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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re V.B., a Person Coming Under the Juvenile Court Law.	B237036 (Los Angeles County Super. Ct. No. CK75617)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KATHY R., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Sherri Sobel, Juvenile Court Referee. Reversed in part and remanded with directions.

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

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel for Plaintiff and Respondent.

Kathy R.'s parental rights with respect to her son V.B. were terminated pursuant to section 366.26 of the Welfare and Institutions Code.[1] Kathy R. claims on appeal that the juvenile court should have granted her petition under section 388 and that the court erred in failing to apply the parent-child relationship exception to the statutory preference for adoption. She further argues that the Department of Children and Family Services (DCFS) failed to give adequate notice under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA). We find no error in the denial of the section 388 petition and the determination that the parent-child relationship did not preclude the termination of parental rights, but we conclude that the requirements of ICWA were not fulfilled. We conditionally reverse the termination order and remand with directions to follow the mandates of ICWA.

FACTUAL AND PROCEDURAL BACKGROUND

V.B., then 11 months old, and his three older siblings came to the attention of DCFS in late 2008 after their father A.B. injured their mother Kathy R. in an incident of domestic violence. A.B. accused Kathy R. of infidelity and choked her so severely that her injured throat required medical attention. Upon investigation, DCFS learned that A.B. had relationships and children with both Kathy R. and her sister Andrea R., both of whom are classified as "borderline mentally retarded." Kathy R. and Andrea R. reported multiple incidents of domestic violence by A.B.; he also hit the children with a leather belt. The oldest child, Emily, who was nine years old at the time, told DCFS that A.B. caused bruises when he struck them with the belt. She reported that the children were happy to be away from their father and that their mother took better care of them than their father, who "just hits us. He doesn't talk to us." She believed that if Kathy R. had not taken the children and left A.B., he would have killed her.

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

Kathy R. reported to DCFS that A.B. had abused her physically since she was pregnant with her first child. A.B. controlled most aspects of Kathy R.'s life: he told her she could not pass a driving test, so she never learned to drive. She was dependent on A.B. to take her everywhere, including to the grocery store and appointments. She turned over her disability check to him and he gave her spending money. She had no friends outside the relationship. A.B. denied abusing Kathy R.

DCFS filed a dependency petition concerning the four children of A.B. and Kathy R.; the petition alleged that V.B. came within the jurisdiction of the juvenile court under section 300, subdivisions (a), (b), and (j). In the petition, DCFS noted that the children were Mescalero Apache. DCFS learned that the children's paternal great-grandfather was a registered member of the Mescalero Apache tribe and advised the juvenile court that further investigation was necessary to determine whether the children were subject to ICWA. At the detention hearing, the court made no ICWA findings. The children were released to their mother. Four days later, with no further reports from DCFS and no explanation, the juvenile court found that ICWA did not apply.

The juvenile court found the children to be dependent children. The children were placed with Kathy R. with monitored visitation for A.B. Kathy R. was ordered to undergo counseling, domestic violence counseling, and parenting education through the Regional Center. Kathy R. underwent in-home therapy and individual counseling, and received independent living services and parenting training on a daily basis. DCFS initially described Kathy R. as "working very hard to keep her children and care for them," and stated that "[i]t is very apparent the children are very bonded to their mother."

As of July 2009, Kathy R. had become involved in a conflict with her service provider and had multiple child abuse referrals reported to the Child Abuse Hotline. Kathy R. felt that she was not treated with respect by some of the Future Transitions staff, and the Future Transitions staff believed her to be uncooperative and declining services. Future Transitions removed staff from Kathy R.'s home because she was not cooperating. When Kathy R. requested a new service provider, the Regional Center refused. Kathy R. was reported by DCFS to be in partial compliance with the case plan as of July 2009.

DCFS described her as "very much invested in having her children remain in her care," as "exemplified in her willingness to comply with Department of Children and Family Services and the Court." Kathy R. solicited the social worker's opinions on her maintenance of the household and raising the children. She was described as "regularly giv[ing] 100% effort in these tasks which are difficult."

