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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

In re D.S., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

D.S.,

Defendant and Appellant.

E086334

(Super.Ct.No. DPSW2300309)

OPINION

APPEAL from the Superior Court of Riverside County. Kelly L. Hansen, Judge.

Affirmed.

William Hook, under appointment by the Court of Appeal, for Defendant and
Appellant.

Minh C. Tran, County Counsel, Jamila T. Purnell and Prabhath Shettigar, Deputy County Counsel for Plaintiff and Respondent

Defendant and appellant Drew S. (Father) appeals after the termination of his parental rights to D.S. (born September 2023), hereinafter Minor, at a Welfare and Institutions Code section 366.26¹ hearing. Minor was found to be an Indian child based on her maternal grandmother being a member of the Muscogee Creek Tribe in Oklahoma (Tribe). At the section 366.26 hearing, the parental rights of Father and S.P. (Mother) were terminated and Minor was freed for adoption by a maternal cousin.

On appeal, Father contends the juvenile court applied the wrong standard in terminating his parental rights at the section 366.26 hearing. Father also contends substantial evidence did not support the juvenile court's finding that "active efforts" had been made to provide remedial and rehabilitative programs to Mother designed to prevent the breakup of the Indian family. The findings and orders at the section 366.26 hearing must be vacated and a new hearing be conduct in accordance with the standards in ICWA. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

A. DETENTION

According to the detention report, Mother and Father came to the attention of the Riverside Department of Public Social Services (DPSS) when Minor and Mother tested positive for methamphetamines and cannabis at the time of Minor's birth in September

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

2023. Mother admitted using methamphetamines on September 24, 2023, which she claimed to have found in her car and was having a “bad day” so she used them. Mother stated she had a period of sobriety when she found out that she was pregnant but had relapsed. Mother did not have housing but planned to live with the maternal great-grandparents upon release from the hospital.² A social worker went to the hospital on September 27, 2023. Minor was not showing symptoms of withdrawal but it was still too early and Minor needed to remain at the hospital to be observed for any changes. Mother and Minor were to be released the following day.

Mother was interviewed at the hospital. She identified Father as Minor’s father. She admitted using methamphetamine during the first two or three months of her pregnancy. She admitted that she used cannabis throughout her pregnancy. Mother had used methamphetamine since she was 18 years old. Mother had been arrested for driving under the influence in 2017 and 2018.

Father was also interviewed. He insisted he had only recently found out about Mother’s drug use. They had only known each other for one year. He could not use drugs because of his employment. Father planned to live with Mother and Minor once they were able to secure housing. Father refused to take a urine drug test because it was a waste of his time and money for gas to get to the test. A nurse from the hospital advised DPSS that Mother and Father had wanted to leave the hospital with Minor but that they

² This court has incorporated the record from case number E085017. The clerk’s and reporter’s transcripts for case No. E085017 will be referred to as “CT” and “RT.” The clerk’s and reporter’s transcripts from the instant case will be referred to as “1CT,” and “1RT.”

were told it would be against the hospital's medical advice to leave. Later that day,

Father took off Minor's security bracelet and he, Mother and Minor left the hospital.

A protective custody warrant was obtained for Minor. Mother was contacted by a social worker and she was with Father. Father advised DPSS that Minor was safe with him and asked why he would give his baby over "to you fucks." Mother requested that the social worker send her the information on the court hearing. Father called back the social worker and apologized. He did not understand why he had to give up Minor to DPSS when he did nothing wrong. The social worker advised Father and Mother who both were on the phone call, that there were concerns for Minor, including Father leaving the hospital with Minor prior to her being ready for discharge. Father told the social worker he would not turn over Minor until the court hearing. Mother and Father finally agreed to turn over Minor to the Department and Minor was placed in protective custody in a foster home. Mother and Father both refused saliva drug tests at a visitation with Minor on October 2, 2023.

Mother reported to DPSS that she had Indian ancestry in the Tribe. On September 28, 2023, a social worker contacted the Tribe and they reported that Mother was not enrolled in the Tribe. Father denied any Indian ancestry.

On October 3, 2023, section 300 petitions were filed against Mother and Father for Minor. It was alleged under section 300, subdivision (b), that Mother had an ongoing substance abuse problem which impacted her ability to provide for and protect Minor including that at the time of Minor's birth, she and Minor tested positive for

amphetamine and cannabis and Mother admitted using drugs several days prior to Minor's birth; she was homeless and could not provide a stable home for Minor; and she had a criminal history including driving under the influence. It was alleged against Father that he abused controlled substances placing Minor at substantial risk of harm and had refused two drug tests; and (b-5) he had criminal history including a previous arrest for driving under the influence. It was alleged against both Father and Mother that they neglected the safety and health of Minor by removing Minor's hospital bracelet and leaving the hospital together against medical advice and without a car safety check.

