommended continuing individual therapy and deferring conjoint therapy with her father.

At the end of the disposition hearing on December 16, 2014, the court ordered that A.S. and Je.S. remain removed from parental custody. Mother and father received reunification services and monitored visits for a minimum of twice a week for two hours. Mother's monitored Saturday visits with A.S. and Je.S. continued, with additional visitation when possible based on A.S.'s schedule.

By March 2015, mother had completed classes on parenting and domestic violence, but the Department remained concerned about her unresolved history of entering relationships with different partners. The Department

recommended a domestic violence support group and potentially more liberal visitation.

In April 2015, A.S.'s placement changed again, from her paternal cousin to a D-rate foster home.[6] The paternal cousin had reported A.S. was unhappy, constantly crying, and taking her frustrations out on the cousin's 3-year-old adoptive child. A.S. remained in therapy, and reported she did not want to reunify with father, as she recognized he would falsely disparage mother. Father missed a number of visits in May because he was arrested and incarcerated for misdemeanor domestic violence.

Mother was employed and maintaining consistent visitation on Fridays. The Department referred mother to Casey Family Services for assistance in finding stable housing.

At the six-month review hearing on June 16, 2015, the court ordered mother's visits to be liberalized to three hours and unmonitored.

In August 2015, the Department reported mother was having unmonitored visits with A.S. and Je.S. from 3 to 6

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[6] According to information on the Department's Child Welfare Mental Health Services Division website, the term "D-rate" refers to a "special funding category for foster care providers who have received special training to provide care for children with special needs due to a mental health diagnosis." (Los Angeles County Department of Children and Family Services, *D-Rate Program* <http://www.lacdcfs.org/katieA/D_RATE/index.html> [as of May 1, 2018].)

p.m. on Saturdays, but the children's caregivers were concerned that mother never contacted the children outside of visits, not even calling to say good morning or good night.

On August 7, 2015, a Casey Family Services social worker was assigned to work with mother. Mother wanted all three children present during visits, and the Casey social worker arranged for Jo.S. to be present for an unmonitored family visit in September.

In September 2015, A.S. was hospitalized for suicidal ideation. She continued on psychotropic medications.

By December 2015,[7] mother was doing well with her reunification services, was having occasional overnight visits, and was working with the Casey social worker to locate permanent housing. Father's conduct at visitation had improved.

The Department's March 2016 report noted that mother had started conjoint counseling with A.S. The Department stated mother was having overnight unmonitored visits with A.S. and Je.S., but gave no details about the visits, their quality or frequency. Mother was employed and was working with two organizations, Casey Family Services and Families Coming Home Together to identify suitable housing. The Department recommended continuing reunification services for mother, but not for

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[7] We note that although the court originally scheduled the 12-month review hearing for June 2015, it was ultimately continued to August 2016.

father, who was possibly encouraging A.S. to falsely accuse her caregiver of abuse.

The Department's June 2016 report provided a detailed picture of mother's progress towards reunification as well as potential obstacles. Mother was having difficulty finding housing assistance because the children were not yet in her care. She continued in individual therapy and participated in family sessions with A.S. According to the Department, there was a substantial probability A.S. would be returned to mother within six months. During visits with her youngest son Jo.S., mother complained to Jo.S.'s caregiver about difficulties with A.S., and the caregiver reported witnessing A.S. being manipulative towards mother. The Department recommended that A.S.'s visits with father remain monitored, as he had a pattern of periodic arrests for criminal behavior or violation of probation, and was most recently incarcerated in February 2016.

On June 14, 2016, mother participated in a team meeting that included A.S.'s mental health support team, her caregiver, and Department and Casey social workers to discuss A.S.'s behavior, visitation, and the prospect of reunification. A.S. participated in the first part of the meeting and expressed her willingness and desire to return to her mother's care. She seemed happy at the prospect. After A.S. left the meeting, her caregiver expressed concern that mother does not contact A.S. except during visits, in contrast to father who contacts A.S. by phone every day. The caregiver believed that A.S. wants a more meaningful

relationship with mother, and many of A.S.'s behavioral issues would be reduced if she were able to return to mother. The Department's social worker pointed out that mother finds visitation with all three of her children daunting, and returning all three children to mother at once would be overwhelming, particularly because mother does not have a physical home and relies on public assistance. Her sporadic overnight visits with the children have taken place at maternal grandmother's home, but relatives were complaining that the landlord has threatened to raise the rent. Mother was dismayed to learn that A.S. would be returned to her first and that she could not have all three children at once, and insisted she would not need to work with A.S. alone for very long before she could also reunify with Je.S. and Jo.S. Mother continues to fear coming into contact with father, although it has not happened and mother has not obtained a restraining order against him.

