

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re A.N., a Person Coming Under the
Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN
AND FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

E.A.,

Defendant and Appellant.

A142267

(Contra Costa County
Super. Ct. No. J13-00682)

E.A., the mother of A.N., appeals from the orders denying her Welfare and Institutions Code¹ section 388 petition and terminating her parental rights.² She contends that the juvenile court abused its discretion in denying her section 388 petition requesting reunification services. She also argues that the court failed to comply with the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) because it did not ask father whether he had any Native American heritage. We affirm.

¹ Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

² Mother’s notice of appeal does not reference the court’s denial of the section 388 petition. We construe mother’s notice of appeal liberally to encompass the denial of her section 388 petition since the trial court denied the petition on the same day it issued its order terminating parental rights and hence during the 60-day period prior to mother’s filing of the notice of appeal. (*In re Madison W.* (2006) 141 Cal.App.4th 1447, 1450-1451.)

I. FACTUAL BACKGROUND

On June 3, 2013, a section 300 petition was filed alleging that parents failed to protect A.N. in that father punched mother in front of the minor, causing bruises to mother's arms. The petition further alleged that parents violated a court order prohibiting contact between them and prohibiting father's contact with A.N. The court detained A.N. and placed her in foster care.

On June 11, 2013, the court referred the matter to mediation. Following mediation, mother waived her right to a jurisdictional hearing and agreed to jurisdiction based on the allegation that she failed to protect and supervise A.N. when she violated the court's order precluding contact with father.³

The Department's report for the dispositional hearing recounted an incident that occurred after mother's scheduled visitation on July 2, 2013. Father was waiting for mother in the Department's parking lot and yelled at her to get in her car. He chased her around the car and demanded that she drive him to the mall. Mother eventually got into the car and drove off with father. A security guard called the police; father was subsequently arrested for a parole violation.

Mother denied that she was in contact with father, but the Department's social worker questioned how father knew mother's whereabouts. She also denied that father had hit her. But she appeared at a meeting with her social worker on August 1, 2013, with her right eye puffy and bruised.

The dispositional hearing was held on August 15, 2013. The court ordered reunification services for mother. It admonished mother that she was not to have any contact with father, and that the next six months were mother's last chance to reunify with A.N.

³ The Department's detention/jurisdiction report noted that A.N. was the subject of a prior dependency case from September 16, 2011, to September 28, 2012, due to parents' domestic violence. Mother received reunification services during that case, and the court ordered that mother and A.N. were not to have any contact with father.

The Department's report for the six-month review hearing recommended that reunification services for mother be terminated. The Department noted that mother had only minimally engaged in addressing her history with domestic violence and had not yet begun counseling. She had been inconsistent in attending STAND! For Families Free of Violence (STAND) domestic violence classes and had only minimally participated in a parenting class. There was also some indication that mother had contact with father through Facebook. The Department opined that there was not a substantial probability that A.N. could be returned home if reunification services were extended. It noted that the issue of contact between parents had not been resolved as mother continued to have contact with father and had not developed a safety plan to protect her and A.N. from abusive and violent relationships.

The contested six-month review hearing was held on February 10, 2014. Father was in custody but appeared at the hearing. Father requested counsel. The court indicated that it would refer him to counsel and proceeded with the review hearing.

Sarah Flam, the Department's social worker on the case, testified that mother had attended STAND during the review period as well as completing six hours of a child development class at Sweet Beginnings Women's Resource. Flam testified that she had supervised visits between mother and A.N. and they had consistently good visits.

During Flam's testimony, the parties conferred with the court. Counsel for mother submitted the matter with the understanding that the court would likely follow the Department's recommendations but that mother would be able to file a section 388 petition before the section 366.26 hearing. The court thereafter terminated reunification services to mother but ordered that she could have two visits per month with A.N. as long as she consistently engaged in her case plan, attended STAND and individual counseling and had no contact with father, including no social media contact with him. The court set the matter for a section 366.26 hearing with the understanding that it would consider a section 388 petition. The court noted that counsel would be appointed for father the following day.

