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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ADAM R., A Person Coming  
Under the Juvenile Court Law.

B244683  
(Los Angeles County  
Super. Ct. No. CK43032)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

AXEL R.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Sherri Sobel, Juvenile Court Referee. Affirmed.

Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Office of the County Counsel, James M. Owens, Assistant County Counsel and Kimberly A. Roura, Deputy County Counsel for Plaintiff and Respondent.

Appellant Axel R. (Father) appeals the juvenile court order terminating parental rights to his son Adam R. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *A. Detention*

Lara R. (Mother) is the mother of three children, including Adam.<sup>1</sup> On the day Adam was born in September 2010, Mother tested positive for cocaine and opiates. After his release from the hospital, Adam was placed with foster parents Cecilia and Ricardo C.

Interviewed by the caseworker, Mother admitted using methamphetamine in the past, but denied having used drugs during the prior three years and denied ever using cocaine or opiates.<sup>2</sup> Mother reported that although Father had a history of

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<sup>1</sup> Adam was detained immediately after birth and was initially known as “Baby Boy [R.]” Mother’s older children, Angel C. and Jessica M., were living with other relatives at the time of Adam’s detention. Neither child is a subject of this appeal.

<sup>2</sup> There were records of unconfirmed referrals dating back to 1998, alleging that Angel was being neglected due to Mother’s drug use. When Mother’s daughter Jessica was born in 2000, Mother had tested positive for amphetamine and methamphetamine. In October 2000, the juvenile court sustained allegations that Mother had a long history of drug abuse and had used amphetamine and methamphetamine during her pregnancy. The court also sustained allegations that Angel’s father, Angel C., Sr., had engaged in domestic violence against Mother and that Jessica’s alleged father, Juan M., was incarcerated and had a repeated history of theft-related convictions. Mother regained custody, and jurisdiction over Angel and Jessica was terminated in September 2002. In March 2006, a caller alleged that Mother was abusing drugs again and neglecting the minors, sleeping all day and leaving them to fend for themselves. In July 2006, a referral alleged that Mother had left Jessica with her paternal grandmother for an indefinite period with no provision for her care, and that Angel had been left without an adult caretaker because Mother was in jail. In September 2007, Angel was taken into protective custody because Mother was again in jail, and the neighbor who had been caring for him moved from the area.

drug use, he had been clean for three years and was willing to care for the baby.<sup>3</sup> Father reported that he suspected Mother had used drugs five months earlier, but that cocaine and opiates had never been her drugs of choice. He was willing to care for Adam, but did not have a stable residence. He said he was residing with friends and using his mother's address as his mailing address. His mother reported that Father had been working and doing well for the past three years.<sup>4</sup>

Prior to the detention hearing, Father filed a JV-505 "Statement Regarding Parentage" form, which stated that he believed he was Adam's father and requested that the court enter a judgment of parentage and find him to be the presumed father. The form stated that he had lived with Mother at the time of Adam's birth and had had a romantic relationship with her off and on for four to five years. The form further stated that Mother had said he was the baby's father.

At the September 15, 2010 detention hearing, the court found Adam to be an Indian child within the meaning of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq., (ICWA)), as both he and Mother were registered members of the Fort Peck Assiniboine and Sioux Tribe (the Tribe). The court ordered Adam detained, specifically finding that "active efforts were made to prevent or eliminate the breakup of this Indian family." The court confirmed that Mother and Father were living together at the time of Adam's birth. The court stated that Father was

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<sup>3</sup> In 2002, Father's parental rights had been terminated after the court found that the mother of the two children involved was a regular user of amphetamine and cocaine, that Father had been incarcerated for being under the influence of a controlled substance and for willful infliction of corporal injury on a spouse, and that neither parent was able to care for the children. Prior to the termination order, Father's reunification services had been terminated due to lack of compliance.

<sup>4</sup> Father suggested placing the child with his mother, but she subsequently told the caseworker she was unable to take on the care of an infant.

“[d]eclared under 505.”<sup>5</sup> The court appointed counsel for Father and instructed the Department of Children and Family Services (DCFS) to prepare a complete evaluation of Father. The court ordered drug testing for both parents and a drug treatment program for Mother.

