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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re DANIEL D., a Person Coming Under the Juvenile Court Law.	B250997 (Los Angeles County Super. Ct. No. CK88404)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DANIEL D., SR. and CHELSEA O., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County. Philip Soto, Judge. Reversed and remanded with directions.

Christopher R. Booth, under appointment by the Court of Appeal, for Defendant and Appellant Daniel D., Sr.

Cristina Gabrielidis, for Defendant and Appellant, Chelsea O.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

No appearance on behalf of Minor.

* * * * * *

Appellants Daniel D., Sr. (Father) and Chelsea O. (Mother) separately appeal from an order terminating their parental rights to the child, Daniel D. They contend the order should be reversed because the juvenile court failed to provide proper notice under the Indian Child Welfare Act, 25 U.S.C. section 1901 et seq. (ICWA), and because they demonstrated the beneficial relationship exception to termination set forth in Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i).[1] Father also challenges the denial of his section 388 petition by which he sought the reinstatement of reunification services.

Because the juvenile court failed to provide proper notice under the IWCA, we must conditionally reverse the order terminating parental rights. In all other respects, we affirm. Substantial evidence supported the juvenile court's determination that Mother and Father failed to meet their burden to establish they maintained regular visitation and contact and that Daniel would benefit from continuing the parent-child relationship. The juvenile court properly exercised its discretion in denying Father's section 388 petition, as he failed to show either changed circumstances or that a change of order was in Daniel's best interest.

FACTUAL AND PROCEDURAL BACKGROUND

Initial Petition.

Mother and Father came to the attention of the Los Angeles County Department of Children and Family Services (Department) on June 17, 2011, when a referral reported that Father had brought the child Daniel, then nine months old, to the hospital with lacerations on his face and a possible head injury. Father reported that Mother had broken a vase and, while asleep, Daniel had fallen from his bed onto the broken pieces. When Mother arrived at the hospital, she and Father yelled at each other before he left.

A Department social worker arrived at the hospital as Mother was leaving with Daniel, who had received 12 stitches. A nurse indicated she had made the referral because Mother and Father had conflicting stories, Daniel's injuries were inconsistent

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

with Father's story and after Daniel was injured Father had called a relative to watch the child during a job interview instead of seeking immediate medical treatment. The social worker accompanied Mother and Daniel home. She observed dirty clothes on the floor and stacked bare mattresses in the living room; broken beer bottles, dirty diapers and clothes on the floor of the closets; and many dirty dishes in the kitchen. She observed neither milk nor formula for Daniel. Another bedroom where the paternal grandfather lived was locked.

Though they admitted to past marijuana use, Mother and Father denied any current drug use and any past or current domestic violence. Mother confirmed that she had dropped and broken a vase earlier that day and was able to clean up most of it. She left Father and Daniel sleeping on the mattress, and Father told her when he woke up he went to sweep the remaining vase pieces, but Daniel rolled off the mattress while he was getting a broom. Father outlined the same series of events in his interview. The social worker observed no broken vase pieces in the trash.

On June 22, 2011, the Department filed a dependency petition containing allegations under section 300, subdivision (a) that Daniel sustained multiple facial lacerations and head trauma, Mother's and Father's explanation of the cause was inconsistent with those injuries and such injuries would not ordinarily occur except as a result of unreasonable and neglectful acts on the part of the parents (paragraph a-1); and under subdivision (b) concerning Daniel's injuries (paragraph b-1), the filthy and unsanitary home environment (paragraph b-2), Mother's history of drug abuse (paragraph b-3) and Father's history of drug abuse (paragraph b-4). For the detention hearing, Mother and Father each completed an ICWA-020 form, Parental Notification of Indian Status. While Father indicated he was unaware of any Indian ancestry, Mother indicated she may have Indian ancestry through her maternal great grandmother Augustina R., but that she did not know the name of the tribe.

At the detention hearing, the juvenile court released Daniel to Mother and Father under Department supervision and under the condition that the parents immediately enroll in parenting classes, receive unannounced visits from the Department, participate

in random drug testing, refrain from any physical punishment and obtain a crib—the latter of which the parents had already done. It further directed the Department to interview Augustina regarding her Indian ancestry and to notify the tribe if appropriate.