On June 23, 2016, mother was accepted into a housing program administered by Tot's Housing Solutions, Inc. The program informed mother she and her children would have a move in date of June 29, 2016. Mother had not signed the lease or moved in before July 5, 2016, but by July 13, 2016, the Department was able to assess the home. The Department informed mother that because she was working, she needed to have day care in place before any of her children could be placed with her. The reverend running the housing program advised that day care was available and it would take about one week to make the arrangements.

By July 22, 2016, a new social worker with Casey Family Services contacted the Department to report that mother had terminated her lease and was homeless again. Mother reported she did not like the neighborhood and there was a recent shooting involving the reverend's son. The Casey social worker stated she had concerns about mother's commitment to reunification. Mother was feeling overwhelmed with her visits with A.S. and Je.S., and her work hours had been reduced due to chronic tardiness. A.S.'s wraparound facilitator also expressed concern because the child was having continued confusion about who she would be returning to.

On August 2, 2016, mother came to the Department offices asking for transportation funds, insisting she had no money. The Department was concerned that after two years of preparation, mother still lacked the ability to care for her children and did not seem to fully acknowledge A.S.'s mental health concerns. The Department recommended to the court in its August 16, 2016 report that the court terminate reunification services to mother for A.S., as well as for Je.S. and Jo.S.

C. August 2016 to [September 2017] – permanency planning and mother's efforts to change court orders

Overview

After mother's setbacks and father's continuing challenges, the Department began to shift towards

permanency planning for all three children and identifying a possible adoptive placement for A.S. Mother continued in her efforts to have the children placed with her.

Detailed summary of events

In September 2016, mother was employed and receiving general relief. Mother continued seeking the children's placement, proposing that she could live with a friend or with maternal great grandmother. The Department did not consider either option viable, but mother did not recognize obstacles posed by the fact that her friend had five daughters and a two-bedroom home, and maternal great grandmother was previously suspected of abusing mother. Mother's decision to leave a housing program after less than two weeks had unraveled two years of work with Casey Family Services to address her homelessness and reunify with her children. She remained unable to take the necessary steps to apply for public assistance.

A.S.'s paternal aunt in Maryland came forward as a potential placement option. She told the Department she was aware of the child's mental health concerns and was willing to care for A.S.

The Department sought a court order terminating father's visits based on father's continued aggressive and disrespectful behavior. The Department recommended that the court terminate reunification services for mother and father, terminate father's visits, and order an assessment of

paternal aunt's home under the Interstate Compact for the Placement of Children (ICPC).

In December 2016, mother informed the Department she had identified an apartment, but needed funding for first and last month's rent. The social worker informed her she would need proof of income and her lease agreement to make the request, but mother did not provide the information.

At a hearing on December 15, 2016, the court ordered a holiday visit for mother, conditioned on the Department's inspection of the home, and ordered father's visits to be in a therapeutic setting only, with the Department providing the case history to the therapist. It directed the Department to begin the ICPC process for A.S.'s paternal aunt in Maryland, and scheduled a hearing under section 366.26 for May 2017.

Ahead of the holiday visit, mother sought to have the visit at the home of another relative, because mother's roommate was going to have guests. The change was not possible, but mother was able to have the visit at a hotel. A.S. described the visit as okay, explaining that she had been disrespectful to her mother and mother said they were having a "shitty" visit. Je.S. confirmed mother's statement and said mother pulled A.S.'s hair and ear. He did not want any more visits with mother. The Department initiated an ICPC with Maryland on January 31, 2017.

On February 1, 2017, the court terminated reunification services for both parents. It again ordered that father's visits would only be in a therapeutic setting and

ordered that the therapist be given all the case reports on file.

The Department's May 2017 section 366.26 report described mother's visits, stating that mother was often one or two hours late for the full day Sunday visits, and visits were inconsistent with mother attempting to cancel if A.S.'s brothers were not available to visit. A.S. did not feel a close relationship with mother, and would only talk to mother outside of visits if she called mother. At times, mother would tell A.S., "I'm busy, I'll call you back," but would not always return the call.

In contrast, father had been consistent with his therapeutic visits and would call A.S. every other day to talk with her for 15 minutes. While he was recently incarcerated, he had prepared A.S. for the possibility that the visits would not take place while he was in custody.