### *B. Jurisdiction and Disposition*

Interviewed prior to the jurisdictional hearing, Mother again denied any current use of drugs. Father also stated she had not been using drugs. Mother and Father both stated that Father had not been using drugs for some time. Mother reported that Father helped her pay rent and buy food for the children. Father and Mother both stated that they were attempting to work on their relationship and get back together. The caseworker could not confirm Father’s residence. DCFS recommended that Mother, but not Father, be provided reunification services. At a hearing on October 6, 2010, the court ordered DCFS to provide both parents parenting classes.

In October 2010, the paternal grandmother reported that Father had not lived with her for more than two years and that she did not know where he was living. Father stated that he currently lived with “friends,” but planned to move in with the paternal grandmother once he got custody of Adam. He refused to provide any other information about where he was living, saying the caseworker did not need to know. The hospital retested the specimen provided by Mother at the time of Adam’s birth and confirmed the presence of cocaine and opiates. Father tested negative for drug use in September and October 2010. Mother tested negative on

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<sup>5</sup> The court’s minute order stated Father was the “declared father” of Adam “per 505 form.”

September 24, but did not appear for tests scheduled on September 28 and October 5.

In November 2010, the foster mother reported that both parents had smelled of alcohol at one visit. Father had additional negative drug tests in October and November. Mother had not appeared for tests scheduled on October 19 and November 8. Complaining that she had been unable to visit Adam due to transportation costs, Mother made an appointment to see the caseworker on November 1 to obtain a bus pass, but Father called and left a message that she would not be able to keep that appointment. The caseworker visited Mother at the address she had provided to deliver the bus pass. Father answered the door. He denied that Mother was there, although a security guard had just informed the caseworker he had seen her go in with Father.<sup>6</sup> The caseworker left, but called Mother and left a message stating she knew Mother was there. Father returned the call and cursed the caseworker for “calling [him] a liar.” The next day, Mother called the caseworker to apologize for their behavior on the day of the visit. She did not, however, provide an adequate explanation for why she had not come to the door or spoken with the caseworker. DCFS continued to recommend that Father not be provided reunification services.

On November 15, the court sustained the following jurisdictional findings: “[Mother] has a history of illicit drug abuse, including amphetamine and methamphetamine, [and] is a current abuser of cocaine and opiates which renders [her] unable to provide regular care and supervision of the children. [Mother] abused illicit drugs during [her] pregnancy with [Adam]. On 09/10/2010, [Mother] had a positive toxicology screen for cocaine and opiates at the time of [Adam’s] birth. [Mother] has a criminal history of a conviction of Use/Under the Influence

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<sup>6</sup> The guard had also stated that Father was “always [t]here.”

of Controlled Substance. The children Angel and Jessica are former dependents of the Juvenile Court due to [Mother's] illicit drug abuse. Such illicit drug abuse by [Mother] endanger[s] the children's physical and emotional health and safety and places the children at risk of physical and emotional harm, damage and danger."<sup>7</sup> At the hearing, the court asked whether Father was requesting placement. His counsel stated he did not have stable housing and expected his mother to help him. The court continued the disposition hearing to another day because the Tribe had not yet provided its position. The court warned Father that Adam would not be placed with the grandmother because she clearly did not want the responsibility of his care, and that it was unlikely Adam would be placed with Father because he appeared to be residing with Mother.

In December 2010, the caseworker reported that Mother had not appeared for drug tests on November 19 and December 2, and that she had not visited Adam for a month. Father had consistently tested negative. After repeatedly refusing to state where he was living, he admitted he was living with Mother. He had been visiting Adam, but did not do anything to care for him, such as feeding or changing diapers. Father tried to cover up Mother's lack of visitation, telling the caseworker they were visiting together, although that was not true. Father became hostile and uncooperative when the foster mother cancelled a visit due to severe weather and the caseworker attempted to reschedule. Mother reported her belief that Father was attempting to get custody of Adam in order to secure a relationship with her. The Tribe informed DCFS in writing that it was in support of continuing Adam's placement with the foster parents.