In late July 2009, however, Kathy R. appeared unannounced at A.B.'s visit with the children, bringing a bag of his possessions and directing one of the children to give it to him. The DCFS social worker was concerned with Kathy R.'s lack of judgment in coming to the office to personally deliver A.B.'s possessions, and Kathy R.'s appearance at the visit caused the social worker to question Kathy R.'s assertion that she was afraid for her life.

Also in late July, the children's counsel learned that Kathy R.'s attitude toward receiving services had dramatically changed, as had conditions in the home. The children had begun to get sick frequently, and they contracted ringworm and head lice. They left the apartment without supervision. Both the service provider and neighbors had made calls to the Child Abuse Hotline. During a week-long break from services Kathy R. had negotiated with her service provider, the children left the home without supervision, one was lost in the apartment complex, and the apartment became very dirty. The Regional Center case manager believed that Kathy R. could not function on her own and did not understand why the children had not been detained. Kathy R. was now declining all services beyond assistance with her finances.

The Future Transitions case manager confirmed that Kathy R. was refusing services. She reported that even when workers were in the home constantly, they were concerned by safety issues such as Kathy R. leaving a bucket containing bleach solution within the children's reach. Kathy R. had called the case manager and "casually mentioned" that she could not find her seven-year-old child. The manager came to the apartment complex and searched in the dark for the child for 45 minutes until she found him in a neighbor's apartment approximately one-eighth of a mile away. The three-year-old child had fallen from a neighbor's car and broke the car mirror as he fell. All of the

children, including V.B., had been wandering around the apartment complex, and one-and-one-half year-old V.B. was nearly hit by a car as he stood, unattended, in the middle of the complex parking lot.

The children's attorney filed a petition under section 388 requesting that the children be removed from their mother's physical custody because of "[m]ultiple incidents of Mother's inadequate supervision and recognition of safety risks." Counsel contended that the children were at substantial risk of serious physical harm. Attached in support of the request was a six-page report from the attorney's investigator outlining multiple safety hazards and deficiencies in care provided by Kathy R. observed over a two-and-a-half hour visit. The juvenile court ordered DCFS to spend three days investigating conditions at the family's apartment and to return to court to present the results of the visits, but after the first day of investigation DCFS detained the children due to safety concerns.

DCFS filed a subsequent dependency petition under section 342, alleging that the children were subject to dependency jurisdiction under section 300, subdivision (b), based on Kathy R.'s inability to care for and supervise them. This petition, too, noted that the children had lineal ancestors who were Apache. The detention report delineated myriad safety hazards in the home. It also included Kathy R.'s statement on July 31, 2009, that her father was Apache, and that she was trying to get the children registered with the tribe.

On August 26, 2009, the court found true the section 300, subdivision (b) allegation in the subsequent petition. The court ordered family reunification services, visitation for Kathy R., and parenting counseling and counseling in independent living skills for Kathy R.

As of October 2009, Kathy R. had ceased visiting her children. Her telephone had been disconnected and DCFS could not reach her. The caregiver for two of the children reported that Kathy R. had said the visits with those children were "very painful and she could not bear to see the children," although the caregiver for the other children stated

that Kathy R. had said that her attorney told her not to call anyone. DCFS was unable to assess Kathy R.'s compliance with the case plan.

DCFS prepared a review report in February 2010. As of that time, Kathy R. was still not visiting her children, although she telephoned occasionally. When Kathy R. did call her children, she was often inappropriate in conversation and refused to call at times that were not disruptive to the children or to leave her telephone number. DCFS had written letters and visited her home, and the children's therapist had urged her to contact DCFS, but Kathy R. had not done so. DCFS had observed other adults in the home where Kathy R. lived and had received reports that these people were controlling Kathy R. through fear. Observations of the inside of Kathy R.'s home revealed that it was unclean and unkempt, and not suitable for children to live in safely. Kathy R. had not provided any documentation that she was complying with any court orders.

DCFS also reported that V.B., now two years old, was a Regional Center client. His caregiver reported that V.B. engaged in "self-injurious behaviors such as hitting his head into the floor or wall, pulling his own hair, and biting himself." The caregiver reported that the children were very rough with each other and that V.B. was the "punching bag" for the older siblings. The caregiver had observed that when V.B. was seeking comfort, he would engage in the injurious behaviors. He could not be left alone on tile floors for fear he would harm himself. V.B. had also been observed to eat non-stop if permitted to do so, without regard for what he was consuming.