The detention hearing was held on October 4, 2023. Mother's counsel reported that Mother had enrolled in substance abuse treatment and therapy. She had been approved for housing. Mother's counsel also represented that Mother was waiting for her membership card for the Tribe. She had family members who were willing to have Minor placed with them. Father's counsel indicated that there was no evidence he was using illicit drugs. He was randomly drug tested by his employer. He previously denied testing because the testing facility was far away from him. He was willing to test that day. Father insisted that Minor was fine when they left the hospital and there was no substantial risk to Minor. DPSS did not support return to Father's care at that time based on his behavior leading up to the hearing.

The juvenile court believed that Father put Minor at risk by leaving the hospital before it was authorized by Minor's doctors. The juvenile court required additional

ICWA inquiry based on Mother's claims of being part of the Tribe. The juvenile court found a prima facie case was established and Minor was detained.

Mother completed an ICWA-020 form stating that she was or may be a member of the Tribe. On November 8, 2023, DPSS filed a notice of child custody proceeding for an Indian child to inform the Bureau of Indian Affairs (BIA), the Tribe and the Tohono O'odham Nation. In that notice, DPSS stated that maternal grandmother verified she was a registered member of the Tribe and provided her Tribe roll number. Maternal great grandmother also provided she was a registered member of the Tribe and provided her Tribe roll number. Mother had submitted an application to become a member. Father's family mentioned having Indian ancestry in the Tohono O'odham Nation. Notice was received by the Tribe, BIA and the Tohono O'odham Nation of Arizona.

B. JURISDICTION/DISPOSITION REPORT AND HEARING

The jurisdiction/disposition report was filed on November 14, 2023. DPSS recommended that the matter be continued for 45 days pending paternity test results. DPSS was seeking a paternity test for Father because he did not sign an acknowledgment of paternity at the hospital when Minor was born. Minor remained in a confidential foster home. Father was to be ordered to submit to random drug testing, and Mother was to submit to a psychological evaluation. DPSS also discovered criminal history for Father which included a conviction for driving under the influence in 2018, and other arrests for driving under the influence in 2018 and 2019. In 2014, he was convicted of misdemeanor fighting and received probation.

Mother had moved in with Father after Minor was born. Mother had reported that during the prior two weeks, Father had locked her out of the house and she had to sleep in her car. Mother reported that Father was verbally and emotionally abusive to her and she decided to move out. Mother had not found stable housing. On October 7, 2023, Father submitted to a drug saliva test and tested positive for amphetamines and methamphetamines. He claimed it was because he drank an excessive amount of Nyquil. He declined to submit to a hair follicle test. He was a no show for drug tests from October 19, 2023 through November 1, 2023. He declined a saliva drug test prior to a visit with Minor on November 14, 2023.

Mother and Father both had missed scheduled visitations with Minor. They both were late to several visits. Mother had a positive test for methamphetamine and amphetamines, and another for THC. Mother had been referred to Family Preservation Court (FPC) but Mother had not responded to requests for her to complete the intake. A.C. (maternal cousin) wanted to be considered for placement of Minor. A home evaluation was being completed.

The jurisdiction/disposition hearing was continued at a hearing on November 20, 2023. Father was ordered to submit to a paternity test and an on-demand drug testing.

On December 4, 2023, DPSS submitted further ICWA information. The Tohono O'odham Nation had responded that Father's family was not part of their tribe. DPSS had reached out to the Tribe on November 8, December 11 and December 20, 2023 regarding Mother's membership but had received no response.

DPSS filed an addendum report. DPSS recommended that the juvenile court find the allegations in the section 300 petition true and that ICWA may apply. It should order that Father submit to random drug testing near his home; Father should be named the presumed father; and Father and Mother should both receive reunification services. Minor had been placed with maternal cousin on September 29, 2023. Mother had enrolled in FPC. Mother had received a psychological examination. Mother expressed that she intended to stay in a relationship with Father. Mother had a history of severe alcohol abuse when she was younger. She had previously completed a substance abuse treatment program for alcohol. The examiner recommended she remain in a program to help with her substance abuse and she should do random drug testing. She also needed counseling regarding her and Father based on conflicts between them if she wanted to stay with him. Mother had a negative drug test on December 13, 2023. Mother arrived at visitation with Minor on December 8, 2023, and appeared be under the influence. She tested positive for amphetamines and methamphetamine. Several visits between Mother and Minor had to be cancelled due to Mother failing to confirm visits or cancelling.

Father missed several on-demand drug tests. Paternity testing showed that he was the biological father of Minor. Father was willing to participate in services if they could be scheduled on the weekends. He also felt that Minor should be placed with him based on him doing nothing wrong and he denied any substance abuse. Father had not had a visit with Minor for almost two months.

The jurisdiction/disposition hearing was set contested. Notice of the hearing was sent to the Tribe. Mother had her membership card for the Tribe issued on November 16, 2023. The Tribe sent notice to DPSS that Minor would be considered an Indian child and the Tribe was considering what action to take in the matter.

