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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re N.M. et al., Persons Coming Under the Juvenile Court Law.	B299875
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.M., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK12749)

APPEAL from orders of the Superior Court of Los Angeles County. Stephen C. Marpet, Juvenile Court Referee. Conditionally affirmed and remanded with directions.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

Mother S.M. appeals the juvenile court's order terminating parental rights to her children N.M. and A.C. We find no error in the court's order terminating parental rights but remand for further Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.) compliance.

FACTUAL AND PROCEDURAL BACKGROUND

We begin by quoting in part from our previous opinion affirming the trial court's order declaring the children to be dependents of the court, *In re A.M.* (Mar. 14, 2017, B272211) [nonpub. opn.]:

"On August 2, 2015, mother called a helpline and said she was suicidal. She was eight months pregnant, and her family was homeless. She said she was 'thinking of hurting [her]self and [her] unborn child' and planned to overdose on insulin that her doctor had prescribed for her diabetes. Mother threatened to take her life while in the presence of three-year-old N.M. [and an older child who is not part of this appeal].

"Law enforcement responded to the scene and took the children into protective custody. A social worker interviewed mother who said her boyfriend, J.C., [(who is A.C.'s father)] generally paid the rent but they had become homeless in the past week after they were forced to move out of the motel where they were staying. . . .

"Mother was diagnosed with depression and hospitalized temporarily at a psychiatric facility on a voluntary basis. She told the treating physician she had felt suicidal but denied having a plan to harm herself. She further said she would comply with her doctor's recommendations for treatment. Her physician recommended follow-up care at the outpatient clinic

and mother said she would follow up with the clinic upon discharge. The children were placed in foster care. . . .

"On August 5, 2015, the [Los Angeles County] Department of Children and Family Services (Department) filed a petition alleging that mother's mental and emotional problems rendered her incapable of providing regular care for [N.M. and the older child] under Welfare and Institutions Code section 300, subdivision (b). The petition further alleged that mother had 'expressed suicidal ideations' and failed to provide shelter for the children thereby placing the children at risk of serious physical harm. . . . [¶] . . . [¶]

"In August 2015, mother gave birth to A.C. On September 4, 2015, a social worker visited mother and the infant at their residence. The social worker observed that A.C. had a 'severe diaper rash that was bright red' along his inner thighs, around his legs and on his buttocks. He whimpered in pain when mother wiped the area.

"Mother stated she had been discharged from the hospital with an ointment for the diaper rash. Mother acknowledged that she had not taken A.C. to his follow-up doctor's appointment that day. The social worker helped mother to schedule another appointment, and instructed mother on caring for A.C.

"On September 11, 2015, when A.C. was two weeks old, he was removed from mother's care. The diaper rash had become worse and there were red spots on his face. J.C. said he had not noticed the rash even though he changed A.C.'s diaper every day. A public health nurse examined A.C. She opined that the medicated ointment had not been correctly applied, he was not 'being cared for hygienically,' and he was in need of urgent medical attention.

"A.C. was placed with paternal grandmother. She said the rash was bleeding and there were open sores. A.C. cried in pain whenever she changed his diaper or bathed him. It took four days of treatment with the prescribed ointment before his pain eased.

"On September 16, 2015, the Department filed a petition alleging two bases for jurisdiction under [Welfare and Institutions Code] section 300, subdivision (b) [as to A.C.]: (1) mother and J.C. had failed to obtain necessary medical treatment for A.C.'s rash thereby placing him at risk of serious physical harm, and (2) mother's mental and emotional problems endangered A.C.

"The adjudication and disposition hearing was continued multiple times. In November 2017, the Department submitted a report stating that mother was attentive to A.C. during visits. However, paternal grandmother had observed J.C. acting controlling toward mother during visits. Paternal grandmother said J.C. tended to lash out at mother, hover over her, and touch her constantly. N.M.'s foster mother also said that J.C. frequently called mother on the phone during visits, and mother had bruises on her arms and neck. Social workers noticed mother's bruising as well and observed her being fearful of and subservient toward J.C." (*In re A.M.*, *supra*, B272211, fns. omitted.)