For the August 3, 2011 jurisdiction hearing, the Department initially reported that Mother and Father had moved to Menifee, California and had been unavailable for an interview. It also reported it had been unable to interview Augustina regarding her Indian ancestry but hoped to obtain more information from Mother. A supplemental report outlined its interviews with Mother, Father and other relatives. With respect to the pending ICWA findings, Mother reported she believed she had Indian ancestry, but did not know the tribe's name and could not provide a tribal membership number. The Department also interviewed Estella R., Augustina's daughter and Daniel's maternal great grandmother, who confirmed the family had Indian ancestry. She could not pronounce the name of the tribe so the Department could understand it, nor could she spell it, getting only as far as "Kara." She reiterated that her mother Augustina had Indian ancestry, and identified her parents as Hilario and Otula A. She further identified her father's name, dates of birth and death, and names of his parents.

With respect to the events leading to the dependency petition, Father denied that Daniel's injuries were inconsistent with his description of what occurred, and he denied calling a relative to watch Daniel once he was injured. He continued to characterize the incident as an accident. Mother reported she believed Father's version of the events and had never observed any behavior that would indicate Father would try to hurt Daniel. Mother and Father both acknowledged that Mother had smoked marijuana when she was a young teenager, but Mother denied using drugs ever again and Father had never seen her use or possess drugs or drink alcohol in the two years he had known her. Father stated he had his medical marijuana license and on occasion ate marijuana when he could not sleep due to a knee injury. Both denied there were broken beer bottles or multiple dirty diapers in their home.

Estella did not have any concerns about Daniel being with Mother and Father. The Department also interviewed the paternal great grandmother Donna E., who stated

Father told her that Mother had thrown a "bank" or something else at him that broke, and told him to clean it up; Daniel fell on the pieces before Father was able to remove them. She had never heard of a previous similar incident and added that neither Mother nor Father would ever hurt Daniel.

At the jurisdictional hearing, Mother and Father pled no contest to an amended petition. The juvenile court modified paragraph b-1 to provide that Daniel's injuries would not ordinarily occur absent neglect and such neglectful conduct placed him at risk, and paragraph b-4 to provide that Father had an unresolved history of drug use that periodically rendered him unable to care for Daniel. It dismissed the balance of the petition. Proceeding to disposition, the juvenile court declared Daniel a dependent of the court pursuant to section 300, subdivision (b) and ordered that he remain at home with family maintenance services. It directed Mother and Father to participate in a parenting class, individual counseling and random drug testing. It did not make ICWA findings.

Subsequent Petition.

Following an unannounced home visit on August 10, 2011 in Menifee, the Department learned the family had relocated back to Los Angeles County, but their exact whereabouts were uncertain. Mother and Father were staying in a motel and told the Department Daniel was with a paternal aunt. A few days later, the Department met with Mother and Father at the paternal grandfather's house. Mother had two scratch marks by her right eye and Father's eye was bruised and cut. The Department did not believe the parents' explanations of the injuries and learned from law enforcement that on August 9, 2011 Mother had been arrested for domestic violence. Father reported that Mother punched him in the eye during an argument while Daniel was in the room. Though stating this was not the first violent incident, he refused an emergency protective order. During a team decision meeting, Mother and Father both denied past incidents and Mother characterized the incident as an accident. The parents also made excuses for not yet beginning compliance with their case plan.

The Department removed Daniel from Mother's and Father's custody, and on August 23, 2011, filed a subsequent petition pursuant to section 342, alleging that Daniel

was exposed to a violent altercation between Mother and Father and that such conduct placed him at risk. The juvenile court ordered that Daniel be removed and permitted Mother and Father monitored visitation. It ordered that both great grandmothers be evaluated for placement. The Department's prerelease investigation report for the great grandmothers was initially negative for both pending criminal waivers, as individuals residing in each household had criminal records, but expressed a preference for Estella.