DPSS filed an addendum report. It continued to recommend that Minor remain placed in the home of maternal cousin and that Mother and Father both receive reunification services. It further recommended that the juvenile court find that ICWA applies to Minor. DPSS asked that the matter be continued for 30 days for the Department to obtain the Indian expert declaration. The paternal grandparents were to be assessed for placement, and if Father lived with paternal grandparents, Minor may be placed with him on family maintenance.

DPSS had been in contact with the Tribe. Placement with maternal cousin was considered ICWA compliant. Further, a representative from the Tribe would not be present at the jurisdiction/disposition hearing. The Tribe would rely on DPSS to provide updates. DPSS was working to get Minor registered with the Tribe. Mother had been inconsistent in attending her services through FPC. Mother had missed several drug tests and tested positive for methamphetamine on January 12, 16 and 25, 2024. On January 29, 2024, the Tribe sent a referral list for their out-of-state liaison for tribal members to obtain resources. Mother was sent an email with the contact information for the liaison to assist with resources. Father had several negative saliva tests. He insisted he did not want to submit to a hair follicle test and did not submit to urine testing because he was

too busy. He had missed five on-demand tests. Father had not started any services. Father reported not being able to afford counseling. Father moved in with paternal grandparents and was still seeing Mother. Mother had missed several visits during the reporting period due to sickness. Father had been visiting with Minor.

Minor was thriving in the care of maternal cousin. DPSS did not recommend moving Minor to paternal grandparents as they could not control Father's actions and keep Mother from Minor. Further, placement of Minor with Father on family maintenance was not appropriate as he had not participated in any services.

On February 5, 2024, the jurisdiction/disposition hearing was continued in order for an ICWA declaration to be filed. Educational rights were transferred to maternal cousin so Minor could be assessed for services. Maternal cousin provided additional information regarding Minor. Maternal cousin was committed to teaching Minor about her Indian heritage. Maternal cousin was educating herself on the Tribe's culture.

DPSS filed another addendum report on March 15, 2024 to include a declaration from an ICWA expert. Mother had stopped participating in FPC. Mother did not communicate with DPSS most of the reporting period. DPSS sent a text to Mother encouraging her to reach out to the Tribe for additional resources or referrals but Mother did not respond. Father had missed drug tests and not started any services. He had two positive saliva drug tests for methamphetamine during the reporting period. Minor was evaluated for Inland Regional Center services. There were concerns about Minor's stiffness, vomiting and some development delays.

DPSS sent all reports to the intake coordinator for the Tribe. An email was sent on February 21, 2024, seeking any input from the Tribe on the family's case plan, services requested or current requests. No response was received. Mother had missed all of her visits with Minor. Father attended some visits with Minor but brought no provisions for her care to the visits.

The declaration from the ICWA expert—Vevila Blossoming Bear, MSW—was submitted with the addendum report. The expert had reviewed all of the DPSS reports. She provided a history of the Tribe and removal of children from the Tribe. In the Tribe, extended family members helped to raise children and impart knowledge of the Tribe to the children. Participation in ceremonial and other community events were important for the development of children. Bear reviewed the facts of the instant dependency case.

Bear noted that an Indian culturally appropriate psychologist was not sought out to perform the psychological evaluation on Mother. Bear also noted that the FPC did not appear to be an Indian service and did not appear to connect Mother with culturally responsive treatment services. Mother had reported to Bear she had enrolled herself in a culturally appropriate outpatient treatment with the San Manuel Behavioral Health Center. DPSS had not shown its efforts to find Mother housing. The Tribe did not have assistance available for the Mother.

Mother had contacted an out-of-state liaison for obtaining resources but was advised that there were not services for individuals living out of state. Bear reviewed the Tribe's website on March 1, 2024, and found that they "do not have services available for

tribal members outside of their jurisdiction.” Mother was interviewed by Bear. Mother admitted she made a mistake using drugs prior to her labor. She wanted Minor to be with her family and she wanted to stay in counseling. She admitted she used drugs a few times after Minor’s birth. Mother disclosed she had never been offered culturally appropriate services by DPSS and had to seek out an Indian provider on her own. Mother had spoken with the out-of-state liaison and there were not any services that were available to her in California. Mother claimed she had completed a parenting class but it was not specifically an Indian parenting class. Mother never felt that DPSS had adequately explained to her about services. Mother was open to attending inpatient substance abuse treatment. Mother wanted to live with Father. She denied any domestic violence between her and Father. She blamed missed visits with Minor on poor communication from DPSS. Mother felt that she and Father could care for Minor.

Bear tried to contact someone from the Tribe for several weeks. She spoke with several persons but none of them were able to help her. She was still awaiting a call from the Tribe as to their position on Minor.

