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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re M.T., a Person Coming Under the
Juvenile Court Law.

SONOMA COUNTY HUMAN
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

W.S.,

Defendant and Appellant.

A144161

(Sonoma County
Super. Ct. No. 4271-DEP)

I.

INTRODUCTION

W.S. (Mother) appeals from an order terminating her parental rights to her daughter, M.T. She alleges the Sonoma County Human Services Department (the Department) failed to provide adequate notice to comply with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). She further asserts the trial court erred in terminating her parental rights because the beneficial parent-child relationship exception (Welf. & Inst. Code, § 366.26, subd. (c)¹) applied. We issue a limited reversal of the court’s dispositional order and remand for a determination of proper compliance with the notice provisions of ICWA.

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

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Initial Referral & Detention*

The initial petition was filed in September 2013, when M.T. was six days old. It alleged that M.T. was at substantial risk of serious physical harm pursuant to section 300, subdivision (b). Mother and Alex T., M.T.'s father (Father), both exhibited signs of depression and had untreated mental health issues. They had no viable plan for feeding M.T. and they were unable to provide information about how often M.T. had been fed.

The events that brought the family to the Department's attention began when Mother was six months pregnant. Mother took 70 Xanax pills and was taken to the hospital and committed for attempted suicide. A public health nurse, Liz George, was referred for prenatal visits with Mother because of the suicide attempt.

George went to the hospital within 24 hours of M.T.'s birth. She made an appointment to visit Mother and Father at home the day after they were released from the hospital. When she arrived for the visit, Mother was asleep and it took 30 minutes to wake her. Mother had taken Ativan, ibuprofen, and hydrocodone. Her breasts were engorged so she could not nurse the baby. The breast pump was not working and Mother had not pumped since, at least, the previous night. There was approximately 2.5 ounces of milk in the refrigerator but no formula for the baby. Neither parent knew the last time the baby had been fed. M.T.'s diaper had not been changed in at least five hours. Despite this, M.T. seemed to be doing well.

George was concerned with the parents' mental health and felt "[t]hey were not focused on the baby[,] they were focused on their relationship." Mother asked if she could smoke marijuana to help deal with the stress.

On September 12, 2013, the court held a detention hearing and ordered M.T. detained.

B. *Jurisdiction Report & Hearing*

In the jurisdiction report, the Department detailed Mother and Father's criminal histories and mental illnesses. In an interview with Mother, she stated she took

medication for depression and had previous psychiatric hospitalizations for eating disorders. She discussed her substance abuse history, which included using heroin and marijuana. She explained that Father had been addicted to opiates and was undergoing treatment. Father confirmed his addiction to opiates. He had been in inpatient drug treatment at least five times. He also mentioned a previous psychiatric hospitalization. He continued to use marijuana.

The report found ample evidence to support the allegations. It found the parents had difficulty providing adequate care for the newborn. “Not only could the mother not be woken by [the public health nurse] for thirty minutes, neither parent could say when the child was last fed or how much she had eaten. There was no way to obtain additional milk for the baby with the pump not working and mother not being able to breast feed, yet the parents did not go to the store to obtain formula.” Father was unable to wake Mother throughout the night to feed the baby.

The report also noted Mother had a “deeply troubled childhood” during which she was removed from her parents and placed in foster care. Mother had been arrested for driving while under the influence of LSD, mailing herself 400 grams of marijuana, and was a reported heroin user.

At the jurisdiction hearing, both parents submitted on the report and the court sustained the amended petition. The court ordered psychological evaluations and set a disposition hearing.

C. Disposition Report and Hearing

The disposition report included a family assessment that outlined more of Mother’s history. Mother had been removed from her parents at age 11 due to ongoing molestation by her brother. She lived in foster homes and a residential facility before being emancipated.

The report noted that during September 2013, both parents had visited M.T. twice a week. In October, Mother went out of state to clear a warrant related to narcotics charges. Father’s visitation was sporadic.

During the visits, the parents were described as “intimidated and tense,” did not know how to properly hold the baby, and had a difficult time changing her.

The parents had not participated in the psychological examinations as ordered, but Mother had taken steps to resolve her criminal matter and expressed her strong desire to reunify with M.T.

At the disposition hearing, the court adopted the findings and orders of the report. The court found there was clear and convincing evidence M.T. should be removed from her parents’ custody. The court ordered family reunification services and set a six-month review hearing.