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<sup>7</sup> The court struck an allegation that Father had a history of drug abuse and a criminal history which rendered him unable to provide regular care and supervision of Adam.

At the December 29, 2010 hearing, the court reviewed the December report and informed Father's counsel it was disinclined to provide him services since he had been uncooperative with the caseworker and was clearly living with Mother. Counsel requested that the matter be put over for a contest. At the January 11, 2011 dispositional hearing, the court changed its mind and ordered reunification services for Father.<sup>8</sup> Father was to participate in a hands-on parenting class for infants and an anger management program, and to continue drug testing until he had 10 consecutive clean tests. The court granted Father two monitored visits per week. The court permitted Father to retain his right to make education and medical decisions on behalf of Adam.

### *C. Reunification Period*

In April 2011, the caseworker reported that Father had not appeared at three scheduled drug tests. He was visiting only once a week and had rejected the foster mother's offer to accommodate a second regular weekly visit by bringing the child closer to him. Father told the caseworker he would be providing case progress information to his attorney, not to the caseworker. Further, although Father was evasive with the caseworker about his residence, he admitted to Arizona child protective services that he continued to live with Mother.<sup>9</sup> At a status hearing on

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<sup>8</sup> The court did not order reunification services for Mother pursuant to Welfare and Institutions Code section 361.5, subdivision (b)(10) (court previously ordered termination of reunification services in another proceeding), (b)(11) (parental rights over other children have been previously terminated), and (b)(13) (parent has a history of "extensive, abusive, and chronic" use of drugs and has resisted court-ordered treatment). Undesignated statutory references are to the Welfare and Institutions Code.

<sup>9</sup> The caseworker learned at this time that Father had not disclosed the existence of another child, a teenage son. The boy's mother was Mother's sister. The boy had been detained from his mother in Arizona due to neglect; his mother and stepfather were  
(*Fn. continued on next page.*)

April 12, the court stated that Father would need to continue to test until he had ten clean tests in a row with no missed tests.

In July 2011, the caseworker reported Father continued to visit Adam at least once a week and had begun to feed and change him but did not ask the foster mother about his medical condition or developmental needs.<sup>10</sup> The caseworker reported that from all appearances, Father continued to live with Mother. As Father denied that Mother had a drug abuse problem, the caseworker was concerned that Adam would be subject to abuse if released to Father. DCFS recommended termination of reunification services. At the August 8 six-month review hearing, the court, finding that Father had made consistent and regular contact with Adam and significant progress in resolving the problems that led to Adam's removal, continued reunification services. The court ordered Father to attend Al-Anon meetings twice per week and counseling. The court changed visitation to three times per week.<sup>11</sup>

In November 2011, the caseworker reported that while Father had tested negative on some occasions, he had failed to appear at other scheduled drug tests.

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reportedly alcoholics. A third sister, Felicia R., reported to Tucson caseworkers that the boy should not be sent to live with Father because Father was living with Mother and Felicia understood Mother had a heroin addiction. The boy himself reported that he preferred remaining in foster care to living with Father. Father was not offered reunification services in the Arizona proceeding.

<sup>10</sup> At approximately this time, Adam's doctor became concerned about the shape of his head, which was slightly deformed, and about the possibility he was experiencing developmental delays. In June 2011, Adam received an occupational therapy and speech therapy referral and began attending weekly occupational therapy sessions. Reports from the therapists indicated he was not yet crawling by the age of one. In addition, he was unable to sit up for long periods or chew solid food and his speech was limited to "mama" and "papa."

<sup>11</sup> There is no evidence that Father ever took advantage of the enhanced visitation provided by the court.



He was attending Al-Anon meetings, but only once a week. He had not attended any of Adam's medical or therapy appointments. Father reported he no longer resided with Mother and was not in a relationship with her. He said he did not need her help caring for the child, but at the same time, did not understand why she should not be permitted to care for Adam. DCFS again recommended termination of reunification services for Father and recommended adoption by the foster parents as the permanent plan. The Tribe reported that it had been unable to locate a suitable family for Adam within the Tribe. Because Adam had bonded with his foster family with whom he had lived his entire life, the Tribe found the permanent plan of adoption by the foster family to be appropriate.

