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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re E.J. et al., Persons Coming Under the
Juvenile Court Law.

HUMBOLDT COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

R.J.,

Defendant and Appellant.

A135157

(Humboldt County
Super. Ct. Nos. JV1001691, JV1001692)

Mother appeals from an order terminating her parental rights and selecting adoption as the permanent plan for her two children. She contends the court erred in finding that the parent-child exception to adoption did not apply. She also argues that the trial court failed to ensure compliance with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We find no error and shall affirm.

Factual and Procedural Background

On November 15, 2010, the Humboldt County Department of Health and Human Services (department) filed a petition alleging the children, then ages nine months and two years, came within the provisions of Welfare and Institutions Code section 300, subdivision (b) [failure to protect] and (g) [no provisions for support].¹ The minors were

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

detained and placed in the home of a family friend. On January 10, 2011, mother submitted to jurisdiction and the court sustained the allegations in the petition that mother and father had failed to provide the older child with adequate medical care, that father had been physically abusive towards mother in the presence of the children, and that the father knew or should have known of mother's mental health issues and failed to protect the children. At the dispositional hearing, the court continued the children's existing placement and ordered reunification services for mother. At the six-month review hearing, the court terminated reunification services and set a permanency planning hearing. This court previously reviewed and denied on the merits mother's writ petition challenging the termination of services. (*L.J. v. Superior Court* (Mar. 14, 2012) A134132, A134133 [nonpub. opn.])

In advance of the section 366.26 hearing, the state Department of Social Services filed a preliminary adoption assessment recommending the children's adoption by the current foster parents. The final state adoptions assessment repeated that recommendation and included its findings that the children would be adopted. The state social worker reported that the foster parents were committed to the children's permanence and were able and willing to adopt them. She opined that removal from the foster parents would be detrimental to the children. She had not, however, had an opportunity to speak with the parents or observe them with the children. The children's CASA representative also filed a report recommending adoption as the children's permanent plan. The report indicates that she "has observed many positive and loving interactions between the foster parents and both children, as well as reasonable and appropriate discipline and structure."

The department's section 366.26 report also recommended termination of parental rights and adoption. The department acknowledged that the mother had a bonded relationship with her children and that she had maintained regular, supervised visitation with the children, but it argued that the benefit of the loving relationship with mother did not outweigh the benefits the children would obtain through the permanence of adoption. Minor's counsel agreed that there was not sufficient evidence to support the parental relationship exception to termination. The court acknowledged the "difficult and heart-

wrenching decisions,” but agreed with the department and terminated parental rights. At the request of mother and over the objection of the department, the court ordered a step-down visitation plan with the last visitation occurring in July 2012, four months after termination of parental rights. Mother filed a timely notice of appeal from the order terminating her parental rights.

Discussion

1. *Parent-Child Exception*

“ ‘Adoption, where possible, is the permanent plan preferred by the Legislature.’ [Citation.] If the court finds a minor cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination of parental rights would be detrimental to the minor under one of five specified exceptions.” (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the termination of parental rights if termination would be detrimental to the child because “[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” The requirement that the child “benefit from continuing the relationship” has been interpreted to refer to a “parent-child” relationship that “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. 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.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) “While it is the child welfare agency’s burden to prove a likelihood of adoption [citation], the burden is on the parent or parents to establish the existence of one of the circumstances that are exceptions to termination.” (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 731.) “To meet the burden of proof for the section 366.26, subdivision [(c)(1)(B)(i)] exception, the parent must show more than

frequent and loving contact or pleasant visits. [Citation.] ‘Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.]’ [Citation.] The parent must show he or she occupies a parental role in the child’s life, resulting in a significant, positive, emotional attachment from child to parent.” (*In re L.Y.L., supra*, 101 Cal.App.4th at pp. 953-954.)

Here, the parties agreed that the children loved and were bonded to their mother. However, there was also substantial evidence that the children loved and were bonded to their foster parents, with whom they had spent a significant portion of their lives. At the Section 388 modification hearing held just prior to the permanency planning hearing, mother offered only slight evidence of changed circumstances in support of her request to reinstate reunification services: a letter from a counselor indicating that she had a mental health assessment in January 2012 and attended one group counseling session later that month, a receipt indicating that mother’s boyfriend had paid the rent on a new apartment for one month, and logs from her visits with the children showing the generally positive nature of her relationships with the children. The court was certainly entitled to find, based on this record, that the mother had failed to establish that she could provide these children with adequate stability in a timely manner.