D. *Termination of Services to Father*

In January 2014, the Department filed a request under section 388 for the court to reconsider reunification services for Father. Father failed to complete a second psychological examination, and the first examination found he could not benefit from services. Father then voluntarily waived reunification services.

E. *Six-Month Review Report and Hearing*

The Department filed a six-month status review report on April 22, 2014. It noted that M.T. had been residing in an emergency foster home since she was five days old. Mother was in residential drug treatment and attending therapy. Mother’s psychological evaluation raised concerns about her ability to meet M.T.’s needs due to Mother’s emotional difficulties and lack of parental knowledge. The evaluation recommended individual therapy, parental education, medication for her anxiety, and ongoing substance abuse treatment. The report noted that Mother struggled with sobriety, submitting positive drug tests on December 4, 18, and 20, 2013, and January 2, 2014.

Mother’s therapist felt Mother was motivated and willing to make changes, but was concerned about “the mutually combative and dysfunctional” relationship with Father and Mother’s substance abuse.

Mother was happy to visit with M.T. but remained very cautious and “does not yet seem to be completely comfortable handling her.” The report documented problems with

visitation. Originally, Mother visited twice per week, but “the parents struggled to arrive on time” and several visits were canceled due to late arrival.

The Department identified M.T.’s paternal uncle and aunt as a potential placement. They traveled from the East Coast four times, at their own expense, to visit M.T.

The report concluded that Mother “loves her daughter very much and wants what is best for her.” Recently, Mother had been consistent in her visitation but struggled with treatment. Mother’s own childhood trauma and current abusive relationship distracted from her ability to fully support M.T. Mother had made some changes and was moving in a positive direction, but she had not made as much progress as necessary to return M.T. to her care. The Department recommended continued reunification services.

The Department filed an addendum report on April 29, 2014. The addendum report stated that due to recent events, the Department no longer recommended reunification services and requested the court terminate services and set a section 366.26 hearing. Mother had left her residential drug treatment facility with Father against the advice of her case manager. The case manager had been meeting with Mother daily, but Mother “appeared too distracted and fixated on outside influences.” The report stated that Mother “has the ability to overcome the traumas that she has had to experience, but . . . she seems to lack the motivation and commitment to do so at this time.” While it is “heartbreaking,” M.T. should not have to wait for permanency as the cycle is perpetuated. Mother is not willing or able to put M.T.’s needs before her own.

On May 14, 2014, the court terminated Mother’s reunification services and set a section 366.26 hearing.

F. *Section 388 Petition and Hearing*

Mother filed a section 388 petition requesting the court vacate the section 366.26 hearing and order additional reunification services. Mother argued she had continued her recovery and was attending Alcoholics Anonymous and Narcotics Anonymous meetings. She had a job as a waitress and a secure place to live. She had terminated her abusive relationship with Father.

At the hearing on the petition, M.T.'s counsel argued that there was nothing in the petition about changed circumstances in regard to Mother's mental health or her ability to parent M.T. M.T. spent seven months in emergency foster care while Mother received reunification services and it was "not fruitful." M.T. was in a stable home and doing well, so it would not be in her best interest to continue services for Mother.

At the hearing, the court found: "Even assuming that there is a showing of change in circumstances, I just am completely lacking in any information as to why this would be in [M.T.'s] best interest. And as such, I am going to deny the [petition]" for a hearing.

G. Section 366.26 Report and Hearing

The section 366.26 report recommended that parental rights be terminated and the court order a plan of adoption for M.T.

M.T. had been living with her paternal aunt and uncle (foster parents) for two and half months. The report found M.T. was happy, healthy and well cared for by her foster parents. M.T. has transitioned well and is "a loved member of their family."

The report concluded that Mother's visitation with M.T. was "inconsistent" until she entered treatment. Mother "was consistently late and no showed for visits often at the Department. [Mother] missed visits approximately thirteen times between September 27, 2013 and January 30, 2014." However, several of those visits occurred during the month Mother was out of state addressing her criminal charges. From February to April 2014, M.T. was transported to Mother's treatment facility for visits. When Mother left treatment she only visited M.T. once, in May 2014, and she informed the social worker she was unable to schedule additional visits due to her work schedule. Since leaving treatment, Mother has only visited M.T. three times.