Father was also interviewed. Father insisted he did not remove Minor from the hospital without permission. He had not been contacted by DPSS in order for a home assessment to be completed at paternal grandparent’s home and he had not been assessed for family maintenance. He was unable to drug test and make visits with Minor because of his work schedule. He believed the positive drug tests were false positives. Father had a good relationship with Mother.

Maternal cousin was also interviewed. She was getting Minor the care she needed. They were bonded. Maternal cousin was willing to continue the relationship with Mother as long as it was safe.

Maternal great-grandmother was interviewed. She felt that Mother could care for Minor. She was unable to take Minor as she lived in senior housing. Her parents had been placed in Indian boarding schools. She indicated that her parents did not teach her about the Indian traditions. Paternal grandmother was interviewed and felt that Father was capable of taking care of Minor. She complained that the assigned social worker was not helping the family. The family was able to help Father care for Minor. Mother could live with them if she did not use controlled substances.

The social worker assigned to the case was also interviewed. She had treated the case as an ICWA case since the beginning of the case. Bear provided to the social worker a resource from the California Judicial Council that explained how ICWA cases were handled differently. There were standard differences, such as “serious risk” of harm to an Indian child rather than “substantial risk.” Further, it must be shown that there were “active efforts” by DPSS to keep the family together. Bear listed the required active efforts, which included trying to find a culturally appropriate parenting classes, behavioral health services, and substance abuse treatment, in addition to helping to secure tribal membership for the child. The social worker stated that Mother had been provided with the number for the out-of-state liaison for the Tribe. Father had been provided with several referrals for services.

In her assessment, Bear concluded that a serious risk of harm to Minor existed at one time based on Mother’s drug use which could have physically harmed Minor. It could have further impacts as Minor got older. However, the evidence provided by DPSS was not sufficient “to suggest a serious risk” to Minor in regard to both parents. ICWA did not allow for removal of an Indian child for reasons of poverty, homelessness and substance abuse alone. Bear noted that Mother and Father leaving the hospital early against medical advice created “possible serious risk.” However, it appeared that fear of losing Minor contributed to their actions. It was reasonable for DPSS to detain Minor based on the actions by the parents at the beginning of the case.

There was still moderate or substantial risk if Minor was returned to Mother’s care based on her continued methamphetamine use. Mother should continue to work on her sobriety. Bear recommended that Minor be placed with Father and his family. DPSS had determined that Father’s low engagement in services and positive drug tests posed a “substantial” risk of harm to Minor. However, for an Indian child, DPSS had to find “serious” risk. Minor would not be at risk of serious harm if placed with Father and paternal grandparents. DPSS should complete a home assessment and have Minor engage with Father and his family. Father should continue to submit to drug tests but the risk was mitigated by the fact the paternal grandparents could adequately care for Minor. Further, if Father was required to do additional services, they should be free and not conflict with his work. Mother should be allowed to visit with Minor in Father’s home to determine how they parent together. DPSS also should consider culturally appropriate

services to Mother, and Father should be given the opportunity for these services if he wanted them. If DPSS could not find local culturally appropriate services, efforts to locate them or make other accommodations for the family should be documented.

An amended section 300 petition was filed on March 20, 2024. It removed the allegation in the original petition that Father had removed Minor's hospital bracelet at the time they left the hospital. On March 20, 2024, Father submitted on the amended petition and waived his rights to a hearing. Mother submitted a letter from Behavioral Health Services, Riverside—San Bernardino County Indian Health Inc. (Indian Health). Mother began receiving services through Indian Health on March 18, 2024, and agreed to participate in weekly sessions and submit to drug testing.

The jurisdiction/disposition hearing was heard on March 20, 2024. Mother and Father were both present. DPSS asked that the juvenile court find the allegations in the amended petition true and offer family reunification services to Mother and Father. It recommended that the juvenile court find that ICWA applies and that Minor was a member of the Tribe. Mother's counsel submitted the letter from Indian Health regarding Mother participating in services. Mother denied the allegations in the amended petition.

The juvenile court found that ICWA did apply. The juvenile court found that there had been "affirmative, active, and timely efforts to provide remedial services which are designed to prevent the breakup of this Indian family." In addition, efforts were made consistent with the prevailing social and cultural conditions. Minor was placed in a home that was in accordance with placement preferences under section 361.13 as she had been

placed with a maternal relative. The juvenile court found by a preponderance of the evidence that the allegations in the amended petition were true. Mother and Father were given reunification services.

C. **SIX-MONTH REVIEW HEARING**

The six-month review report was submitted on August 14, 2024. It was recommended that reunification services for both parents be terminated and a section 366.26 hearing be scheduled with a permanent plan of adoption. Maternal cousin was willing to adopt Minor. Minor had been placed with maternal cousin since November 20, 2023. Maternal cousin and her husband were named de facto parents of Minor.