In a September 15, 2011 Department report, Mother continued to characterize the violence as an isolated incident, stating that while they were in the motel Daniel had woken up at 3:00 a.m. and she was frustrated because Father was not helping. She said Daniel was asleep when the incident occurred. As a result of the incident, she was convicted of misdemeanor battery and received probation. Mother did not appear to have any further criminal history. Father had over 10 arrests between 2006 and 2010, resulting in convictions for theft, battery and vandalism. During August, Father had one positive and one negative drug test, and one no show. The Department had not received confirmation that Mother and Father had enrolled in any services. They visited regularly with Daniel and the visits went well. The report contained no new information regarding Mother's Indian ancestry, instead repeating the results of the earlier interviews with Mother and Estella, and requesting that the juvenile court make ICWA findings on the basis of that information.

At the jurisdictional hearing on the supplemental petition, Mother and Father again pled no contest to an amended petition that alleged pursuant to section 300, subdivision (b) Daniel was exposed to a physical altercation when Mother struck Father's face and such conduct placed him at risk. The juvenile court dismissed the allegation under section 300, subdivision (a). Before disposition, the juvenile court determined the ICWA did not apply, reasoning "any Indian heritage is too remote, and the court has no reason to believe that this child is an Indian child." It ordered that Daniel be suitably placed, directing that he be placed with Estella as soon as the waivers cleared. It ordered Mother and Father to participate in reunification services including parenting classes and individual counseling to include domestic violence issues for Mother, and parenting

classes, individual counseling, substance abuse counseling and random drug testing for Father. Mother and Father received monitored visitation with the Department having discretion to liberalize the visits.

Reunification Period.

According to the Department's January 2012 interim review report, in October 2011 Mother had moved in with her mother in Menifee because of another domestic violence incident with Father, which resulted in his arrest and sentence of 180 days in jail. She indicated she had obtained a restraining order against him and did not intend to resume a relationship with him. She had otherwise partially complied with her case plan and maintained weekly visitation with Daniel. Father had not contacted the Department, though it learned he had a monitored visit with Daniel after being released from jail.

Sometime in December 2011, Mother stopped contacting the Department. In mid-January 2012, Mother left her mother's house without providing any information regarding her whereabouts. The Department ultimately located her in Los Angeles March 2012, and she reported she completed her parenting classes and was trying to enroll in other services. Mother had maintained consistent visitation with Daniel. The Department obtained a telephone number for Father, but when the social worker called Mother answered, said "oh shoot" when asked why she had answered and then hung up. Father visited Daniel once per month in January and February 2012. Daniel was doing well in Estella's care. The juvenile court provided Mother and Father with updated referrals at the March 15, 2012 review hearing.

In May 2012, the Department reported that Father had been participating in certain programs, having completed a parenting class after a few false starts. According to Estella, Father visited Daniel once per month for approximately one to two hours. Mother was participating in a domestic violence program and counseling. She visited Daniel weekly for five to six hours per visit, and he called her "mom." Citing Mother's and Father's minimal progress during the past year, the Department recommended that reunification services be terminated. Estella had indicated a willingness to adopt Daniel;

the Department had completed an adoption assessment and Estella was working with the Department to complete a home study.

At the juvenile court's direction, the Department provided a supplemental report regarding Mother's and Father's participation in reunification services. Mother had attended 13 sessions of a domestic violence program and four individual counseling sessions. Father had begun substance abuse counseling. He had one negative drug test and one positive test for marijuana, though the testing agency indicated he had additional positive marijuana tests. He was also attending job training and had an upcoming job interview. He stated he had been visiting Daniel twice a week since being released from jail, though on occasion Estella made the visits difficult for him. The Department's recommendation remained unchanged. At the May 18, 2012 review hearing, the juvenile court adopted the Department's recommendation and terminated reunification services.

Permanency Planning.

In its September 13, 2012 section 366.26 report, the Department reported that Estella was no longer interested in adoption and was instead requesting legal guardianship, both because Father's attorney had advised she not seek adoption and because she wanted to give Mother, her granddaughter, an opportunity to regain custody. Mother continued to have weekly monitored visits with Daniel. Estella reported Mother was appropriate and appeared to have a good bond with Daniel, and that Daniel loved visiting with Mother. Father's visits were inconsistent.