At the 12-month review hearing on December 5, 2011, the court found that Father had consistently and regularly visited Adam and made significant progress in resolving the problems that led to his removal from home and set an 18-month review hearing. The court specifically found that despite the missed tests, Father had submitted sufficient clean drug tests in a row and no longer needed to test. Father was instructed to continue to attend Al-Anon meetings once per week.

In March 2012, the caseworker reported that Father had secured a suitable apartment. She made an unannounced visit in February and did not see any evidence that Mother lived there.<sup>12</sup> However, during an unannounced visit in March, the shower was running when Father opened the door. Father insisted the person in the shower was not Mother, but a short time later, Mother came out of the bathroom. During this visit, the caseworker stressed that contact with Mother would pose safety concerns for Adam. Father stated he could not keep them apart. During this period, Father continued to regularly visit Adam, but did not inquire

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<sup>12</sup> Angel reported he had gone to Mother's last-known apartment and that she was no longer living there.

about his medical or developmental needs or attempt to attend any of his medical or therapy appointments. He did not provide the caseworker a plan for caring for Adam when he was at work. The caseworker expressed concern that he would be unable to properly care for Adam. The Tribe continued to support the recommendation to terminate reunification services for Father, terminate parental rights, and free Adam for adoption by the foster parents.

At the hearing on March 8, 2012, the court ordered an updated report on Father's compliance. In April 2012, the caseworker reported that Father had attended one of Adam's therapy sessions, but had not asked any questions about the treatment. He still had not provided the caseworker a plan for Adam's care when he was at work. The caseworker expressed the opinion that Father was not prepared to care for a child with Adam's special needs.<sup>13</sup> At the April 10, 18-month review hearing, Father testified that he had missed three visits when he was sick, when he did not have transportation funds, and when the foster mother took Adam on an outing. He stated he had attended one therapy session and would be willing to take Adam to his appointments at the Regional Center. He further stated he had made daycare arrangements for the boy. He had not, however, taken a parenting class for infants and had stopped going to Al-Anon meetings. The court terminated reunification services and set a hearing under section 366.26 to consider termination of parental rights. The court found that although Father "mostly did what was asked of him," he would be unable to protect the child from Mother. The

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<sup>13</sup> By this point, Adam was attending ten hours of therapy sessions per month. At 20 months, he was able to stand and walk for brief periods, but was still not eating independently and knew very few words. The foster mother had been instructed to work with him at home to accomplish certain tasks, such as learning simple words and learning to use utensils, and was expected to actively participate during therapy sessions.

court found “by a preponderance of the evidence,” that return would create a substantial risk of danger to the physical or emotional well-being of the child.

On September 17, 2012, Father filed a section 388 petition requesting the court to order Adam placed with him. He stated he had been participating in a new series of classes covering fatherhood, job readiness, healthy relationships and money management. The court ordered a hearing on the petition for October 2, the same day as the section 366.26 hearing. At the hearing, Father testified he was not in a relationship with Mother and would be able to protect him from her. The court denied the section 388 petition, finding insufficient changed circumstances to justify a change in the court’s prior orders. The court found by clear and convincing evidence that Adam was adoptable. The court further found that active efforts had been made to prevent or eliminate the breakup of the Indian family and stated on the record: “[B]eyond a reasonable doubt it would be detrimental to return [Adam] to either parent.” The minute order stated that “[r]eturn of [Adam] to either of the parents at this time would likely result in either severe emotional or severe physical harm to the [child].” The court ordered parental rights over Adam terminated. Father appealed.