M.T.'s foster parents set up an email address to encourage the exchange of information about M.T. They sent an email to Mother with an update and pictures of M.T. in June 2014. Mother did not respond for two months, then in August 2014 she asked if M.T. could visit for her birthday. The foster parents responded with another update and pictures and informed Mother a trip was being planned for September.

The report concluded that M.T. has a “positive, healthy relationship with her potential adoptive family and would benefit from the establishment of a permanent parent/child relationship through adoption.” Removal from her adoptive parents would be detrimental to M.T.’s well being. The report concluded it was in M.T.’s best interest for the court to terminate the parental rights of her birth parents.

The court held a contested section 366.26 hearing on October 29, 2014. Mother testified that after she left the rehabilitation center, she had visited M.T. three times between May and July 2014. Mother testified that as M.T.’s mother she can “keep her safer” and keep her “happy throughout life.” Mother stated she could provide for all of M.T.’s basic necessities. She stated she did not believe the foster parents were the best thing for M.T.

Traci Bernal, the social worker handling M.T.’s case, testified that prior to residential treatment, Mother’s visits with M.T. were not consistent. She described the most recent visit between M.T. and Mother in September 2014, and said M.T. gave slight resistance to going to Mother. M.T. and Mother played, took pictures, and had a snack. She was more reluctant to go to Mother than her foster mother.

The Department argued that Mother’s visits were not regular and consistent, so she was not in a position to argue for a beneficial exception under section 366.26, subdivision (c)(1)(B)(i). Further, even if there had been consistent visitation, the Department argued “the record here does not show the kind of bond such [that] it would be detrimental to [M.T.] to terminate parental rights.” M.T. is thriving in her current placement and the focus of the termination of reunification is on the child’s needs and stability.

M.T.’s counsel added that M.T. had been out of Mother’s care for a year and was only in Mother’s care for five days, implying no long term bond had developed.

Mother argued the court should apply the beneficial relationship exception because her contact had been regular and consistent and it would be detrimental to M.T. to terminate parental rights.

The court found that the beneficial relationship exception did not apply. “The Court has not seen that there’s sufficient contact between the mother and the child in visitation and in a consistent fashion that would allow the beneficial relationship exception to apply.” The court adopted the findings and orders in the report that the termination of parental rights would not be detrimental to M.T.

H. ICWA Notification

Father completed the parental notification of Indian status form and stated he had no Indian ancestry. On her form, Mother stated she may have Cherokee ancestry from a tribe or band in Illinois or Missouri. The Department sent notices to the Bureau of Indian Affairs (BIA) and three Cherokee tribes. The original notices included only Mother’s and Father’s information and limited information about each of their fathers, but no other family information.

At the detention hearing, Mother informed the court that her information about her Cherokee heritage was from her grandmother on her mother’s side. The court asked if there was anyone in the family who would know, and Mother responded “I’m not sure.”

The disposition report stated that after receiving responses from its ICWA notices, M.T. was not considered an Indian child. At a jurisdiction and disposition hearing on November 6, 2013, the court did not inquire on the record about ICWA notification, but adopted the proposed finding in the report. The order states that the court has read and considered the documents submitted by the Department including the notices sent and responses received and ICWA does not apply to this case.

After this appeal was filed the Department sent updated notices that included the maternal grandmother’s name and address and limited information about the maternal grandparents.

II.

DISCUSSION

A. ICWA Compliance

ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) When the

notice provision is violated, an Indian child, parent, Indian custodian, or the Indian child's tribe may petition the court to invalidate the proceeding. (25 U.S.C. § 1914; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 735.)

Mother argues the Department and the juvenile court failed to provide meaningful notice to the Cherokee Tribe pursuant to ICWA. The forms lacked information about Mother's Cherokee relatives that could have been provided by her mother (M.T.'s grandmother). The Department concedes that the notices sent to the BIA and the Cherokee tribes were insufficient under ICWA.

Mother did not raise the issue of ICWA compliance at the section 366.26 hearing, but that does not forfeit the issue on appeal. “ ‘The purposes of the notice requirements of the ICWA are to enable the tribe to determine whether the child is an Indian child and to advise the tribe of its right to intervene. The notice requirements serve the interests of the Indian tribes “irrespective of the position of the parents” and cannot be waived [or forfeited] by the parent.’ . . .” (*Guardianship of D.W.* (2013) 221 Cal.App.4th 242, 249, quoting *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267 [citing cases holding the notice requirement is meant to protect the tribe so parents cannot waive it].)