By November 2012, Estella indicated that she was re-committed to adoption. Daniel's grandmother and Estella's daughter, Deana K., had agreed to become the co-adoptive parent. Mother had not visited Daniel in over one month, and Estella had discovered she moved back in with Father, who had not visited since June 2012. In January 2013, the juvenile court set a contested section 366.26 hearing for March 2013. That date was continued due to problems with Estella's live scan results which precluded completion of her home study. Estella reported that Mother resumed regular visitation in April 2013.

On July 2, 2013, Father filed a section 388 petition, requesting a change of order for additional reunification services on the grounds he had completed an alcohol and drug program and Daniel would benefit from reunifying with him. The juvenile court granted a hearing on the petition. Estella's home study was approved the following day.

The Department's report on Father's section 388 petition indicated that Mother and Father were currently living with the paternal great grandmother; both were unemployed, lacked transportation and were otherwise homeless. In a telephone call, Father stated that he had done everything the Department wanted him to do, adding he had completed all court-ordered programs, drug tested favorably and visited with Daniel weekly. The Department obtained test results demonstrating that Father's last test was in September 2012 and he was a no show thereafter.

On August 26, 2013, the juvenile court held a combined hearing on Father's section 388 petition and termination of parental rights under section 366.26. In connection with the section 388 petition, the trial court admitted into evidence the Department's recent reports and took judicial notice of the entire case file. It also considered an offer of proof of Father's testimony that he had visited Daniel at least once per month throughout the proceedings and approximately three times per week when he lived closer to him. The juvenile court concluded that Father failed to meet his burden to show changed circumstances, as many of the problems that brought the family to the Department's attention remained unresolved. It further found that the provision of additional reunification services to Father would not be in Daniel's best interest.

In connection with the section 366.26 hearing, Mother offered stipulated testimony that she currently visited Daniel every other week and was unable to visit more frequently because she lived two hours from Estella. The stipulation also included information that during the visits she engaged in activities with Daniel, including bathing him and playing outside with him. Father testified that when he visited Daniel they would hug each other immediately. Father enjoyed teaching him things, reading books to him and playing with him, and always made sure he was clean and well fed. He did not like to discipline Daniel in view of everything that had gone on, but added that Daniel typically would not

do anything wrong when he was with him. Father visited once every other week now that he lived two hours away, but visited three times per week for approximately six hours at a time when he lived closer. He would bring him clothes, books and healthy snacks. Daniel called Father "dad" and made him promise he would come back at the end of a visit.

Following counsel's argument, the juvenile court found that Daniel was adoptable, that it would be detrimental to return Daniel to Mother and Father and that they had not met their burden to establish any exception to adoption, including the beneficial relationship exception under section 366.26, subdivision (c)(1)(B)(1). It characterized the parents' interaction with Daniel as that of a "welcomed visitor," insufficient to establish parental rights. Accordingly, the juvenile court terminated Mother's and Father's parental rights as to Daniel, referred the case for adoption finalization and also made a referral for consideration of post-adoption visits by Mother and Father.

Mother and Father appealed.

DISCUSSION

Mother and Father contend the order terminating parental rights should be reversed because the juvenile court failed to give proper notice under the ICWA and they offered sufficient evidence to support the application of the beneficial relationship exception to termination. Father also claims the juvenile court abused its discretion in denying his section 388 petition. Only the first contention has merit.

I. The Juvenile Court Failed to Provide Proper Notice Under the ICWA.

In *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1164-1165, we summarized the legal principles governing ICWA notice: "Congress passed the ICWA in 1978 'to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children "in foster or adoptive homes which will reflect the unique values of Indian culture. . . ."' [Citations.] The party seeking termination of parental rights must notify the Indian child's tribe of the pending proceedings and its right to intervene. [Citations.] [¶] The right of a tribe to intervene would be meaningless without notice. Accordingly,

the ICWA provides: 'In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary. . . .' (25 U.S.C. § 1912(a).) In 2007, the California Legislature enacted provisions consistent with the ICWA. (See § 224 et seq.)"

According to section 224.3, subdivision (b)(1): "The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following: [¶] (1) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe."