In February 2010, adoption planning began for the children. In March 2010, DCFS recommended the termination of reunification services for both parents. Kathy R. continued to be unavailable and her residence was uncertain. At this time, V.B. was no longer overeating and was sleeping well, although he continued to hit himself and others frequently. The court ordered reunification services terminated on March 23, 2010. Kathy R. visited the children once in April 2010.

As of June 2010, adoptions were being explored with the children's adult half-siblings. During the summer, Kathy R. visited with the children regularly. The Court Appointed Special Advocate (CASA) reported that Kathy R. loved her children very

much and was working hard to see them each week. Kathy R. was also working on her own development, and had her own residence and a job through a special program. The CASA believed that the children would benefit from having a continued relationship with their mother. The CASA opined that Emily understood that she had intellectually surpassed her mother and that the middle two children had behavioral and academic issues too complex for Kathy R. to handle, but she believed that with sufficient assistance, Kathy R. could take care of V.B.'s basic needs at that time. Kathy R. loved V.B. and watched him closely, but she also had unrealistic expectations of him and was unable to take cues from his actions. The CASA expressed concerns over Kathy R.'s tendency to obsess over specific issues and wondered whether she would be able to care for V.B. as he matured and his needs became more complex. As of September 2010, only Emily had been placed in a prospective adoptive home; the CASA believed it would be premature to terminate parental rights. The juvenile court continued the section 366.26 hearing to March 2011.

By the beginning of 2011, prospective adoptive families had been identified for all four children. In March 2011, one adult half-sibling became the legal guardian of the middle two children. These two children soon moved out of California with their guardian due to a military deployment. Emily was placed with a different adult half-sibling, and she was freed for adoption in April 2011. The adult half-sibling who took Emily expressed a desire to adopt V.B. as well. V.B., however, was developing well[2] in a successful placement with non-relative caregivers who wanted to adopt him, and they

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[2] V.B., who had once been evaluated for possible attachment disorder, related to his prospective adoptive parents as his family and their home as his home. The CASA reported seeing "significant positive changes" in him since the placement began. "His vocabulary and language skills have increased and his behavior has changed dramatically. V[.B.] is much calmer. He listens and follows directions. There is no longer a concern that, at any moment, he will hit others, hit his head against the wall or fling himself off a table or jungle gym; these were behaviors previously demonstrated by V[.B.] Some of these changes can be attributed to chronological development, but the CASA believes a lot of the changes are due to the attention he has received from [the prospective adoptive parents]."

initially opposed a change in custody. In light of the two families that wanted to adopt V.B., the juvenile court ordered a bonding study. The expert recommended that V.B. be adopted by his non-relative caregivers but that all the adults work together to preserve the relationship between V.B. and Emily.

In July 2011, Kathy R. filed a section 388 petition seeking the return of all four children to her custody with family maintenance services; or, in the alternative, to take the section 366.26 hearing off calendar and to provide reunification services with unmonitored visits. According to Kathy R., the change of circumstances prompting the application were: "I have completed domestic violence program & done specialized training for parents through Journey to Independence. My counselors are prepared to testify that I am able to appropriately parent my kids." Kathy R. stated that the changes would be in the children's best interest because "I love my children and my children love me. I want them to be raised together as a family. Returning them to me would allow them to be raised by their mother and they could grow up in the same home together." At the hearing on the section 388 petition, the scope of the petition was narrowed from all four children to only V.B.

Kathy R. presented the testimony of her parenting skills training supervisor; an Americans with Disabilities Act compliance coordinator for the Los Angeles Department of Disability; her therapist and advocate; the DCFS social worker assigned to the case; and the children's adult half-sibling who was adopting Emily and who wanted to adopt V.B. After Kathy R.'s presentation of evidence, the court continued the hearing until September 2011.

In late August 2011, V.B.'s nonrelative prospective adoptive parents reluctantly concluded that it was in V.B.'s best interest to be placed with Emily and his adult half-sibling and requested that he be removed from their custody. V.B. moved to the home of his adult half-sibling on an extended visit in September 2011.