On April 11, 2016, the court held the adjudication and disposition hearing. The court sustained the allegation that mother's mental and emotional problems endangered the children and ordered reunification services.

Mother and J.C. appealed, and on March 14, 2017, we affirmed the jurisdiction and disposition orders but remanded for

ICWA compliance. We found that in August 2015, "mother informed the court that her maternal great-grandmother, Nina R., was a member of the Cherokee tribe. She further wrote that her maternal cousin, Vanita H., would have more information on their Native American ancestry. She later said her great-great-grandfather was also a Cherokee member. The [juvenile] court found that ICWA did not apply." (*In re A.M.*, *supra*, B272211.) We concluded that the information provided by mother "was sufficient to trigger the obligation of the Department to provide notice under ICWA." (*Ibid.*) We therefore remand[ed] the case for the limited purpose of directing the juvenile court to order the Department to provide such notice . . . ." (*Ibid.*)

In the years since our opinion, the children have been placed with A.C.'s paternal grandmother (N.M., who has a different father, was initially placed in foster care, but was placed with paternal grandmother in September 2016 so the children could live together). Mother received 18 months of reunification services but her visits always remained monitored. The court declared paternal grandmother the children's legal guardian, but later, paternal grandmother asked to adopt them to provide more stability.

Mother filed petitions pursuant to Welfare and Institutions Code section 388, but they were denied for lack of new facts or changed circumstances. Mother had unresolved mental health issues, continued in domestic violence relationships, and did not have a close bond with the children although she visited with them weekly at Chuck E. Cheese's, with maternal grandfather monitoring the visits. The Department obtained a restraining order to protect a social worker whom mother had threatened;

J.C. testified that mother told him she would hire a gang member to throw acid on the social worker's face.

Mother regularly visited the children, but her visits were always monitored. While N.M. enjoyed visiting with mother, she told the Department that "She's not my mom." Instead, she considered paternal grandmother to be her parent. Both children called paternal grandmother "mom."

Paternal grandmother had an approved adoptive home study, and the children were well bonded to her, and thriving in her care. The children were excited to see paternal grandmother after visits with mother.

The Welfare and Institutions Code section 366.26 hearing was contested, and after receiving reports and hearing the testimony of many witnesses, including mother and paternal grandmother, the court terminated parental rights with a plan for paternal grandmother to adopt the children. The court found the beneficial parent-child exception to adoption did not apply, because mother's visits were "friendly, helpful, pleasant, fun, but nothing about being a parent."

DISCUSSION

1. The Beneficial Parent-child Relationship Exception

Once reunification services are terminated, " 'the focus shifts to the needs of the child for permanency and stability.' " (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) A hearing under Welfare and Institutions Code section 366.26 is held to design and implement a permanent plan for the child. At a section 366.26 hearing, the court must terminate parental rights and order the child placed for adoption if it determines, under the clear and convincing standard, that it is likely the child will be adopted. (§ 366.26, subd. (c)(1).)

" 'Adoption is the Legislature's first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.' " (*In re Celine R.*, *supra*, 31 Cal.4th at p. 53; see also Welf. & Inst. Code, § 366.26, subd. (c)(1).) A statutory exception to the general rule requiring the court to choose adoption exists where "[t]he court finds a *compelling reason* for determining that termination would be detrimental to the child" (§ 366.26, subd. (c)(1)(B), italics added) because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (*Id.*, subd. (c)(1)(B)(i); see *In re Casey D.* (1999) 70 Cal.App.4th 38, 50.)

In deciding whether the parent-child beneficial relationship exception applies, "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.* (1994) 27 Cal.App.4th 567, 575.) "If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*) The parent-child relationship must "promote[] 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." (*Ibid.*)

The parent-child relationship "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.) "[I]t is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*Id.* at p. 1350.)