As the *In re Gabriel G.* court further stated: "'The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.' (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; Cal. Rules of Court, rule 5.481(a)(5)(A); *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 258 [providing exhaustive analysis of the issue and concluding the 'minimal showing' required to trigger notice under the ICWA is merely evidence 'suggest[ing]' the minor "may" be an Indian].) 'Given the interests protected by the [ICWA], the recommendations of the [federal] guidelines, and the requirements of our court rules, the bar is indeed very low to trigger ICWA notice.' (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408 [finding father's suggestion that child 'might' be an

Indian child because paternal great-grandparents had unspecified Native American ancestry was enough to trigger notice].)" (*In re Gabriel G., supra,* 206 Cal.App.4th at p. 1165.) On the other hand, more than a "bare suggestion that a child might be an Indian child" is necessary to trigger the notice requirements of ICWA. (*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520-1521; *In re O.K.* (2003) 106 Cal.App.4th 152, 157.) Challenges to the adequacy of a juvenile court's finding the ICWA does not apply are governed by the substantial evidence standard of review. (See *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430; *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 941-943.)

Here, there was insufficient evidence to support the juvenile court's conclusion that the ICWA notice requirements were not triggered. More than two years before the section 366.26 hearing, Mother indicated on her ICWA-020 form that she may have Indian ancestry through her great grandmother Augustina, and the juvenile court directed the Department to interview Augustina and investigate the claim. Though the Department never interviewed her, its August 2011 report contained a summary of its interview with Estella, Augustina's daughter and Mother's grandmother, regarding the family's Indian ancestry: "On 8/1/11, DI spoke with maternal great grandmother Estella R[.], who indicated that there is American Indian Ancestry. However, she was unable to pronounce the tribe's name so this DI could understand it. She was unable to spell the tribe's name either, and got as far as 'Kara.' This DI was unable to determine the name of the tribe with the information provided from the family. Estella stated that her mother Augustina R[.] had American Indian Ancestry on her side of the family and was only able to indicate that Augsutina R[.]'s parents' names were Hilario A[.] and Otula A[.], she was not able to provide dates or birth or places of birth for Hilario and Otula. She did not have a tribal number. She was able to indicate that Augustina's husband was Abel R[.] (DOB 8/17/1922, DOD 9/28/1999) and his parents were Justo and Manuela R[.], no other identifying information is available for them." This was the full extent of the Department's investigation; it repeated this summary in a subsequent report before the juvenile court determined in September 2011 that any Indian heritage was "too remote"

and "the Court has no reason to know that the child falls within the Indian Child Welfare Act."

Like the Department's summary of its interview with Estella, the juvenile court appears to have focused on the information it did not have instead of the information Estella provided. At the time of the juvenile court's finding that the ICWA did not apply, both Daniel's mother and great grandmother affirmatively stated the family had Indian ancestry. Estella further provided the first four letters of the tribe's name; her mother's full name, her mother's parents' full name; her father's full name, date of birth and date of death; and her paternal grandparents' names. Courts have consistently held that "[t]he showing required to trigger the statutory notice provisions is minimal; it is less than the showing needed to establish a child is an Indian child within the meaning of ICWA. [Citation.] A hint may suffice for this minimal showing. [Citation.] 'The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.' [Citation.]" (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 549.) That standard was more than satisfied here.

We find no merit to the Department's argument that Mother's family provided inadequate information to trigger the ICWA notice provisions. To the extent the Department was unable to ascertain the name of the tribe from Estella's description or obtain a tribal number, it was under an obligation to conduct further investigation. (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630 ["The burden is on the Agency to obtain all possible information about the minor's potential Indian background and provide that information to the relevant tribe or, if the tribe is unknown, to the BIA [Bureau of Indian Affairs]"].) The record does not reflect that the Department made any further attempt to interview Augustina or to obtain a tribal name on the basis of Estella's description. As Mother and Father point out, the Department's follow-up investigation on the name of the tribe would not have been onerous, as "[t]he Karuk Tribe of California [is] a federally recognized Indian tribe (65 Fed.Reg. 13298 (Mar. 13, 2000) . . . ." (*In re Guardianship*

of D.W. (2013) 221 Cal.App.4th 242, 245.)[2] Moreover, evidence of enrollment or membership in a tribe is not necessary to trigger the requirement of notice under the ICWA. (See *In re Jack C.* (2011) 192 Cal.App.4th 967, 978-979; *Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 254.)