DPSS detailed its active efforts to provide culturally appropriate services to Mother. In June and July 2024, DPSS sent several emails to a representative of the Tribe sharing what efforts had been made to have Mother participate in services. It also detailed the efforts to expose Minor to the Tribe's customs including maternal cousin reading her books about the Tribe and teaching her the Tribe's alphabet. DPSS also inquired if there were any sister tribes that may be available for Minor. There was no response. DPSS had served all reports on the Tribe.

During the review period, Mother had filed two requests for restraining orders against Father. She claimed he was harassing her and broke the windshield on her car. Copies of threatening text messages from Father to Mother were attached to the report. A three-year restraining order keeping Father from contacting Mother or harassing her was

granted on August 8, 2024. Mother was renting a room in Riverside and was unemployed. Minor was receiving occupational services through the Inland Regional Center and was hitting all of her milestones.

Mother reported in April 2024 that she was participating in counseling through Indian Health but no progress had been reported. DPSS had difficulty contacting Mother during the reporting period. Mother had not completed a parenting class. Mother had initially been involved in FPC but had several absences. It was recommended that Mother enter an in-patient substance abuse program.

On March 18, 2024, Mother enrolled in a substance use disorder program through Indian Health. Mother also enrolled in group therapy entitled Celebrating Families: Native American Project Strengthening the Circle, through Indian Health. On July 18, 2024, and August 26, 2024, Indian Health reported that Mother was attending her classes and testing negative for all substances. However, it was reported she would discuss Father and their relationship during the sessions, and was not focusing on her sobriety. It was reported that Mother appeared to be “obsessed” with Father. Mother had several negative drug tests. Mother only showed up for five visits with Minor.

Father submitted to a psychological evaluation and was found to suffer from unspecified personality disorder, turbulent type with narcissistic features, amphetamine use disorder and history of alcohol abuse. It was recommended that Father complete parenting classes and comply with all drug testing. Father insisted he had enrolled in parenting and anger classes but had not provided confirmation. He also had not provided

confirmation of entering into a substance abuse treatment. Father had positive drug saliva tests during the review period and had failed to show for urine and hair follicle tests. Father missed numerous visits with Minor.

DPSS reported that Mother and Father had made little to no effort to participate in services or address their substance abuse. The permanent plan was adoption by maternal cousin. Maternal cousin reported that Minor was thriving in her home. Maternal cousin was exposing her to the history of the Tribe through videos and books. The review hearing was set contested on October 22, 2024.

DPSS submitted another addendum report for the contested six-month review hearing. On September 13, 2024, Minor had been diagnosed with mild cerebral palsy. Minor would be evaluated for occupational therapy. Mother tested positive for methamphetamine prior to a visit with Minor and was no show for a urine test later that day. Indian Health reported the Mother had missed drug tests. Mother had missed visits. Father also had tested positive for methamphetamine prior to visits with Minor. The six month review hearing was continued to November 4, 2024. Mother and Father were both to submit to hair follicle testing.

A third addendum report was filed on October 29, 2024. DPSS still recommended that reunification services be terminated. Mother arrived late to a visit and it had to be cancelled. Mother and Father both did not submit to hair follicle testing. Father insisted that he was not required to do a hair follicle test. At Father's visit on October 23, 2024, Father was arrested by deputies from the Riverside County Sheriff's office based on a

domestic violence incident between Mother and Father earlier in the day. Father had been charged with felony infliction of corporal injury on a spouse. Mother reported that her and Father got into an argument at a hotel and he slapped her, at which time she fell. She had discoloration around her right eye. Father stated that Mother had come to his hotel room and he tried to get her to leave. They engaged in sexual intercourse. Father admitted they had a verbal argument but denied that he hit her. He insisted Mother slipped on a towel and fell. Mother tested positive for methamphetamine prior to a visit. DPSS stated that the parents' relationship, behaviors and lifestyle presented a clear danger to Minor's safety and well being.

The six-month review hearing was finally conducted on November 4, 2024. Mother and Father both requested that reunification services be continued. Mother presented the stipulated testimony of a counselor at Indian Health. Mother had a negative urinalysis test on September 23, 2024. The juvenile court adopted the recommendations from DPSS. It found that proper notice had been given to the Tribe for it to intervene. Placement of Minor was necessary and followed Indian guidelines.

The juvenile court reviewed the actions of Mother and Father, and found they were not making any progress towards alleviating or mitigating the causes which necessitated placement. It found by clear and convincing evidence that Mother and Father had failed to participate regularly and make substantive progress in their court-ordered treatment plan. The reunification services for Mother and Father were

terminated. The matter was set for a section 366.26 hearing to terminate parental rights.

Mother filed notice of filing a writ petition but did not file one.

D. SECTION 366.26 REPORT AND HEARING

Notice of the section 366.26 hearing was sent to the Tribe. The Tribe sent a response to DPSS that it did not intend to intervene in the matter despite Minor being an Indian child.