An ICPC was underway for A.S.'s placement with a paternal aunt in Maryland. The aunt had not yet completed all the documents for the home study, and had canceled some of the home visits, but the agency was giving her additional time.

On May 2, 2017, mother met with the social worker to discuss her family goals. Mother planned to move in with maternal great grandparents in San Bernardino and was interested in finding work. She had stopped participating in individual therapy, but planned to re-enroll once she moved.

Mother filed a petition under section 388 on May 26, 2017, seeking to reinstate reunification services and have all

three children placed with her at maternal great grandparents' home in San Bernardino. The court denied the petition summarily, noting that while housing was one factor, mother had a lack of progress in individual therapy. The court also continued the hearing under section 366.26.

In early June 2017, the Department social worker and the Casey social worker visited the home in San Bernardino and met with the maternal great grandparents, who had an extensive child welfare history, including substantiated allegations of abusing mother. The maternal great grandparents discussed how their views on parenting had changed. Both felt they had more effective discipline strategies that they would use rather than yelling or using physical discipline. The home was a one-bedroom apartment, but mother explained that her grandparents would sleep in the living room and she obtained a bunk bed and a playpen for the children.

In July 2017, mother had a panic attack at the train station near the end of a visit with the children. A.S. was present, along with maternal great grandmother and mother's other children. Mother left in an ambulance, while maternal great grandmother and the children waited for one of the children's caregivers to pick them up.

A.S. had a one-week visit to her paternal aunt and uncle in Delaware at the end of July 2017. The paternal aunt told the social worker that the only remaining item for the home study was for her husband to complete parenting

classes. He could only take one class a week, but would be able to complete the classes within the next few months.[8]

In its August 2017 report, the Department summarized the quality of A.S.'s visitation with both parents. Mother was often late or inconsistent with her Sunday visits, but A.S. seemed happy to see her mother and brothers for the visits. Father was consistent in his visits until a recent arrest, but he was not always appropriate and nurturing towards A.S.

Mother filed a second section 388 petition on September 5, 2017, again seeking placement of all three children. She attached two letters confirming mother and her three children had been having overnight visits at maternal great grandparents' apartment, and their names were added to the lease. She also attached a letter from the Long Beach Trauma Recovery Center and a letter to show she had part time work. On September 21, 2017, the court denied mother's petition without a hearing.[9]

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[8] We find no additional information in the record about A.S.'s visit.

[9] End of the quoted excerpt from *In re A.S.*, *supra*, B286112.

D. October 2017 to March 2018 – Leading up to termination of parental rights under section 366.26

Overview

After the court denied mother's section 388 petition in September 2017,[10] A.S. remained in foster care while the remaining items needed for her paternal aunt's ICPC approval were completed. In early December, the court ordered mother's visits to be monitored. A.S. visited her paternal aunt for two weeks in December, and the visit went very well. On February 7, 2018 and March 14, 2018, the court conducted a hearing under section 366.26. At the end of the hearing, it terminated mother and father's parental rights.

Detailed summary of events

The ICPC to place A.S. with paternal aunt, which the court ordered the Department to initiate in December 2016, was still pending on November 8, 2017. Paternal aunt reported that the home study had some documents still pending, but she remained interested in adopting A.S. and

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[10] On October 12, 2017, mother filed a notice of appeal challenging the denial of her section 388 petition. On May 23, 2018, this court affirmed the order denying mother's section 388 petition. (*In re A.S.*, *supra*, B286112.) Pursuant to Evidence Code sections 452, subdivision (d)(1), and 459, subdivision (a), we take judicial notice of our prior opinion.

had been maintaining contact with her. Earlier, A.S. had told her father that if she could not live with her mother, she wanted to live with paternal aunt.

On November 29, 2017, the court denied without a hearing a section 388 petition filed by father seeking unmonitored visits with A.S. Father's petition included a letter from Dr. Dannacher, who had been monitoring father's visits since February, supporting father's request.

At a hearing the same day, the court gave permission for A.S. to have an extended visit with her paternal aunt during winter break. A.S.'s attorney also raised concerns about the Department's inadequate response to A.S.'s requests for a math tutor and more consistent sibling visits and visits with mother.

On December 5, 2017, the court granted without a hearing the Department's section 388 petition seeking monitored visits for mother. The Department's petition asserted it had received a report that mother was using methamphetamine and was suicidal. It is unclear from the record whether the Department was able to verify the report.

During a monitored visit on December 15, 2017, mother was observed quietly coaching A.S. to tell people she wants to stay with mother if they ask about her visit with paternal aunt.