The original ICWA notices contained no information about the maternal grandmother, or the maternal great-grandparents. The Department sent updated notices in July 2015 that included additional information, but respondent concedes the information was still inadequate to inform the tribes about the maternal grandmother's possible Cherokee heritage. The caseworker could have acquired this information because, as referenced in the disposition report, the grandmother had contacted the Department about M.T. Mother had also informed the Department she was in contact with the grandmother and was using the grandmother's insurance to pay for mental health counseling.

Notice to the tribes and the BIA is meaningless if insufficient information is provided. (*In re D.T.* (2003) 113 Cal.App.4th 1449, 1455.) In *In re D.T.*, “[a]lthough the notice forms included notification of the pendency of the proceedings and an advisement of the right to intervene, they provided scant information to assist the BIA and the tribes

in making a determination as to whether the minors were Indian children. In fact, other than the names, birth dates, and birthplaces of the minors and their parents, no information was provided to assist the tribes in making this determination. [Citation.]” (*Id.* at p. 1454.) The notices failed to include information that was already known to the social worker such as the tribe affiliation and names of the minors’ grandparents. “[T]he social worker’s affirmative duty to inquire whether the minors might be Indian children mandated, at a minimum, that she make some inquiry regarding the additional information required to be included in the ICWA notice.” (*Id.* at p. 1455.) The tribes and BIA were deprived of “any meaningful opportunity” to determine if the minors were Indian children, and thus the error was prejudicial. (*Ibid.*; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705 [court found a failure to properly determine the applicability of ICWA, the birthplaces of the mother and father were listed as unknown and the birthplace of the child was listed as California but the parents were participating in the proceedings and may have been available to provide more complete information].)

While there are limits on the investigatory burden placed on the agency, the agency must make reasonable efforts to obtain known family history. (*In re C.D.* (2003) 110 Cal.App.4th 214, 225 [holding the agency has a duty to inquire about and obtain, if possible, all of the information about a child’s family history including information about grandparents and great-grandparents]; *In re Louis S.* (2004) 117 Cal.App.4th 622, 630 [“The burden is on the Agency to obtain all possible information about the minor’s potential Indian background and provide that information to the relevant tribe or, if the tribe is unknown, to the BIA. [Citation.]”].)

There is no evidence in the record the Department contacted the maternal grandmother. Therefore, we conclude the Department failed to make reasonable efforts to obtain additional family history. Under these circumstances, we find the ICWA notice was inadequate because the Cherokee Nation was deprived of a meaningful opportunity to determine if M.T. was an Indian child. We conditionally reverse and remand for the limited purpose of ensuring compliance with ICWA.

B. Beneficial Relationship Exception

This court has held that we review a juvenile court's order on the beneficial relationship exception for substantial evidence. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1166 (*G.B.*))²

“After reunification efforts have terminated, the focus shifts from family reunification toward promoting the best interests of the child. A child has a fundamental interest in belonging to a family unit, which includes a ‘placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. [Citation.]’ [Citation.] At the selection and implementation stage, the court has three alternatives: adoption, guardianship or long-term foster care. [Citation.] In selecting a permanent plan for an adoptable child, there is a strong preference for adoption over nonpermanent forms of placement. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 808–809.) If a child is found adoptable at the section 366.26 hearing, the juvenile court must terminate parental rights and place the child for adoption unless termination would be detrimental to the child. “ ‘Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). [Citations.] Section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights when “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from

² Both parties assert there is a division among the Courts of Appeal about the appropriate standard of review for the applicability of the beneficial relationship exception. Division Three of this court has applied the abuse of discretion standard. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*) [holding the “practical differences between the two standards of review are not significant”].) The Fourth and Sixth Districts have held that both standards apply: the substantial evidence standard applies to the factual issue of whether a beneficial relationship exists and the abuse of discretion standard applies to the court's discretionary determination whether there is a compelling reason weighing against adoption. (*In re J.C.* (2014) 226 Cal.App.4th 503, 530; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) We apply the substantial evidence standard but recognize the result would be the same under either standard, or both.

continuing the relationship.” . . .” (*G.B.*, *supra*, 227 Cal.App.4th at p. 1165, quoting *In re S.B.* (2008) 164 Cal.App.4th 289, 297 (*S.B.*.)