Nor do we find merit to the Department's assertion that the information offered here was akin to that in other cases holding the ICWA notice provisions were not triggered. (See *In re J.D.* (2010) 189 Cal.App.4th 118, 123 [ICWA notice provisions not triggered by paternal grandmother's statement that her maternal grandmother once said she had Indian ancestry, when she did not know the name of the tribe or which side of her grandmother's family claimed Indian heritage, and could not identify other relatives who would know more]; *In re Z.N.* (2009) 181 Cal.App.4th 282, 298-299 [though stating ICWA notice provisions were not triggered by assertions of great grandparents' Indian ancestry where grandparents were not registered and had not established any tribal affiliation, court held any error was harmless in light of notices provided on behalf of half siblings]; *In re Jeremiah G., supra,* 172 Cal.App.4th at p. 1521 [no ICWA notice required where the child's father stated his great grandfather might have Indian heritage but did not know a tribe name, and later he retracted any claim of Indian ancestry]; *In re O.K., supra,* 106 Cal.App.4th at p. 157 [ICWA notice provisions not triggered by paternal grandmother's statement that the child "may" have Indian heritage without any further identifying information].) Here, in contrast, both Mother and Estella definitively represented that the family had Indian ancestry, identified the family members who claimed such heritage and provided enough information to enable the Department to ascertain the name of the tribe. This information was not "too indefinite" to trigger ICWA notice. (*In re O.K., supra,* 106 Cal.App.4th at p. 158.)

Finally, we cannot conclude that any error was harmless. The Department argues that the policy behind the ICWA was satisfied because Daniel was placed with Estella, a

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[2] The Karuk Tribe of California is the only federally recognized tribe in California that begins with the letters "KAR." (See generally http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx.)

relative through which he claimed Indian ancestry. As explained in *In re Marinna J.* (2001) 90 Cal.App.4th 731, 738, the requirement of notice is critical under the ICWA because it fosters one of the ICWA's major purposes "to protect and preserve Indian tribes. (25 U.S.C. § 1901.) In fact, under certain circumstances . . . an Indian tribe possesses exclusive jurisdiction over child custody proceedings involving Indian children. (25 U.S.C. § 1911(b).)" (Accord, *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1425 ["Indian tribes are independent communities possessing their own natural rights" and "Indian children are a tribe's most valuable resources'].) Given that the failure to provide ICWA notice affected the rights of an Indian tribe, such error was not harmless.

"Because the juvenile court failed to ensure compliance with the ICWA requirements, the court's order terminating parental rights must be conditionally reversed. This 'does not mean the trial court must go back to square one,' but that the court ensures that the ICWA requirements are met. [Citations.] 'If the only error requiring reversal of the judgment terminating parental rights is defective ICWA notice and it is ultimately determined on remand that the child is not an Indian child, the matter ordinarily should end at that point, allowing the child to achieve stability and permanency in the least protracted fashion the law permits.' [Citation.]" (*In re Gabriel G, supra*, 206 Cal.App.4th at p. 1168.)

II. Substantial Evidence Supported the Juvenile Court's Order Terminating Parental Rights.

Section 366.26, subdivision (c)(1) provides for the termination of parental rights when family reunification services have been terminated and the juvenile court finds by clear and convincing evidence that the child is likely to be adopted. Once the juvenile court has terminated reunification services, "'[f]amily preservation ceases to be of overriding concern" because " the focus shifts from the parent's interest in reunification to the child's interest in permanency and stability. [Citation.]' [Citation.]" (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1195.) "Adoption, where possible, is the permanent plan preferred by the Legislature. [Citations.]" (*In re Autumn H.* (1994) 27

Cal.App.4th 567, 573.) Once the juvenile court has determined that a child is adoptable, the parent has the opportunity to demonstrate "a compelling reason for determining that termination would be detrimental to the child" under one the statutory exceptions specified in section 366.26, subdivision (c)(1)(B). "An exception to the adoption preference applies if termination of parental rights would be detrimental to the child because the '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 re C.F.* (2011) 193 Cal.App.4th 549, 553.)