In a January 31, 2018 review report, the assessment of A.S.'s foster placement noted that the caregiver was meeting A.S.'s everyday needs, but that she faced difficulties, making poor choices at school, talking back to teachers, and being

disruptive. She also reportedly had consistent problems with nighttime bedwetting. A.S.'s therapist recommended long-term individual therapy, such as Wraparound services, noting that A.S.'s anxious, depressive, and acting out behaviors increased after visits with her father.

A.S. had a great time during her extended holiday visit with her paternal aunt over winter break and wanted to live with her. The ICPC request was still pending, waiting for a few references. A.S. stated she loves both her parents, and if she cannot live with her parents she wants to be adopted by her aunt. The Department considered arranging another extended visit with paternal aunt but decided against it in mid-January, because the aunt was unable to take time off work and thought it would not be a good idea for A.S. to miss too much school.

On February 7, 2018, the court began a contested hearing under section 366.26. Father admitted into evidence three letters written by Dr. Dannacher in March, April, and May of 2017. He also called her to testify as a witness to demonstrate application of the parental relationship exception. While cross-examining Dr. Dannacher, the Department's attorney called into question whether Dr. Dannacher was testifying as a neutral monitor or as an advocate for father. Dr. Dannacher pointed out that she was engaged by the Department to monitor father's visits.

All parties offered oral argument on the application of the parental relationship exception to termination of parental rights. The Department argued that the parental

relationship exception did not apply. A.S.'s attorney expressed frustration at the delay in obtaining ICPC approval, pointing out that more than a year had passed, and the Department was not taking affirmative steps to move the process along. The attorney opposed terminating parental rights until the ICPC was approved, and expressed a desire to maintain post-adoptive contact if adoption was the permanent plan. Father's attorney argued for guardianship based on the existence of a bonded relationship between A.S. and father , and mother's attorney joined in the argument in favor of guardianship, arguing it "would allow her permanency and ongoing contact with the significan[t] adults in her life." The court stated it was inclined to terminate parental rights, but would continue the hearing for additional information on the status of the ICPC.

At the continued hearing on March 14, 2018, the court heard additional argument and then decided that no exception to the termination of parental rights applied. It noted "The court is not focused on removing parental rights, but that's the process for the ultimate goal of adoption. She'll be with family[.] She will have an opportunity to visit parents. [¶] The court would not be opposed to any agreement, but I don't think it's up to the court. I can't order it, but I'm not opposed to it. The child loves her parents and they love her, but the need for stability and permanence is greater for the child's welfare in this instance."

The court terminated the parental rights of mother and father at a hearing on March 14, 2018. Mother filed a notice

of appeal on April 30, 2018. Father filed a notice of appeal on May 10, 2018.

DISCUSSION

Denial of parental relationship exception as to mother

Mother contends the court erroneously denied application of the parental relationship exception to termination of her parental rights. We disagree. In reviewing challenges to a court's decision to deny application of a statutory exception to adoption, we employ the substantial evidence or abuse of discretion standard of review, depending on the nature of the challenge. (*In re K.P.* (2012) 203 Cal.App.4th 614, 621–622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315 (*Bailey J.*).) For factual determinations, such as whether a parent has shown consistent visitation and the existence of a parental relationship, we apply a substantial evidence standard of review. *(In re K.P.*, at p. 22; *Bailey J.*, at p. 1314.) Once the court has found adequate evidence of a parental relationship, it must determine whether termination of parental rights would be detrimental to the child as weighed against the benefits of adoption. (See *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1300; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 647 (*Breanna S.*).) Because the second determination requires the court to exercise its discretion, we apply an abuse of discretion standard of review. (*In re*

K.P., supra, at p. 622; *Bailey J., supra*, at p. 1315.) "In the dependency context, both standards call for a high degree of appellate court deference." (*In re J.S.* (2017) 10 Cal.App.5th 1071, 1080 [sibling relationship exception].)

"By the time of a section 366.26 hearing, the parent's interest in reunification is no longer an issue and the child's interest in a stable and permanent placement is paramount." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) Under section 366.26, subdivision (c)(1), if the court finds by clear and convincing evidence that it is likely the dependent child will be adopted, "the court shall terminate parental rights and order the child placed for adoption." The parental relationship exception under section 366.26, subdivision (c)(1)(B)(i), applies only if "[t]he court 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." (§ 366.26, subd. (c)(1)(B)(i).)