On September 21, 2011, after argument on Kathy R.'s section 388 petition, the court denied the petition and proceeded to take evidence and hear argument on the termination of parental rights over V.B. The court concluded that V.B. was adoptable

and that termination of parental rights would be not be detrimental to him under the statutorily-specified exceptions, and then terminated A.B. and Kathy R.'s parental rights. Kathy R. appeals.

DISCUSSION

I. Section 388 Petition

Section 388 is a general provision permitting the court, "upon grounds of change of circumstance or new evidence . . . to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." (§ 388, subd. (a).) The statute permits the modification of a prior order only when the petitioner establishes by a preponderance of the evidence that (1) changed circumstances or new evidence exists; and (2) the proposed change would promote the best interests of the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) We review the court's ruling for an abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

The court denied the section 388 petition seeking a change of placement to Kathy R.'s home, or, alternatively, a resumption of reunification services, because Kathy R. had not established a change of circumstances. The court observed that although Kathy R. was "making strides for her own independence," she did not represent that she was competent to parent on her own; and that although her circumstances were changing, the change was insufficient to warrant placing "a special-needs three-year-old" in her care. Kathy R. contends that the court abused its discretion because she had demonstrated a change of circumstances; return of V.B. to her was possible because she had housing, employment, and Regional Center assistance; she posed no safety risk; and it was in V.B.'s best interest to be placed with his mother.

We find no abuse of discretion here. Kathy R. presented evidence of her efforts to improve herself, to learn parenting skills, and to gain independence, and her affection for and commitment to her children was indisputable; she also presented testimony of several

witnesses who believed she was capable, at least with assistance, of caring for V.B. The juvenile court, however, found more credible the evidence that Kathy R.'s circumstances had not truly changed with respect to her readiness to be a custodial parent, and the evidence permitted such a conclusion. The basis for the dependency jurisdiction with respect to Kathy R. was that she had failed to properly care for and supervise the children, placing them at substantial risk of physical harm. At the time of her petition, Kathy R. had been participating in the "Journey to Independence" program for approximately six months. She had been regularly visiting with V.B. for a little more than one year, but had never progressed to unmonitored visitation. Kathy R. struggled to parent her older children effectively, even at monitored visits. She was unable to provide appropriate direction, and "monitors had to consistently redirect the mother on how to interact and provide guidance to the children" during visits. Kathy R. lacked the ability to discipline V.B. appropriately and had inappropriate expectations of his behavior. Although she wanted to nurture and interact with her children appropriately, Kathy R. was challenged to understand what were age-appropriate interactions with her children and had "a hard time understanding" that age-appropriate activities would "help her to bond with and nurture her children in a positive way." The CASA believed that Kathy R. did not have the ability to provide full-time care to a child. The DCFS social worker testified that Kathy R. could "possibly" care for V.B., but she could not say that Kathy R. could successfully parent him even if he were the only child in her care.

When the children lived with their mother, Kathy R. had failed to secure medical and dental attention for them. Kathy R. continued to experience difficulties understanding doctors and comprehending how to follow medical instructions with respect to medication, as well as more general difficulties with having sufficient patience to get information over the phone and to relay information about her needs. As the CASA stated, Kathy R.'s "difficulty with communication and retention of information . . . would impact her ability to interact with school, doctors, and other community involvement and [to] advocate for V[.B.] as he matures." While Kathy R. had learned some skills, such as taking the bus and getting to visits, it was observed that

changes in the established routine caused her confusion and prompted obsessive attention to the change: "[I]f the visitation schedule changes at the last minute, even if it is explained, Ms. R[.] gets confused and obsesses about the problem. It would be extremely difficult for her to adapt to the ever changing needs of a young child."

Evidence before the juvenile court also indicated that despite repeated explanations, Kathy R. did not understand that her children were removed from her because she had not kept them safe. Kathy R. believed it to be unfair that DCFS took her children from her once she left the abusive home of the children's father, and did not understand how her parental rights to Emily could be terminated when she was attending therapy and parenting instruction. The CASA found Kathy R. to be "unable or unwilling to review her own actions to see that she put her children in danger," and DCFS stated, "The mother is incapable of understanding that she must protect the children, as well as herself." Kathy R.'s failure to appreciate or acknowledge the danger in which she had put her children when she inadequately supervised them tended to show that she could easily leave V.B. unsupervised and in peril again.