DPSS also submitted an addendum report regarding the assessment of maternal cousin and her husband as the adoptive parents. In that report, DPSS stated that a social worker had spoken with a representative from the Tribe on January 27, 2025. The representative informed the social worker that the Tribe would not be intervening in the case. Further attempts to contact someone at the Tribe on January 15 and 18, 2025 were unsuccessful.

DPSS filed their section 366.26 report on February 13, 2025. DPSS recommended that parental rights be terminated and that Minor be freed for adoption by maternal cousin. DPSS detailed the active efforts it made in regard to the Tribe since the six-month review hearing including informing the Tribe that it recommended termination of parental rights and an update on Mother and Minor. A social worker was finally able to speak with a representative on January 27, 2025. She informed the social worker that the Tribe did not intervene in out-of-state cases as they did not have the resources or personnel to handle the cases. The representative agreed to send DPSS a letter confirming they would not intervene. The letter was attached to the section 366.26 report

and it confirmed that the Tribe, although it considered Minor an Indian child, did not intend to intervene. Bear, the tribal expert witness, provided a second declaration. Bear outlined the events in the case since her last report. She reviewed the services provided for both Mother and Father. Bear was unable to contact Mother or Father to be interviewed for the report. Bear spoke with a representative at the Tribe who advised her that they did not intervene in out-of-state cases and would not be contributing any information to the case. Bear was also informed that termination of parental rights would not interfere with Minor's tribal enrollment.

Bear concluded that Minor would be at "serious physical and [] emotional risk" if placed back with Mother. Mother entered a culturally appropriate counseling program but did not complete it. Mother had failed to visit with Minor. Bear also concluded that Minor would be at "serious physical and/or emotional risk of harm" if placed back with Father. Father had provided DPSS with no information as to his progress in services. Father had been arrested for domestic violence. She noted that a representative from the Tribe was not present at the case planning meeting at which DPSS had decided that parental rights should be terminated and Minor freed for adoption by maternal cousin. However, Bear noted that the Tribe had indicated that it was not going to intervene as it was an out-of-state case. DPSS also submitted the necessary documents in order for Minor to be registered with the Tribe. Minor was placed in a home that was in accordance with the placement preference as required by section 361.31.

Minor had been receiving therapy and was improving her strength. She was meeting her developmental milestones. Mother had missed all her visits with Minor during the reporting period. Father had attended visits.

An addendum report was filed on February 25, 2025. Additional information was provided by Bear. Mother had contacted Bear and she was interviewed. Mother reported receiving tribal services such as counseling and domestic violence services. Mother stated that she had been “encouraged” to do culturally appropriate services and she had participated. She blamed Father for losing Minor and all her problems. Mother claimed she had to relocate several times to get away from Father. Mother sought additional reunification services or that a guardianship be considered. Bear concluded that the issues of domestic violence put Minor at risk of serious physical and/or emotional harm, and she should not be placed with Mother. The section 366.26 hearing was continued.

The section 366.26 hearing was held on April 17, 2025. Father was not present. DPSS submitted on its reports including the expert declaration from Bear. Mother submitted on the evidence. Father’s counsel requested a continuance for Father to be present but the request was denied. Father’s counsel had no objection to the evidence, no affirmative evidence and objected to the termination of parental rights.

The juvenile court stated it had reviewed the evidence, including the letter from the Tribe indicating it was not going to intervene and the expert declaration from Bear. The juvenile court concluded that based on the findings at the hearing on November 4, 2024, reasonable services had been offered to the parents to overcome the problems

which led to the initial removal. It found, “The Court finds by clear and convincing evidence that termination of the parental rights would not be detrimental to the child in that none of the exceptions contained in 366.26 (c) are applicable in this case.” Termination of parental rights and adoption was in the best interests of Minor. Father filed a notice of appeal from the termination of parental rights.

DISCUSSION

A. TERMINATION OF PARENTAL RIGHTS UNDER ICWA

Father contends the juvenile court applied the wrong standard of proof in terminating parental rights by relying on a “preponderance of the evidence” finding of detriment instead of “beyond a reasonable doubt” standard required by the federal ICWA statute and section 366.26, subdivision (c)(2)(B)(ii).

“ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes and families by establishing minimum federal standards in juvenile dependency cases. [Citations.] (*In re M.B.* (2010) 182 Cal.App.4th 1496, 1502 (*M.B.*).) “To accomplish these goals the ICWA grants a tribe exclusive jurisdiction over child custody proceedings involving children residing on the reservation. Concerning certain involuntary actions involving children living off the reservation, a tribe has the right to intervene in those actions or a qualified right to transfer them to its jurisdiction.” (*In re Riva M.* (1991) 235 Cal.App.3d 403, 410 (*Riva M.*)).