In analyzing whether a parent has met his or her burden to show application of the parent-child relationship exception, the dependency court considers two prongs. The first prong examines the quantitative question of how consistently a parent has maintained visitation with the child. (*In re Grace P.* (2017) 8 Cal.App.5th 605, 612.) "[T]he second prong involves a qualitative, more nuanced analysis, and cannot be assessed by merely looking at whether an event, i.e. visitation, occurred. Rather, the second prong

requires a parent to prove that the bond between the parent and child is sufficiently strong that the child would suffer detriment from its termination." (*Id.* at p. 613.)

"To avoid termination of parental rights, it is not enough to show that a parent-child bond exists." (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1200.) The parent asserting the parental relationship exception will not meet his or her burden by showing the existence of a "friendly and loving relationship," an emotional bond with the parent, or pleasant, even frequent, visits. (*In re J.C.* (2014) 226 Cal.App.4th 503, 529; *In re C.F.* (2011) 193 Cal.App.4th 549, 555; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418–1419.) "A showing the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption." (*Breanna S.*, *supra*, 8 Cal.App.5th at p. 646.) Mother must show she occupies a parental role in the child's life. (*Ibid.*; *In re G.B.* (2014) 227 Cal.App.4th 1147, 1165.) She must also establish "the child would suffer detriment if his or her relationship with the parent were terminated." (*In re C.F.*, *supra*, at p. 555.) In making these determinations, the court must find that preserving the parent-child relationship "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. 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." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child's need for a parent." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

There is substantial evidence to support the court's decision that the parental relationship exception was inapplicable, based on its determination that A.S.'s interest in achieving permanency through adoption outweighed the harm she would suffer if parental rights were terminated.

We reject mother's attempt to analogize A.S.'s situation to that of the older child in *In re Jerome D.* (2000) 84 Cal.App.4th 1200 (*Jerome D.*). In that case, nine-year-old Jerome had lived with his mother for the first six-and-a-half years of his life. Although reunification was not an option based on mother's past abusive acts, the court found that mother had maintained consistent visitation, and described mother's relationship as with Jerome as "parental." (*Id.* at p. 1206.) The court had permitted unmonitored visits, including overnight visits, with Jerome for the two months preceding the section 366.26 hearing, and even permitted unsupervised visits to continue after mother's parental

rights were terminated. (*Id.* at p. 1204.) Jerome was very talkative and happy when he was with mother, and the two were very loving with each other. (*Id.* at pp. 1206–1207.) Jerome's caretaker was the father of his two younger half-siblings. All three children shared the same mother, and the caretaker had agreed to adopt Jerome as well. However, Jerome spent more time at the caretaker's aunt's home, and he was sad, lonely, and the "'odd child out,'" compared to his half-siblings. (*Id.* at p. 1206.) There was also evidence the caretaker created obstacles to mother's efforts to maintain visitation with Jerome. (*Id.* at p. 1203.) The appellate court reversed the termination of parental rights, finding insufficient evidence to support the lower court's determination that the parental relationship exception did not apply. (*Id.* at pp. 1207, 1210.)

Here, mother tries to compare A.S.'s situation in her foster home to Jerome's situation in his caretaker's home, pointing out that A.S. was the odd child out in her foster home. But the comparison is flawed. Even assuming that A.S. was not thriving in the foster home, in contrast to the facts in *Jerome D.,* she was not facing permanent placement in that home. Rather, the court was waiting for ICPC approval from Delaware before placing A.S. with her paternal aunt, who was being considered for adoptive placement. A.S. previously stated that while her preference was to live with mother, if that was not possible, she wanted to live with her paternal aunt.

Unlike Jerome's mother in *Jerome D.,* A.S.'s mother has not occupied a parental role, despite A.S.'s desire for mother to fill that role. Nor has mother maintained consistent visitation with A.S. A.S. has not lived with mother since she was only one year old, when she was removed from mother's custody in a prior dependency proceeding that concluded in 2009 with father having full custody and mother having monitored visits. Even before the current dependency case began in 2012, mother only had monitored visits with A.S., and for a large portion of this case, mother's visits were sporadic or inconsistent. In September 2016, the Department reported that mother had no explanation for attending only six out of 12 conjoint therapy sessions with A.S., and she was chronically late for the sessions she attended. A report from May 2017 stated that if A.S.'s brothers were not available to visit, mother would attempt to cancel A.S.'s visit. Mother was inconsistent with her visits, often running late and not calling to let A.S. or the foster parent know. Mother also would not call A.S. between visits, and when A.S. would initiate a phone call, mother would tell A.S. she was busy and would call back, but then would not follow through. In December, 2017, in response to direction from the court, the Department moved to restrict mother's visitation to monitored visits. The Department's motion under section 388 stated it had received a referral alleging mother was using methamphetamine and wanted to drown herself while the children were on a visit. At the 366.26 hearing, Mother did

not provide any evidence to controvert the basis for her monitored visits.