"We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child. [Citations.]" (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.) We cannot find an abuse of discretion unless the juvenile court exceeded the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) " ' "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." ' " (*Ibid.*)

We find no error in the juvenile court's findings that the beneficial parent-child relationship exception does not apply to preclude adoption. While mother generally had good visits with her children, the children enjoyed visiting with her, and N.M. understood she is her birth mother, the children were strongly bonded to paternal grandmother, and called her "mom." After visits with mother, they were happy to return home to paternal grandmother. A.C. had lived with paternal grandmother for almost four years, and N.M. had lived with her for nearly three years, when the court terminated parental rights. Mother did not have a parental role in their lives, but was more like a loving playmate, and therefore, the court properly found that any benefit the children may derive from a continuing relationship with mother was outweighed by the benefits permanency would provide.

2. ICWA

In mother's earlier appeal, we affirmed the jurisdiction and disposition orders and remanded for the limited purpose of directing the juvenile court to order the Department to comply with ICWA. After the case was remanded, the juvenile court ordered the Department to send notices to the Eastern Band of Cherokee Indians, the United Keetowah Band of Cherokee Indians, and the Cherokee Nation of Oklahoma, and to interview mother to obtain any information mother may have to substantiate her claim of Indian ancestry.

On July 3, 2018, mother informed the Department that maternal grandmother, Lanette M., was the only person in the family with any information about their possible Cherokee heritage, and that she had passed away in May of that year. Mother did not know the names or contact information of any other relatives who might possess relevant information. The record is silent about whether the Department ever located or interviewed maternal cousin, Vanita H., or maternal grandfather.

The Department sent notices that included information about the children, mother, the children's fathers, maternal grandparents, and maternal great-grandmother, Nina. The notices were sent to the three Cherokee tribes, the Bureau of Indian Affairs, and the Secretary of the Interior. The Department received a response from the Eastern Band of Cherokee Indians that the children were not eligible for membership in the tribe. No other responses or return receipts appear in the appellate record.

County counsel provided copies of the ICWA notices to all counsel before the Welfare and Institutions Code section 366.26

hearing. When the court inquired if any party had any objection to the ICWA notices, mother's counsel said there was no objection or concern, and no other party asserted an objection. The court once again found ICWA did not apply.

Mother now contends the Department again failed to ask maternal cousin, Vanita H., and maternal grandfather about her belief she has Native American ancestry with the Cherokee tribe through her great great-grandfather. She claims, as a consequence, there was insufficient information in the notices the Department sent. She also claims that while the Eastern Band of Cherokee Indians responded that the children are not Indian Children, there is no response or return receipt in the record from the Bureau of Indian Affairs, the Secretary of the Interior, the Cherokee Nation, or the United Keetoowah Band of Cherokee Indians. The Department contends there was no error, or that any error was necessarily harmless, because mother stated that no other relatives had any information about her possible Indian ancestry.

Congress enacted ICWA " 'to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' " (*In re Isaiah W.* (2016) 1 Cal.5th 1, 8.) ICWA requires notice to Indian tribes "in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.' " (*In re Isaiah W.,* at p. 8.) The child's tribe must receive "notice of the pending proceedings and its right to intervene." (*In re H.B.* (2008) 161 Cal.App.4th 115, 120.)

"ICWA itself does not expressly impose any duty to inquire as to American Indian ancestry; nor do the controlling federal

regulations. . . . But ICWA provides that states may provide 'a higher standard of protection to the rights of the parent . . . of an Indian child than the rights provided under [ICWA]' . . . , and long-standing federal guidelines provide 'the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.' " (*In re H.B.*, *supra*, 161 Cal.App.4th at pp. 120-121, fn. & citations omitted.)