## **DISCUSSION**

Section 1912(f) of title 25 United States Code provides: “No termination of parental rights may be ordered in [proceedings involving Indian children] in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” Father contends the order terminating parental rights must be reversed because the court failed to make the requisite finding under ICWA, and that the evidence was insufficient to establish beyond a reasonable

doubt that Adam would suffer serious emotional or physical damage if Father were given custody of him.<sup>14</sup>

The record reflects that the court found “beyond a reasonable doubt” that it would be “detrimental” to return Adam to either parent, and the minute order expressly stated that return of Adam to either parent would “likely result in either severe emotional or severe physical harm to the [child].” Although the court used the term “detrimental” rather than “serious emotional or physical damage” at the hearing, we find its statements on the record and in the minute order sufficient to establish that the court applied the proper standard. Moreover, there was extensive evidence that Adam would be subject to serious physical or emotional damage if returned to Father. Mother was a long-term drug user, whose drug abuse had led to the neglect of her two older children on multiple occasions in the past. The fact that she had drugs in her system when she gave birth to Adam, her refusals to drug

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<sup>14</sup> Respondent contends that Father has no standing to raise these issues, as he was never found to be Adam’s presumed father. The record reflects that at the detention hearing, Father submitted form JV-505 requesting the court to make a determination that he was Adam’s presumed father, but that the court failed to issue a ruling on that request at the hearing, although it found him to be a “declared” father. The rules impose a duty on the court to determine the parentage of every child who is the subject of a section 300 petition even without a formal request (Cal. Rules of Court, rule 5.635(a)), and when “a person appears at a hearing in [a] dependency matter . . . and requests a judgment of parentage on form JV-505,” the court is required to determine “[w]hether that person is the presumed parent of the child, if that finding is requested.” (*Id.*, subd. (h)(1).) Here, Father requested that he be found to be a presumed father in his first appearance. The court thereafter appointed counsel for Father and provided Father 18-months of reunification services, leaving open the possibility that Adam would be released to Father’s custody and permitting Father to make educational and medical decisions on his behalf. As only presumed fathers are entitled to appointed counsel, reunification services and custody (see, e.g., *In re Marcos G.* (2010) 182 Cal.App.4th 369, 383; *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596), the court’s actions may have inadvertently lulled Father into waiving his right to a timely determination of his status. On this ambiguous record, we will regard Father as Adam’s presumed father.

test during the reunification period, and her evasions of face-to-face meetings with the caseworker supported the inference that she was continuing to abuse drugs. Father continued to live with Mother throughout the reunification period, despite multiple warnings that he would be unable to obtain custody of Adam as long as did so. He overtly disagreed that leaving Adam in Mother's care would be inappropriate and admitted that he would be unable to keep Mother from being with Adam. When the caseworker visited Mother's apartment and the apartment Father claimed was his alone, Father and Mother were almost always together. Father had lost custody of older children after leaving them in the care of neglectful drug addicted and alcoholic mothers. Evidence that the nonoffending parent will not protect the child from the parent whose conduct has been expressly found to seriously endanger the child constitutes sufficient grounds for the court to find that return of the child to the nonoffending parent would constitute a risk of serious harm. (See, e.g., *In re Rico W.* (1986) 179 Cal.App.3d 1169, 1177-1178 [mother's attitude "convinced the court she did not appreciate the necessity of keeping the children apart from [abusive husband] and therefore could not be relied upon to live away from him if the children were returned to her care"]; *In re Vonda M.* (1987) 190 Cal.App.3d 753, 757 ["The more likely it is that the offending parent will have further contact with the nonoffending parent, the more the child's welfare is jeopardized by being placed unsupervised with the nonoffending parent."].) The court was not obliged to credit Father's last-minute claim that he would keep Mother separated from Adam and make alternate provisions for his care. The court's finding of detriment beyond a reasonable doubt if custody of Adam were transferred to Father was supported by substantial evidence.

Father contends that section 1912(f) of title 25 United States Code requires qualified expert witness testimony by an Indian or ICWA expert to support the

court’s findings, and points out that no such testimony was provided here. As explained in *In re M.B.* (2010) 182 Cal.App.4th 1496, the purpose of this provision is to permit the parent “to offer a cultural perspective on [his or her] conduct with his or her child to prevent the unwarranted interference with the parent-child relationship due to cultural bias.” (*Id.* at p. 1505.) Here, as in *In re M.B.*, Father “does not point to any cultural evidence that his behavior . . . would be interpreted differently in a cultural context . . . .” (*Ibid.*) Accordingly, expert testimony concerning cultural practices would not have been helpful.

### **DISPOSITION**

The order terminating parental rights is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.