Mother also draws a comparison between Jerome and A.S. by pointing out that the lower court in *Jerome D.* mistakenly ordered that mother be allowed to have unsupervised visits after her parental rights were terminated. (*Jerome D., supra,* 84 Cal.App.4th at p. 1204.) Here, the court *encouraged* monitored phone calls between A.S. and both parents, but it did not *order* those phone calls, acknowledging that, while the parties could make an agreement permitting continued contact after termination of parental rights, the court lacked the power to so order. The court stated, "The court would not be opposed to any agreement, but I don't think it's up to the court. I can't order it, but I would not be opposed to it. The child loves her parents and they love her, but the need for stability and permanence is greater for the child's welfare in this instance." Nothing about the court's statements convinces us that it was error to deny application of the parental relationship exception to the termination of parental rights.

Mother also tries to compare this case to *In re S.B.* (2008) 164 Cal.App.4th 289, at page 300, but she correctly acknowledges that numerous subsequent opinions have limited the holding in that case to its own unique facts. (*In re C.F., supra,* 193 Cal.App.4th at p. 558 ["we once again emphasize that *S.B.* is confined to its extraordinary

facts."].)[11] Mother argues that the only inference that can be drawn from facts of this case is that it would be detrimental to terminate parental rights. Mother points Dr. Dannacher's reports and testimony, emphasizing that A.S. stated to Dr. Dannacher that she felt that she must have "piss[ed] God off," and became distraught at the prospect of not seeing her parents again. Considering that evidence in the larger context of the case, including mother's history of inconsistent compliance with visitation, lack of progress in therapy, and A.S.'s mental health history and her positive feelings about paternal aunt, we see nothing in mother's argument that persuades us to follow *In re S.B.* here.

Mother also makes the argument that the trial court improperly considered the possibility of post-adoption contact in denying the exception. However, the record demonstrates that the court commented on the benefit of post-adoption contact, but did not take any expectation of

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[11] In *S.B.*, the court found father had met his burden to establish the beneficial parental relationship exception applied, because: "he maintained regular, consistent and appropriate visitation with the child; he was the child's primary caretaker for three years; when she was removed from his custody he immediately acknowledged his drug use was untenable, started services, maintained his sobriety, sought medical and psychoanalytic services and complied with every aspect of his case plan; and after a year apart the child continued to display a strong attachment to her father." (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 558.)

continued contact into account when denying application of the parental relationship exception.

ICWA findings and duty of inquiry

Father contends the court erred when it ordered termination of parental rights without first inquiring into whether A.S. was an Indian child under ICWA. Mother joins in father's arguments on appeal. In his opening brief, father acknowledges that the record does not include facts or information to explain why or how the Department determined that father might have Indian ancestry. The Department also does not contest that it had an obligation to conduct further inquiry into the possibility that father had Indian ancestry. In light of the policy goals behind ICWA, we agree that additional facts are necessary before the court can determine whether notice is required under ICWA, or whether ICWA is applicable.

Factual and procedural background

On October 29, 2012, father filed Judicial Council form ICWA-020 entitled "Parental Notification of Indian Status," denying he had any Indian ancestry. Mother also denied any Indian ancestry, and filed her ICWA-20 form on December 10, 2012. On November 5, 2013, the court found ICWA did not apply.

After that finding, there were no changes until April 2017, when the Department sent a Judicial Council form ICWA-30 (Notice of Child Custody Proceeding for Indian Child) to over 20 different tribes, as well as the Bureau of Indian Affairs. The notice was dated April 5, 2017, and it was sent certified mail or return receipt requested. The ICWA-30 notices sent to the tribes were incomplete in several areas, and there is no evidence in the record that the Department conducted any inquiry to obtain the missing information. The ICWA-030 notice listed as "unknown" the names and any information about father's grandparents, or mother's parents or grandparents. While the notice identified father's parents by name, it did not state whether they were alive or deceased, and did not provide addresses or other requested information such as birthdates or birth places. The notice stated it was unknown whether A.S.'s birth father was named on her birth certificate or had acknowledged parentage. The Department received responses to the ICWA-30 notice from two tribes and the U.S. Department of the Interior, as well as a number of signed receipts showing delivery.