Under state law, Welfare and Institutions Code, former section 224.3[1] imposes on the juvenile court and the Department "an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child . . . ." (§ 224.2, subd. (a).) If there is "reason to believe that an Indian child is involved in a proceeding" further inquiry regarding the possible Indian status of the child "shall" be made, including "[i]nterviewing . . . extended family members" to obtain the necessary information to notice the tribes. (*Id.*, subd. (e)(1).) Similarly, the California Rules of Court impose on the court and Department "an affirmative and continuing duty to inquire whether a child is or may be an Indian child . . . ." (Cal. Rules of Court, rule 5.481(a).)

Notices to the tribes must contain sufficient information to allow the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership. (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705.) Welfare and

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[1] The substantive provisions of Welfare and Institutions Code, former section 224.3 have been renumbered as section 224.2, effective January 1, 2019, pursuant to Statutes 2018, chapter 833, sections 5 and 7.

Institutions Code, former section 224.2[2] requires the notices to include "[a]ll names known, and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents and great-grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information." (§ 224.3, subd. (a)(5)(C).)

Mother has not made any showing, in her briefs or otherwise, that either maternal cousin Vanita H. nor maternal grandfather actually has any useful information about the children's possible Indian ancestry. We do not even know if mother has any contact information for Vanita H. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431.) Nevertheless, to the extent that mother is acting as a surrogate for the tribe, to achieve the purpose of providing notice sufficient to allow the tribe to determine whether either child is an Indian child, we will remand with instructions that the Department comply with its duty to inquire of Vanita H. (if she can be located) and maternal grandfather, and if either has any additional information about Indian heritage, to comply with any resulting duty to provide notice to the tribes. (See, e.g., *In re N.G.* (2018) 27 Cal.App.5th 474, 484.)

We find mother has forfeited her additional claim of error that the record does not include a response or return receipt from the Bureau of Indian Affairs, the Secretary of the Interior, the

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[2] The substantive provisions of Welfare and Institutions Code, former section 224.2 have been renumbered as section 224.3, effective January 1, 2019, pursuant to Statutes 2018, chapter 833, sections 4 and 7.

Cherokee Nation, or the United Keetoowah Band of Cherokee Indians. (*In re N.M.* (2008) 161 Cal.App.4th 253, 269 [when after remand for ICWA compliance, parents did not object in the juvenile court that the ICWA notices were inadequate, "[t]he parties may not object to the adequacy of ICWA notice on appeal if they failed to raise a proper objection at the special hearing after a remand"]; *see also In re S.B.* (2009) 174 Cal.App.4th 808, 812–813 [where after remand for further ICWA notice, parents' counsel did not object to the adequacy of additional notices, any failure to file return receipts was harmless because the social worker certified she sent notice, and nothing in the record suggested the social worker did not perform her duty to send ICWA notice; Court of Appeal relied on the presumption in Evidence Code section 664 that official duty has been regularly performed in concluding "[i]n the absence of any contradictory evidence . . . that ICWA notice was given to all appropriate tribes"].) On remand, in demonstrating ICWA compliance as ordered in this opinion, the Department shall provide the juvenile court with any records the court may require to confirm the Department has complied with its notice obligations.

DISPOSITION

The order terminating parental rights to the children is conditionally affirmed. The matter is remanded to the juvenile court with directions to comply with the inquiry provisions of Welfare and Institutions Code section 224.2 and California Rules of Court, rule 5.481 by ordering the Department to make inquiry of maternal cousin Vanita H. and maternal grandfather; and if, as a result of that inquiry, there is additional reportable information indicating the children may be Indian children, to comply with the notice provisions of ICWA (Welf. & Inst. Code, § 224.3 & Cal. Rules of Court, rule 5.481). If the inquiry of cousin

Vanita H. and maternal grandfather reveals no additional reportable information nor any reason to believe the children are Indian children; or if mother, cousin Vanita H. or maternal grandfather do not respond promptly to the Department's diligent efforts to obtain such information, the order terminating parental rights will be reinstated. If it is determined further notice is required, the court must proceed accordingly.

The remittitur shall issue forthwith.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

WILEY, J.