On May 19, 2014, mother filed a section 388 petition for an order reinstating reunification services and increasing visitation. She alleged that she had engaged regularly with her therapist and with STAND, and she was now employed. Mother provided documentation that she had attended group and peer counseling sessions with STAND, had completed six hours of child development education, and that she had secured housing and was scheduled to move in with a former foster parent.

The Department did not submit a written opposition to mother's petition but filed its report for the section 366.26 hearing. The Department reported that mother missed her visit with A.N. in March 2014 and did not call to schedule a visit in April. The Department nonetheless contacted mother and scheduled a visit. Mother showed up for the visit but never called to confirm it. Mother did not attend a scheduled visit for May 2014. The foster mother advised the Department that she had not heard from mother for several weeks.

The Department further reported that mother had lost her housing at Calli House, a home for homeless teenagers up to the age of 21. Mother did not abide by her contract to check in with the program. Because mother was absent from the house for three days, the house's regulations required that her bed be given to someone else. Mother was currently living with the maternal grandparents. The Department's social worker opined that mother failed to take responsibility for her failures in the dependency case, and that A.N.'s need for permanency outweighed the need to continue the relationship with mother. The Department recommended adoption as the permanent plan. A.N. was in a concurrent adoptive home that had an approved adoptive home study. The prospective adoptive parents were committed to adopting A.N. and to providing her with a loving and stable home.

On June 3, 2014, the court considered mother's section 388 petition. Mother testified that she had learned about the cycle of domestic violence and had developed a safety plan. Her plan was to carry a copy of the restraining order with her and, if needed, she would "go somewhere public . . . and tell them to call the police" She also worked on anger management in her peer counseling sessions. She testified that she was

planning to rent a room at the home of a previous foster mother.⁴ She hoped to move by the end of July 2014. She had deactivated her Facebook accounts three months ago, and had not had any further contact with father. She was not employed but was interviewing for a part-time position. The court denied the section 388 petition, finding that mother had not shown changed circumstances. The court found that mother's testimony was not credible, and that it would not be in the best interests of A.N. to extend services.

The court proceeded with the section 366.26 hearing. The court found that A.N. needed a permanent placement. The court was concerned that mother continued her relationship with father despite his violence and that "until three months ago, did not even get him off her Facebook. [¶] This man is so dangerous that nobody is to be allowed to know [where the child is placed]." The court terminated parental rights finding that A.N. was adoptable and that termination of parental rights was in her best interests. Father did not appeal.

II. DISCUSSION

Mother contends that the juvenile court abused its discretion in denying her section 388 petition because she had ended her relationship with father, was engaged in domestic violence counseling, and had completed six hours of child development education.

"Section 388 permits a parent to petition the court on the basis of a change of circumstances or new evidence for a hearing to change, modify or set aside a previous order in the dependency. The parent bears the burden of showing both a change of circumstance exists and that the proposed change is in the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 (*Casey D.*)) We may not disturb the decision of the juvenile court absent a clear showing that the court abused its discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

⁴ Mother was a dependent of the court from March 11, 2009, to November 29, 2011. The court vacated and dismissed the dependency case and mother remained in the care of her parents.

Relying on *In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1252 (*Eileen A.*), disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414, mother contends that as a young mother, her “only sin was ignorance and lack of vigilance,” and that she was now more mature. Mother’s reliance on *Eileen A.* is misplaced. In *Eileen A.*, the dependent child suffered physical abuse perpetrated by the father. The court denied reunification services but between that denial and the section 366.26 hearing, mother demonstrated changed circumstances. Although she was not afforded services, she attended parenting classes once a week and went to Al-Anon. (*Eileen A.*, at p. 1252.) She never missed a session of individual therapy, attended all of her daughter’s medical appointments and visited her as much as she was allowed, and consulted an attorney to complete a divorce from the father. (*Ibid.*) The appellate court remanded the matter for a hearing under section 388 on whether changed circumstances indicated that it would be in the child’s best interests to order reunification services to mother. (*Id.* at p. 1263.)