Section 366.26, subdivision (c)(2)(B)(ii), provides that the juvenile court in terminating parental rights when an Indian child is involved shall not terminate parental rights if “[t]he court does not make a determination at the hearing terminating parental rights, supported by evidence beyond a reasonable doubt, including testimony of one or more ‘qualified expert witnesses’ as defined in section 224.26, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.” There is a parallel provision in ICWA. “No termination of parental rights may be ordered in such proceeding 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.” (25 U.S.C. § 1912(f).) As such, “Before the court can terminate parental rights [when an Indian child is involved] it must make a finding, ‘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.’” [Citations.] This finding is commonly referred to as the ICWA detriment finding. [Citation.]” (*M.B., supra*, 182 Cal.App.4th at p. 1502.)

In the instant case, the Tribe chose not to intervene, and the juvenile court determined at the section 366.26 hearing that it would be detrimental to return Minor to the care of parents. The juvenile court concluded that based on the findings at the hearing on November 4, 2024, reasonable services had been offered to the parents to

overcome the problems which led to the initial removal. The juvenile court made the following finding in terminating parental rights: “The Court finds by clear and convincing evidence that termination of the parental rights would not be detrimental to the child in that none of the exceptions contained in 366.26 (c) are applicable in this case.”³ Termination of parental rights and adoption was in the best interests of Minor. As such, the juvenile court did not make an express finding that it was applying the beyond a reasonable doubt standard in section 366.26, subdivision (c)(2)(B)(ii).

We initially address the argument by Respondent that Father has forfeited any objection to the standard employed by the juvenile court by failing to object in the juvenile court. Respondent insists that despite there being no waiver of the notice provisions under ICWA, there have been cases in which the application of ICWA has been found to be waived based on the failure to object in the juvenile court.

Respondent primarily relies on *Riva M., supra*, 235 Cal.App.3d 403. In *Riva M.*, which concerned the federal ICWA statute only, the Court of Appeal concluded that a parent of an Indian child in a dependency proceeding had forfeited the same argument Father raises here—the juvenile court failed to apply the beyond a reasonable doubt standard—by not asserting it in the juvenile court. (*Id.* at pp. 411-412 [“We can only presume [father] did not care whether the ICWA standards were applied, or was attempting to sandbag the issue for appeal. Neither of those reasons merits our

³ We note that Father states that the juvenile court relied on the preponderance of the evidence standard in its detriment finding. However, the record supports that it applied a clear and convincing standard.

consideration of an issue not raised in the trial court.”].) In the reply brief, Father argues that after *Riva M.*, which only involved the federal statute, California codified its own version of ICWA. Relevant here, California Rules of Court, rule 5.484 (a)(2) effective 2008 (renumbered as rule 5.485 effective January 1, 2020), provides that a parent in a child custody proceeding involving an Indian child “may waive the requirement of producing evidence of the likelihood of serious damage” by executing a written stipulation or failing to object, but “only if the court is satisfied that the person . . . has been fully advised of the requirements of the Indian Child Welfare Act and has knowingly, intelligently, and voluntarily waived them.” Father contends that since Mother and Father did not knowingly and intelligently waive their rights under ICWA, they could not have forfeited the claim on appeal that the juvenile court employed the wrong standard at the section 366.26 hearing to terminate parental rights. We need not decide whether waiver is applicable here as any error was harmless. There is no “reasonable probability the outcome would have differed in the absence of the procedural irregularity.” (*Riva M.*, *supra*, 235 Cal.App.3d at pp. 412-413.)

Father claims the results would have differed if the juvenile court applied the beyond a reasonable doubt standard. He insists that Mother engaged in some services and demonstrated “some commitment to rehabilitation.” Her partial participation and progress could have created a reasonable doubt as to whether Minor’s continued custody with her would likely result in serious emotional or physical damage, and therefore, it is reasonably probable the court could have reached a different result.

It is true that Mother started some services, including with Indian Health, but never completed any of her services. Mother continued to have positive drugs tests throughout the proceedings. She was involved in a domestic violence incident in which she went to Father's hotel despite her having obtained a restraining order against him. Father had been arrested for domestic violence and faced felony charges based on this incident. Neither Mother nor Father were consistent in visitation, and many times were late or tested positive for methamphetamine prior to visit. Father had completed no services. Bear, the ICWA expert, concluded that the issues of domestic violence put Minor at serious risk of physical and/or emotional harm, and she should not be placed with Mother. She also confirmed with the Tribe that the termination of parental rights would not impact Minor's enrollment in the Tribe. Mother and Father had a tumultuous relationship, and were inconsistent in drug testing and visitation. There was substantial evidence that the efforts by Mother and Father to reunify with Minor failed and that placing Minor back with Mother would be seriously "detrimental, physically and mentally." (*Riva M., supra*, 235 Cal.App.3d at p. 413.)