Likewise, while mother argues that the reports indicate that she interacted positively with the children at their visits, the children’s counsel reasonably expressed some concerns. She pointed out that of the eight visits that took place following the termination of reunification services, mother attended only two of them by herself. To the others, she brought her new boyfriend. Counsel noted that despite being advised of the inappropriateness of doing so, she referred to the new boyfriend as “daddy” during the visits. The CASA report also reflects these concerns, noting that at a recent visit the mother and the mother’s boyfriend gave the youngest child a gift, including a card addressed to the child using the new boyfriend’s last name. Introducing a new parental figure into the children’s life at that stage in the proceedings reflects a failure to consider the best interests and needs of her children. On the record before us, we cannot say that

the court abused its discretion in finding that the parental relationship exception had not been established. Contrary to mother's argument, the step-down visitation order entered by the court does not demonstrate any error regarding the termination of parental rights. Rather, it reflects the unfortunate reality that although mother's parental rights were terminated, there was still some relationship between mother and child that needed to be resolved in a manner that was consistent with the best interests of the children.

2. ICWA

“Under the ICWA, where a state court ‘knows or has reason to know’ that an Indian child is involved, statutorily prescribed notice must be given to any tribe with which the child has, or is eligible to have, an affiliation. [Citation.] The court and the social services agency have ‘an affirmative duty to inquire whether a child for whom a petition under section 300 is to be, or has been, filed is or may be an Indian child.’ [Citation.] ‘In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.’ ” (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1264-1265.) “ ‘Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies.’ [Citation.] The failure to comply with the notice requirements of the ICWA constitutes prejudicial error unless the tribe has participated in or indicated no interest in the proceedings.” (*Id.* at p. 1265.)

Here, in November 2010, following a conversation with father and the paternal grandfather in which they claimed Indian heritage, the social worker sent notice of the proceedings to the Blackfeet Tribe in Montana and the Cherokee Nation in Oklahoma. The notice included the father's name, current and former addresses, date of birth and potential tribal affiliations. The notice also included the paternal grandfather's name,

current address, date and location of birth and potential tribal affiliations. Finally, the notice included some information for the paternal great-grandfathers, including their names, places of birth and potential affiliation with the Blackfeet and Cherokee Tribes and some information for one of the paternal great-grandmothers, including her name and potential affiliation with the Cherokee Tribe. With respect to section 6 on the standard notice form (ICWA-030), the social worker marked the box labeled “unknown” for each of the following categories: “a. Biological birth father is named on the birth certificate. b. Biological birth father has acknowledged paternity. c. There has been a judicial declaration of paternity.” A copy of the notice, along with certified mail receipts signed by the tribal representatives were filed with the court on December 17, 2010.² In March 2011, the court determined that ICWA did not apply.

Mother contends the notices were insufficient because father told the social worker during their conversation on November 19 that he was listed on the children’s birth certificates so that the social worker should not have marked that category unknown. At that time, however, the department had not been provided copies of the children’s birth certificates and father was still considered an alleged father in the proceedings. Accordingly, the notice was accurate and complete.

Mother also argues that the department should have sent an additional notice to the tribes in December after father was declared a presumed father and it was provided with copies of the children’s birth certificates and a declaration signed by father indicating that he had signed voluntary declarations of paternity in March 2008 and February 2010. She suggests, “Because the tribes never received accurate information about the father’s paternity here, they could not conduct a meaningful examination of their records.” The alleged missing information, however, was neither required under ICWA nor necessary to permit the tribes to determine potential enrollment.

² Mother incorrectly suggests that the department sent a second notice in mid-December 2010. The notice filed with the court in December, however, is not a second notice but rather a copy of the original notice with return receipts attached for purposes of establishing “proof of receipt” by the tribes.

Under federal regulations the notice must advise the tribe or the Bureau of Indian Affairs of the child's name, birthplace and birthdate (25 C.F.R. 23.11(d)(1)), and the name of the Indian tribe in which the child is or may be eligible for enrollment (25 C.F.R. 23.11(d)(2)). (*In re S.M.* (2004)118 Cal.App.4th, 1108, 1116.) In addition, the notice must provide the information set forth in the Bureau of Indian Affairs Guidelines at 25 Code of Federal Regulations part 23.11(d)(3): "All 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." Mother does not dispute that the department's notice included all known information about the children's biological family. The absence of additional information confirming paternity would not interfere with the ability of the tribes to determine potential eligibility for enrollment. Nothing in the statutory scheme suggests that the tribes could not find the minors eligible for enrollment subject to verification. (See, e.g., *In re N.M.* (2009) 174 Cal.App.4th 328, 331 [after indicating the minor was eligible for enrollment, tribe requested a paternity test to confirm the minor's tribal eligibility].) Accordingly, we find no error with respect to the court's determination that ICWA does not apply.

Disposition

The order terminating parental rights is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.