In an April 6, 2017 concurrent planning assessment for A.S., the Department checked the box indicating A.S. was ICWA eligible, and on the portion of the form for "tribe name," the Department listed "Not registered. Possible Cree & Cherokee."

The Department's May 31, 2017 section 366.26 report included the concurrent planning assessment and the ICWA

notices and responses described above. The section of the Department's report titled "Indian Child Welfare Act Status" summarized the court's earlier finding that ICWA did not apply, and then simply stated "Father reports that he may have Cree, Navajo, and Cherokee heritage." The report did not provide any details about the context in which father reported the information about possible Indian ancestry or whether anyone in the Department asked him to provide any detail about the basis for his claim. The report did not describe any efforts by the Department to obtain any additional information from father, his relatives, or anyone else. The Department included a chart showing that A.S. was not eligible for ICWA status for three tribes, and that her eligibility was "unknown" for 15 listed tribes.

Two subsequent reports, dated August 2, 2017, and November 29, 2017, continue to state that father reports he may have Cree, Navajo, and Cherokee heritage, but the reports do not provide any additional information. Father points out that the initial notice sent on April 5, 2017 lists Charles and Eunice Holman as additional relatives , while the notices attached to the August 2, 2017 report list different additional relatives, Sandra Felt and Onita Laggway Hicks.

By January 31, 2018, the Department's reports had returned to stating that ICWA did not apply, but the reports did not provide any information as to how the Department or the court reached this conclusion. While it is possible the information from the spring of 2017 about father's reported

Indian ancestry was somehow erroneous, there is no documentation to support or contradict that hypothesis.

Father's brief avoids making any representation about the Department's reports stating father's claim of possible Indian ancestry, focusing instead on the inadequacies of the notices sent to the tribes. Father's own brief states "there are no documented conversations in the record between [father] and any [Department] social workers or investigators to explain why DCFS prepared ICWA-030 notices on April 5, 2017. [Record citation.] It is not clear what [father] said about his Indian ancestry or when he said it. The May 31, 2017 section 366.26 report is the first time [the Department] reported in a court report that [father] reported he may have Cree, Navajo, and Cherokee heritage and that is all the report says about it. [Record citation.]" No party mentioned the Department's reports about father's claim of Indian ancestry or the ICWA-30 notices at either section 366.26 hearing on February 7, 2018 or March 14, 2018. The court also made no reference to the ICWA notices, and did not make any findings on whether ICWA was applicable or not, even though it admitted the Department's May 31, 2017 and November 29, 2017 reports as evidence.

ICWA analysis

Father contends the Department failed to conduct an adequate inquiry into the possibility of A.S.'s status as an Indian child, and its subsequent ICWA notices were

inadequate because they omitted readily obtainable information. There is evidence in the record that the Department had been informed of the possibility that father might have Cree, Navajo, or Cherokee ancestry, but the origin of the information is unclear. The Department sent notices to a number of tribes, but the notices lacked information the Department—at least theoretically— could have easily obtained. Because both the Department and the court have an ongoing duty to determine whether ICWA is applicable, the matter must be remanded for additional information about the Department's inquiry, including the basis for the statements in the Department's reports and information about any additional inquiry conducted into father's claim of Indian ancestry. After considering the information provided, the court can determine whether notices to any tribes are warranted under ICWA and sections 224.2 and 224.3.

ICWA's enactment in 1978 was Congress's response to "rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32.) ICWA was enacted "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the

removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ." (25 U.S.C. § 1902.) "For purposes of ICWA, an 'Indian child' is a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4); see § 224.1, subd. (a) [adopting federal definitions].)" (*Breanna S.*, *supra,* 8 Cal.App.5th at p. 649, fn. 5.) The determination of whether a child is a member, or is eligible for membership in a tribe "is solely within the jurisdiction and authority of the Tribe," and a state court "may not substitute its own determination" regarding membership or eligibility for membership in a tribe. (25 C.F.R. § 23.108(b) (2017).)

The court has a "continuing duty to conduct an inquiry when it has received information that a dependent child might be an Indian child, as defined by ICWA, and to provide notice to any relevant tribe. This duty arises both under ICWA itself and under California's parallel statutes, Welfare and Institutions Code sections 224 et seq. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 5 (*Isaiah W.*).) The purpose of both statutory schemes is to "enable[] a tribe to determine whether the child [who is the subject of involuntary proceedings in a state court] is an Indian child and, if so whether to intervene in or exercise jurisdiction over the proceeding." (*Ibid.*)

The information required to trigger the ICWA notice provisions is minimal in comparison to the showing required

"to establish a child is an Indian child within the meaning of ICWA." (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 549; see also *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 258 [the party initiating the dependency proceeding must "distinguish between a showing that may establish a child is an Indian child within the meaning of the ICWA and the minimal showing required to trigger the statutory notice provisions"].)