Father relies on *In re Frank R.* (2011) 192 Cal.App.4th 532, in which the Court of Appeal reversed the order terminating parental rights of the father, finding that the juvenile court never made a finding of detriment by clear and convincing evidence for the noncustodial father. The appellate court found that "although there may be valid bases for the juvenile court to make a finding of father's unfitness, the court never made that finding, . . . [w]e may not make that finding here or infer such a finding[,] as father

never had an opportunity to respond to the charges against him. (*Id.* at p. 539.) Here, both Mother and Father were custodial parents, and the juvenile court made a finding of detriment by clear and convincing evidence. Father and Mother had an opportunity to respond to the charges and were aware of the evidence against them which they never disputed. This case is unlike *Frank R.*

The evidence supports the requisite detriment findings beyond a reasonable doubt. Although the juvenile court did not state it was considering termination of the parental rights under the guidelines of 366.26, subdivision (c)(2)(B)(ii), the evidence supports beyond a reasonable doubt that return to Mother would cause serious physical or emotional harm to Minor. There is no reasonable probability that the results of the section 366.26 hearing would have differed if the beyond a reasonable doubt standard was applied.

B. ACTIVE EFFORTS

Father also insists that substantial evidence does not support the juvenile court's finding that DPSS had made active efforts to provide culturally appropriate services to prevent the breakup of the Indian family.⁴

⁴ DPSS also contends, relying on *Riva M.*, that Father waived this issue by failing to object below to the evidence presented by DPSS that it had made active efforts. Father relies on California Rules of Court, rule 5.485 to support his claim that the issue has not been forfeited. Since we find that substantial evidence supported the juvenile court's findings, we need not address forfeiture.

Section 361.7 provides, “Notwithstanding Section 361.5, a party seeking an involuntary foster care placement of, or termination of parental rights over, an Indian child shall provide evidence to the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. The active efforts shall be documented in detail in the record.” Section 316.7, subdivision (b) provides, “What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child’s tribe. Active efforts shall utilize the available resources of the Indian child’s extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.”

Active efforts means “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with their family. If an agency is involved in an Indian child custody proceeding, active efforts shall involve assisting the parent, parents, or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts shall be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child’s tribe and shall be conducted in partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and tribe. . . . Active efforts shall be tailored to the facts and circumstances of the case” (§ 224.1, subd. (f).) Such active efforts may include, but

are not limited to, identifying appropriate services, notifying representatives of the Indian child's tribe to participate in providing services and support to the family, consulting with extended family members regarding possible placement, and monitoring progress and participation in services. (§ 224.1, subd. (f)(2), (f)(3), (f)(4), (f)(9).)

We review the juvenile court's active efforts factual findings for substantial evidence. (*C.F. v. Superior Court* (2014) 230 Cal.App.4th 227, 239.) “ ‘ ‘ ‘ [W]e review the record in a light most favorable to the judgment and must uphold the trial court's findings unless it can be said that no rational factfinder could reach the same conclusion.’ ” [Citation.]” (*Ibid.*)

Here, the juvenile court found at the six-month review hearing and the section 366.26 hearing that DPSS made reasonable efforts to facilitate reunification of the family and eliminate the circumstances which necessitated Minor's detention. The juvenile court's findings are supported by the record. DPSS detailed its efforts to provide Mother with services and culturally appropriate services. Mother was given referrals for counseling, parenting classes and was sent to FPC. Mother was provided an out-of-state liaison for the Tribe for services and told her to reach out to the Tribe. DPSS continuously contacted the Tribe seeking to have its input in the case, but numerous times received no response. DPSS finally received information from the Tribe that it did not provide services to out-of-state Tribe members and did not intervene in out-of-state cases. Bear, the ICWA expert, confirmed that the Tribe would not provide services to Mother and that it was not going to intervene in the case. Bear did note that a Tribe member was

not at the case plan meeting when it was decided to terminate parental rights, but also noted that the Tribe had declined to intervene.

Based on the circumstances in this case, the juvenile court could reasonably conclude that DPSS made reasonable efforts to get Mother services by referring her to FPC and other services, and it attempted to provide her with culturally appropriate services but the Tribe was not able to provide such services. It should be noted that Mother was able to obtain services through Indian Health and San Manuel health but failed to fully participate in these services. In fact, she failed to participate in all services that were provided to her. Also, DPSS submitted all of the necessary paperwork to have Minor enrolled as a Tribe member making every effort to maintain Minor's tribal connection.

Father insists that the efforts by DPSS were insufficient in that it did not take "affirmative, active, thorough, and timely steps that accounted for the social and cultural values of [Minor]'s tribe or utilized tribal and extended family resources as required by that section." Father does not provide how DPSS could accomplish this goal when the Tribe advised that it would not intervene in the out-of-state case and could not provide services to Mother. Mother was already using the services of Indian Health. Based on the record, DPSS made every effort to engage the Tribe in the case, but the Tribe did not have the resources to assist Mother. It provided all available services to her.

Based on the foregoing, the record supports the juvenile court's finding that DPSS made the necessary active efforts and properly terminated the parental rights of Father and Mother.

DISPOSITION

The order terminating parental rights of Mother and Father is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER

J.

We concur:

McKINSTRE

Acting P. J.

RAPHAEL

J.