Because the evidence permitted a conclusion that Kathy R.'s circumstances were changing rather than changed, the juvenile court did not abuse its discretion in denying Kathy R.'s section 388 petition.

II. Termination of Parental Rights

"At a hearing under section 366.26, the court must select and implement a permanent plan for a dependent child. Where there is no probability of reunification with a parent, adoption is the preferred permanent plan. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) To implement adoption as the permanent plan, the juvenile court must find, by clear and convincing evidence, that the minor is likely to be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) Then, in the absence of evidence that termination of parental rights would be detrimental to the child under statutorily-specified exceptions (§ 366.26, subd. (c)(1)(A)-(B)), the juvenile court 'shall terminate

parental rights.' (§ 366.26, subd. (c)(1).)" (*In re K.P.* (2012) 203 Cal.App.4th 614, 620.) Here, the juvenile court found that V.B. was adoptable, and, finding no reason that the termination of parental rights would be detrimental to him, terminated parental rights. Kathy R. appeals the termination, asserting that the parent-child relationship exception to termination of parental rights was applicable here. We review the determination whether a beneficial parental relationship exists for substantial evidence and the conclusion as to whether the existence of that relationship constitutes "'a compelling reason for determining that termination would be detrimental to the child'" (§ 366.26, subd. (c)(1)(B)) under the abuse of discretion standard. (*In re K.P.*, at p. 622.)

"Section 366.26 provides an exception to the general legislative preference for adoption when '[t]he court finds a compelling reason for determining that termination would be detrimental to the child' (§ 366.26, subd. (c)(1)(B)) 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).) The 'benefit' prong of the exception requires the parent to prove his or her relationship with the child 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; see also *In re Derek W.*, *supra*, 73 Cal.App.4th at p. 826 ['parent has the burden to show that the statutory exception applies'].) No matter how loving and frequent the contact, and notwithstanding the existence of an 'emotional bond' with the child, 'the parents must show that they occupy "a parental role" in the child's life.' (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) The relationship that gives rise to this exception to the statutory preference for adoption 'characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.' (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) Moreover, '[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the

Legislature's preference for adoptive placement.' (*In re Jasmine D*. (2000) 78 Cal.App.4th 1339, 1350.)" (*In re K.P.*, *supra*, 203 Cal.App.4th at p. 621.)

Here, the juvenile court found only that no exceptions existed, without further discussion of its analysis. Substantial evidence existed to support a finding of a parent-child relationship here: V.B. had lived with Kathy R. for the first year of his life, and despite a significant period in which she failed to visit her children she had been visiting V.B. regularly for more than a year at the time of the section 366.26 hearing. There was evidence that during visits, Kathy R. performed typical parenting tasks. V.B. knew her as his mother and had generally positive interactions with her, hugging her at visits.

Because the evidence supported a determination that a relationship existed between Kathy R. and V.B., we understand the juvenile court's ruling that no exception applied to mean that the court concluded that the bond between the two was qualitatively insufficient to constitute a compelling reason for determining that termination of Kathy R.'s parental rights would be detrimental to V.B. We review this determination for an abuse of discretion and find none. V.B. had a relationship with his mother, but he did not identify with her as his primary source of comfort. His emotional bonds were to Emily and to the adult half-sibling with whom Emily lived: when he was hurt during a family visit, V.B. refused his mother's offer of comfort and went to the adult half-sibling instead. Moreover, the evidence in this matter demonstrated that V.B. desperately needed permanence, stability and intensive parenting intervention: His aggressive and self-injurious behaviors and language delay had both improved once he was in a stable placement. Instability in the placement—even when it was merely extended visitation with his sister and her adoptive parents—caused V.B. anxiety and a resumption of destructive behavior; indeed, it was the precipitous change in V.B. caused by splitting time between his non-relative prospective adoptive parents and his family that led the prospective adoptive parents to stop fighting to keep him. V.B. settled "beautifully" into his placement with his sister, to whom he was by all accounts well-bonded; but even so, he experienced anxiety when leaving the home because he feared he would not return with his family. On this evidence, the court could reasonably conclude that V.B.'s

relationship with his mother did not promote his well-being to such a degree as to outweigh the well-being he would gain by in a permanent home with adoptive parents. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) There was no abuse of discretion here.