We review the juvenile court's ruling on whether a statutory exception applies to terminating parental rights under the substantial evidence standard. (*In re C.F., supra*, 193 Cal.App.4th at p. 553; *In re Autumn H., supra*, 27 Cal.App.4th at p. 576.) We must affirm the juvenile court's order if there is evidence that is reasonable, credible, and of solid value to support the order. (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1080.) We consider the evidence "in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*In re Autumn H., supra*, at p. 576.)

Mother and Father both contend the juvenile court should have implemented a permanent plan other than adoption because they met their burden to establish the section 366.26, subdivision (c)(1)(B)(i) exception to terminating parental rights. For the exception to apply, the parent must have maintained regular visitation with the child, and the juvenile court must determine that the parent/child relationship "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) "[T]he exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th

1339, 1348.) Rather, to overcome the benefits associated with a stable, adoptive family, the parent seeking to continue a relationship with the child must prove that severing the relationship will cause not merely some harm, but "great" harm to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) Factors that the juvenile court should consider when determining the applicability of the exception 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 . . . ." (*In re Autumn H., supra,* at p. 576.)

The juvenile court found by clear and convincing evidence that Daniel was adoptable and determined that Mother and Father failed to meet their burden to establish an exception to termination. With respect to application to the statutory exception, the juvenile court reasoned: "It doesn't really matter how often the parents visit if they aren't taking a parental role and doing the activities that are required to care for the child day-to-day. The law is very clear that just having or being a welcomed visitor and spending time, helping to feed the child by bringing snacks or feeding the child, or bringing books or clothing, is not in and of itself enough to establish parental rights. It's just a very welcomed visitor which the child, obviously, enjoys, but that's not what a parent is supposed to do. That is not all what a parent is supposed to do. I should say that is not enough to raise the exception of (c)(1)(B)(i)."

Substantial evidence supported the juvenile court's determination. Though Father maintained he visited regularly and frequently with Daniel, the evidence showed that his visitation had been sporadic and inconsistent throughout the dependency proceedings. (See generally *In re S.C.* (2006) 138 Cal.App.4th 396, 415 ["Conflicts in the evidence must be resolved in favor of the juvenile court's findings"].) Though Father visited regularly for the first two months after Daniel's August 2011 detention, he then spent three months in jail. Once released, he visited inconsistently, sometimes failing to appear at a scheduled visit. By mid-2012, Father was visiting approximately once per month, but then stopped visiting between June and November 2012. In May 2013, Estella reported that Father had seen Daniel only twice. Father's level of contact was

insufficient to support application of the section 366.26, subdivision (c)(1)(B)(i) exception. (See *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324 [beneficial relationship exception did not apply where the mother initially had positive and frequent visits but visited sporadically during the six months before the selection and implementation hearing].)

While the evidence showed that Mother for the most part maintained consistent and frequent visitation, her visits remained monitored throughout the proceedings. Under similar circumstances, courts have concluded that such "frequent and loving contact [is] insufficient to show the requisite beneficial parental relationship." (*In re Bailey J.* (2010) 189 CalApp.4th 1308, 1316 [the mother's supervised weekly eight-hour visits insufficient to show she occupied a parental role in the child's life]; accord, *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1109 [parents' failure to progress beyond monitored visitation with a child and to fulfill a "meaningful and significant parental role" supported order terminating parental rights]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51 [while day-to-day contact between the parent and child is not required, it is difficult to demonstrate a beneficial relationship when the parent's visits remain supervised].)