While eligibility to enroll and enrollment are central to a finding that the child is an Indian child within the meaning of the ICWA, a lack of such information does not waive the court's and the Department's affirmative duty to provide notice when the court knows or has reason to know that an Indian child may be involved. (§ 224.3, subds. (c), (d); Cal. Rules of Court, rules 5.481(a)(4), 5.481(b)(1); see also *In re C.A.* (2018) 24 Cal.App.5th 511, 519 ["the [Department] and the court have a duty to ensure that an adequate inquiry regarding Native American ancestry is completed"].) Once the Department becomes aware of circumstances that may provide reason to know a child is or may be an Indian child, it must "make further inquiry . . . as soon as practicable, by interviewing the parents . . . and extended family members" to gather the information needed for the ICWA-030 form. (§ 224.3, subds. (b), (c); Cal. Rules of Court, rule 5.481(a)(4)(A).) The court also has an "'affirmative and continuing duty' to inquire regarding the possible Indian status of the child." (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1168; § 224.3, subd. (a).)

Once the court determines that notice to a tribe or tribes is required, the statutory requirements for such notice are described in section 224.2, subdivision (a). The regulations implementing ICWA specify that the notice must include the names, birthdates and birthplaces (if known) of the child, the parents, and "other direct lineal ancestors of the child, such as grandparents," along with Tribal enrollment numbers or information. (25 C.F.R. §§ 23.11(a), 23.111(d)(1)–(3) (2017).) California law requires the ICWA notice to include substantially similar information. (§ 224.2, subd. (a)(5).)

Compliance with ICWA's notice and inquiry requirements may be raised on appeal from any order that makes an implicit ICWA finding, based on the court's continuing duty to inquire whether a child is an Indian child. (*Isaiah W., supra*, 1 Cal.5th at p. 6; *In re K.R.* (2018) 20 Cal.App.5th 701, 706.) Once it is determined that notice to tribes is required, courts are "extremely reluctant under most circumstances to foreclose the tribe's prerogative to evaluate a child's membership rights without it first being provided all available information mandated by ICWA." (*Breanna S.*, *supra*, 8 Cal.App.5th at p. 655.)

Here, the Department's ICWA-30 notices lacked identifying information about father's relatives as well as information about father's relationship to A.S. Father emphasizes the Department never contacted him for additional information. However, the parent bears equal responsibility to come forward with relevant information,

rather than waiting to be asked. (*In re Levi U.* (2000) 78 Cal.App.4th 191, 198 [a parent who has information or evidence indicating the minor is eligible for membership in a tribe, the parent should provide such information to the court].) Nonetheless, beyond briefly mentioning that father "reports he may have Cree, Navajo, and Cherokee heritage," the record before us does not clarify the nature of the information leading the Department conclude A.S. may have Indian ancestry. In the absence of additional detail, and in light of the fact that later reports state the ICWA does not apply, we hesitate to conclude based on the current record that notice under ICWA was necessary.

We agree that the Department had, at a minimum, a duty to conduct further inquiry, based on father's report. We remand the matter for the juvenile court to direct the Department to provide additional information regarding father's claim of Indian ancestry. The court shall then ensure that ICWA and state law inquiry and notice requirements have been or are satisfied. If notice is provided, and a tribe responds with information that leads the court to determine A.S. 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 shall remain in effect. (*Breanna S., supra*, 8 Cal.App.5th at p. 655.)

DISPOSITION

The order terminating parental rights is conditionally affirmed. The matter is remanded to the juvenile court with directions to comply with the inquiry and notice provisions of ICWA and of Welfare and Institutions Code sections 224.2 and 224.3, consistent with this opinion. If, after conducting further inquiry as required under ICWA and California law, the court determines there is no reason to know A.S. is an Indian child, the order terminating parental rights shall remain in effect. If there is reason to know A.S. may be an Indian child, then the court will order notice to the relevant tribes. If any tribe determines that A.S. is an Indian child, the order terminating parental rights shall be vacated for further proceedings consistent with ICWA.

MOOR, J.

We concur:

BAKER, Acting P.J.

JASKOL, J.*

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