Kathy R., however, contends, based upon *In re C.B.* (2010) 190 Cal.App.4th 102, that the termination here must be reversed because it was based on the unenforceable expectation of future contact between the child and a biological parent. In *In re C.B.*, the Court of Appeal ruled that when the beneficial parent-child relationship exception is established, the juvenile court may not terminate parental rights nonetheless based upon the expectation that the prospective adoptive parents would permit future parent-child contact. (*Id*. at pp. 127-128.) In that case, the juvenile court expected that the children would maintain a relationship with their mother even if her rights were terminated and described the termination of parental rights as affording the affected children "'the best of both worlds'" because they would have stability, predictability, and care with their adoptive family while still maintaining their connection with their parents. (*Id*. at p. 127.) The court had relied, at least in part, upon its expectation of further parent-child contact in assessing the benefit prong of the parent-child exception, finding that the harm to the children that would otherwise result from termination would not actually occur because the children would continue to have parental contact. (*Ibid*.)

Here, although the court did mention its understanding that there would be future contact between Kathy R. and V.B., there is no indication that this understanding impacted the court's analysis of the benefits offered to V.B. from permanency versus from a continued parent-child relationship. The court, after hearing argument on the termination question, observed that childhood is brief and that children need nurturing on their own schedule, not on a parent's schedule. The court talked about weighing the age of the child, the relationship with the parent, and the specific facts of the case and the child. The court remarked that of the four children, Emily had the strongest relationship with Kathy R., but that she had already been freed for adoption. The court observed that

family relationships exist in many ways, in forms such as open adoptions, homes with single-sex parents, and grandparents raising children.

The court continued, "At this point what we look for—the word is permanency. That's what we look for. Permanency; what is the most permanent plan that will provide the needs for a child. [¶] And in this particular case, there's no question it's adoption by the adult sibling, in the same home as the other minor sibling, with a consortium referral for contact." The court described its "understanding" that contact would continue between V.B. and Kathy R., but that the family (all the children fathered by A.B., minor and adult) was united in the view that there would be no contact with his father.

While the court mentioned a referral for further contact despite the termination and expressed its understanding that the adult half-sibling intended Kathy R. and V.B. to continue to have contact after the adoption, we do not construe the court's comments to mean that it considered future contact as a material circumstance when it weighed the relative benefits of adoption and of continuing parental contact. To the contrary, the court was intent upon securing for V.B. a permanent plan that offered him the secure and stable home that he so evidently needed. The court said it would make a consortium referral and expressed the understanding that contact would continue, but it made no statement suggesting that this was a basis for its analysis under the benefit prong or that an expectation of ongoing contact blunted the assessed impact of termination as it had in *In re C.B.*, *supra*, 190 Cal.App.4th 102.

This case is also not like the other case on which Kathy B. relies, *In re Scott B.* (2010) 188 Cal.App.4th 452. In that decision, the parent-child exception to termination clearly applied, and the court observed that the relationship between the child and his mother was so important that a "serious emotional and developmental setback" would occur unless visitation occurred, necessitating court-ordered visitation and a guardianship rather than reliance on the willingness of an adoptive parent to continue visitation. (*Id*. at p. 472.) There was no evidence here that the relationship between V.B. and Kathy R. was as significant to V.B. as the parent-child relationship was to the child in *In re Scott B.* Kathy R. has not established any error here.

III. ICWA

The juvenile court and DCFS have an affirmative and continuing duty to inquire whether the child named in the dependency petition is or may be an Indian child (*In re Desiree F*. (2000) 83 Cal.App.4th 460, 469-470; Cal. Rules of Court, rule 5.481), and to give notice by registered mail, return receipt requested, to the tribe of both the proceedings and the right to intervene. (25 U.S.C. § 1912(a).) Notices must be sent to all tribes of which the child may be a member or eligible for membership. (§ 224.2, subd. (a)(3).)