Here, mother’s efforts at reunification, unlike those in *Eileen A.*, were inconsistent and began far too late. At most they show “changing [circumstances]” regarding mother’s ability to avail herself of services and acquire the knowledge to safely parent a child. (*Casey D.*, *supra*, 70 Cal.App.4th at p. 49.) The record shows that mother had not yet begun individual mental health therapy, she had missed visits with A.N., had not yet secured employment, and had only plans to move to safe permanent housing. Moreover, this was the second dependency for A.N., yet mother had not progressed sufficiently in her reunification plan to offer A.N. the security and permanency she needs.

Additionally, mother failed to demonstrate that it would be in A.N.’s best interests to permit additional reunification services. A.N., who spent eight months of her first year and a half of life as a dependent, and subsequently has been a dependent since she was barely two years old, needs the stability and permanency her prospective adoptive home offers.⁵ (See *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [parents’ efforts at

⁵ The Department expected to formally place A.N. in her prospective adoptive home on June 1, 2014. At the time of the Department’s section 366.26 report, A.N. was transitioning into the new home and was eager to stay with her new family.

rehabilitation begun only three months before the section 366.26 hearing insufficient to show “how the best interests of [their] children would be served by depriving them of a permanent, stable home in exchange for an uncertain future”). “At [this] point of these proceedings—on the eve of the section 366.26 permanency planning hearing—the [child’s] interest in stability was the court’s foremost concern and outweighed any interest in reunification. [Citation.]” (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) While mother made progress in her treatment activities, this did not occur until just a few months prior to the section 388 hearing, and the court had before it a significant record of mother’s failure to accept responsibility for her part in the dependency and to commit to being the mother A.N. needs.⁶ The trial court did not abuse its discretion in deciding that A.N. needs the opportunity for an adoptive home with her prospective adoptive parents who are motivated to providing her with a loving and supportive home. The court properly denied mother’s request for reunification services.

Mother also contends that the court violated ICWA by failing to ask father whether he had any Native American heritage.⁷ She argues that the order terminating parental rights must be reversed in order to correct the omission. We disagree. The error was harmless.

In re Rebecca R. (2006) 143 Cal.App.4th 1426 is dispositive. There, the father made no claim on appeal that he in fact had any Indian heritage but urged that the failure to inquire required reversal. The court declined to do so, reasoning, “[t]he sole reason an appellate court is put into a position of ‘speculation’ on the matter is the parent’s failure

⁶ Mother faults the court for failing to grant her additional visitation hours. The record shows that the court granted mother two visits per month after terminating reunification services with the understanding that the visits were contingent on mother engaging in services. Mother, however, missed visits in March and May, and the Department accommodated visits for her in February and April, although mother failed to confirm scheduled visits. The record of the dispositional hearing also reflects that the court informed mother’s counsel that she could petition to put the issue of visitation on the court’s calendar if there was a basis for it. Mother did not do so.

⁷ Mother has standing to raise the issue of ICWA compliance. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339.)

or refusal to tell us. Father complains that he was not asked below whether the child had any Indian heritage. Fair enough. But, there can be no prejudice unless, if he had been asked, father would have indicated that the child did (or may) have such ancestry.

[¶] Father is here, now, before this court. There is nothing whatever which prevented him in his briefing or otherwise, from removing any doubt or speculation. He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA. He did not. [¶] In the absence of such a representation, the matter amounts to nothing more than trifling with the courts. [Citation.] The knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge and disclosure is a matter entirely within the parent's present control. . . . [¶] . . . In the absence of [a representation of Indian heritage], there can be no prejudice and no miscarriage of justice requiring reversal.” (*Id.* at p. 1431, italics omitted, but see *In re J.N.* (2006) 138 Cal.App.4th 450, 461-462 [remanding matter with directions to inquire of parent whether child is an Indian child].)

Here, there is no evidence that father had any Native American heritage; mother provides no such evidence on appeal. And, in the prior dependency, neither parent made any claim of a Native American heritage. Under these circumstances, mother has failed in her burden to demonstrate prejudice.

III. DISPOSITION

The orders denying mother's section 388 petition and terminating her parental rights are affirmed.

Rivera, J.

We concur:

Reardon, Acting P.J.

Streeter, J.