Though the evidence showed that Mother's visits were appropriate and that Daniel enjoyed the visits, a relationship that is "pleasant and emotionally significant" is not enough to establish a benefit to the child because "it bears no resemblance to the sort of consistent, daily nurturing that marks a parental relationship." (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) Taking into account the factors outlined in *In re Autumn H.*, *supra,* 27 Cal.App.4th at page 576, the evidence showed that Mother maintained positive interaction with Daniel on the one hand, but further showed that he had spent over two-thirds of his life outside Mother's custody and much of that time in Estella's custody, and that his day-to-day needs were met by Estella. Moreover, Mother offered no evidence to show that Daniel would be greatly harmed by discontinuing his contact with her. (See *In re Mary G.* (2007) 151 Cal.App.4th 184, 207 [affirming termination order where the evidence showed the mother visited regularly, but she did not show that the child would suffer great harm without continued contact].) The evidence Mother offered in support

of the section 366.26, subdivision (c)(1)(B)(i) exception was akin to that found inadequate in *In re Helen W.* (2007) 150 Cal.App.4th 71. There, the mother maintained regular visits with her young children for two years, and "[t]he mother clearly loved her children and believed they loved her; she fed and changed them during visits, and sometimes they would call her 'Mom.' But this is simply not enough to outweigh the sense of security and belonging an adoptive home would provide." (*Id.* at p. 81.)

We are guided by *In re Jasmine D., supra,* 78 Cal.App.4th at page 1350, where the court explained "a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship."

III. The Juvenile Court Properly Exercised its Discretion in Denying Father's Section 388 Petition.

Finally, Father contends the matter should not have proceeded to termination of his parental rights, arguing the juvenile court abused its discretion in denying his section 388 petition. He sought an order reinstating reunification services on the grounds he had completed an alcohol and drug program and Daniel would benefit from reunifying with him. After a hearing on the petition immediately preceding the section 366.26 hearing, the juvenile court concluded that Father failed to meet his burden to show changed circumstances or that the requested change of order was in Daniel's best interest.

Under section 388, a parent may petition the court to change, modify or set aside a previous court order. The parent has the burden of showing, by a preponderance of the evidence, both that there is a change of circumstances or new evidence and the proposed modification is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.) "The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O., supra,* at p. 415; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) "'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can

reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (*In re Stephanie M., supra,* at pp. 318–319.) "The denial of a section 388 motion rarely merits reversal as an abuse of discretion." (*In re Amber M., supra,* at pp. 685–686; see also *In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

In support of his petition, Father attached two certificates--one showing he completed a parenting class before reunification services had been terminated and another showing he completed a drug and alcohol program more recently. Though the juvenile court commended Father on his efforts to try to get himself clean and sober, it explained that its task was "to look and see whether or not circumstances have changed, not that they are changing, but they have changed." (See *In re Casey D., supra,* 70 Cal.App.4th at p. 47 ["A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests"].) On the basis of evidence in the Department's report that Father's issues with domestic violence and physical altercations had not been resolved, as well as evidence that Father's most recent drug test was positive, the juvenile court acted within its discretion to conclude that circumstances had not changed. Contrary to Father's assertion, the juvenile court did not focus on irrelevant factors in denying the petition. Though at the hearing it mentioned the reports showed Father was having other challenges—including a lack of housing, employment and transportation--it emphasized that Father had not shown the problems initially leading to Department intervention had been resolved.

The juvenile court further determined Father failed to show it would be in Daniel's best interest to provide additional reunification services. At the time it heard the section 388 petition, reunification services had been terminated, and therefore Father's interests in Daniel's care, custody and companionship were "no longer paramount." (*In re Stephanie M., supra,* 7 Cal.4th at pp. 324-325.) Instead, Daniel's "interest in stability was the court's foremost concern." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.)

Beyond summarily asserting that Daniel would benefit from reunifying with Father, the section 388 petition offered nothing to overcome Daniel's interest in stability. (See *In re Anthony W.* (2001) 87 Cal.App.4th 246, 252 [parent "made no showing how it would be the children's best interest to continue reunification services, to remove them from their comfortable and secure placement to live with [parent] who has a long history of drug addiction and a recurring pattern of domestic violence in front of the children"].) The juvenile court was well within its discretion to deny the section 388 petition.

DISPOSITION

The order terminating parental rights is reversed and the case is remanded to the juvenile court with directions to order the Department to provide the Karuk Tribe of California and the Bureau of Indian Affairs with proper notice of the proceedings under the ICWA. If, after receiving proper notice, no tribe indicates Daniel is an Indian child within the meaning of the ICWA, then the juvenile court shall reinstate the order terminating parental rights.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J. *

FERNS

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.

CHAVEZ

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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.