The record is replete with reports that V.B. may be an Indian child. The ICWA-10 forms attached to the section 300 and section 342 petitions each indicated that he might have Apache heritage. By the time of the detention hearing, DCFS had learned that the children's paternal great-grandfather was a registered member of the Mescalero Apache Tribe. A.B. told the court that a tribe had been involved in a companion dependency case involving his child with Andrea R. Father accounted for some of his conduct (his relationship with Kathy R. and her sister) as being part of Apache culture, and there are references in the record to the children participating in Native American cultural activities and having Native American names. Kathy R. told DCFS that she was Apache and that she was trying to get her children registered with a tribe. Reports relating to the children frequently described them as being Native American, and their DCFS health and education passports listed them as American Indian. As DCFS acknowledges, there is no indication that DCFS followed up on these statements or conducted further inquiry into V.B.'s heritage. For reasons the court did not explain, the juvenile court repeatedly found that it was not an ICWA case.

Based on the information DCFS received from both parents, the juvenile court had reason to know that V.B. could be an Indian child. "The Indian status of the child need not be certain. Notice is required whenever the court knows or has reason to believe the child is an Indian child." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.) There is no evidence in the record that DCFS carried out its obligations to investigate V.B.'s

potential Native American heritage and to gather the information required by section 224.2, subdivision (a)(5). (Cal. Rules of Court, rule 5.481(a).)

"Notice is mandatory, regardless of how late in the proceedings a child's possible Indian heritage is uncovered." (*In re Kahlen W., supra,* 233 Cal.App.3d at p. 1424.) The failure to provide notice under ICWA requires that the termination of parental rights be vacated. (See 25 U.S.C. §§ 1912(a), 1914 [no termination of parental rights hearing may be held until at least 10 days after proper notice to potentially intervening tribes; failure to comply with ICWA's notice provisions is a ground for invalidating a termination of parental rights].) We therefore reverse and remand the order denying terminating parental rights, with directions to the court to order DCFS to investigate V.B.'s possible status as an Indian child; to gather as much of the information required by section 224.2, subdivision (a)(5) as is available; and to send proper ICWA notices consistent with the requirements of ICWA and California Rules of Court, rules 5.481 and 5.482. Proper notice under ICWA must include the petition and following information, if known: the child's name, birth date and birthplace; the name of the tribe in which the child is enrolled or may be eligible to enroll in; the names of the child's mother, father, grandparents, great-grandparents, and any Indian custodians; those individuals' maiden, married, and former names as applicable, their birth dates, places of birth and death, tribal enrollment numbers, and current and former addresses. (25 C.F.R. § 23.11(a) & (d).) This will ensure that the relevant tribes have the opportunity "to investigate and determine whether the minor is an Indian child," and that any concerned tribe is advised "of the pending proceedings and its right to intervene." (*In re Desiree F., supra*, 83 Cal.App.4th at p. 470.)

If, after appropriate notice is given, a tribe responds, indicates that V.B. is an Indian child, and seeks intervention, the relevant orders shall be vacated for him and proceedings consistent with ICWA conducted. If no tribe responds that V.B. is an Indian child, or if no tribe seeks to intervene, the court shall reinstate its section 366.26 order.

DISPOSITION

The order terminating parental rights under section 366.26 is reversed and the matter is remanded to the juvenile court with directions that within 30 days of the remittitur, pursuant to ICWA and rules 5.481 and 5.482 of the California Rules of Court, DCFS investigate and provide the appropriate tribes and the Bureau of Indian Affairs with proper notice of the pending proceedings.

If, after notice is properly given, no tribe responds indicating that V.B. is an Indian child within the meaning of ICWA, the court shall reinstate its order terminating parental rights. If a tribe determines that V.B. is an Indian child and seeks to intervene in the juvenile court proceedings, the juvenile court shall vacate the relevant orders and conduct all proceedings in accordance with ICWA and the California Rules of Court. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

WOODS, J., Acting P. J.

JACKSON, J.