1. Visitation

Mother argues that she maintained regular visitation and contact with M.T. throughout the course of this case. However, the record shows that mother’s visitation was not consistent. She missed 13 visits between September 2013 and January 2014, although some of these were due to her time out of state handling her criminal case. While in residential treatment when M.T. was transported to Mother, the visits were consistent. However, Mother left drug treatment with Father and only visited M.T. once, in May 2014, and she informed the social worker she was unable to schedule additional visits due to her work schedule. Since leaving treatment Mother had only visited M.T. three times.

After M.T.’s placement with her foster parents, they established an email address to encourage the exchange of information about M.T. Recognizing Mother could not visit M.T. across the country, they sent Mother an email update and pictures of M.T in June 2014. Mother did not respond for two months until August 2014, and there was no other documented contact during that period.

At the section 366.26 hearing, the court stated: “The Court has not seen that there’s sufficient contact between the mother and the child in visitation and in a consistent fashion that would allow the beneficial relationship exception to apply.”

There is no dispute that Mother visited M.T., and the evidence documents generally positive interactions where Mother was loving to M.T., but a parent’s “frequent and loving contact” with their children was not enough to establish the necessary benefit from continuing the relationship, when the parents “had not occupied a parental role in relation to them at any time during their lives.” (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418–1419.)

Even if we conclude, as Mother argues, that she maintained regular visitation, we cannot conclude that maintaining the parent-child relationship outweighs the benefit to M.T. of a permanent, adoptive home.

2. Relationship between Mother and M.T.

“The “benefit” prong of the exception requires the parent to prove [that] his or her relationship with the child “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.” [Citations.] No matter how loving and frequent the contact, and notwithstanding the existence of an “emotional bond” with the child, “the parents must show that they occupy ‘a parental role’ in the child’s life.” . . .” (*G.B.*, *supra*, 227 Cal.App.4th at p. 1165, quoting *In re K.P.* (2012) 203 Cal.App.4th 614, 621 (*K.P.*).

The exception is applied on a case-by-case basis taking into account the child’s age, the portion of the child’s life spent in the parent’s custody, the positive or negative effect of interaction between parent and child, and the child’s particular needs. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575–576.)

At the time of the section 366.26 hearing, M.T. was 13 months old and had spent only five days of her life in her mother’s care. She had been in an emergency foster home for nine months, and in the care of her foster parents for four months. At the time of the hearing, Mother had only visited M.T. three times in the preceding four months. During the most recent visit, M.T. slightly resisted going to Mother, which was not unexpected given their lack of contact in the preceding months. Mother played with M.T. and gave her a healthy snack, but M.T. returned easily to her foster mother at the end of the visit.

Mother has never maintained a parental role in M.T.’s life. She never moved beyond supervised visits. Mother had failed to make the necessary progress with her substance abuse and mental health issues, and had only recently ended her dysfunctional relationship with Father. The court ordered the section 366.26 hearing because Mother left residential treatment to be with Father and during that period only visited M.T. once. In *G.B.*, this division found the beneficial relationship exception did not apply where “[m]other’s visits with her children were always supervised, mother was only at the beginning stages of working on the effects of domestic violence in her life, and there was still instability and dysfunction surrounding her relationship with father. By contrast, the

children were in a secure placement and were bonded with their current and prospective caregivers.” (*G.B.*, *supra*, 227 Cal.App.4th at p. 1166.)

Mother analogizes her circumstances to the father in *S.B.*, *supra*, 164 Cal.App.4th 289. The father in *S.B.* was the primary caregiver for the child for three years, had consistent visits with the child three times per week throughout the dependency proceedings, and complied with “ ‘every aspect’ of his case plan,” including maintaining his sobriety and seeking therapy. (*Id.* at p. 298.) The court reversed the termination of parental rights, finding substantial evidence for the beneficial relationship exception because of the significant parent-child bond. (*Ibid.*) The same cannot be said of Mother here. She never fully complied with her case plan and was unable to put M.T.’s needs before her own. There is also no evidence similar to *S.B.* of a significant parent-child bond. (*Id.* at pp. 294-295, 298 [daughter was upset when the visits ended, told father “I love you,” and expressed her desire to live with him].)³

“Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.’ ” (*K.P.*, *supra*, 203 Cal.App.4th at p. 621.) There is evidence that mother visited M.T. and no question that mother has love and affection for her daughter, but the evidence falls short of establishing that the parent-child relationship outweighs the benefit to M.T. of a permanent adoptive home. (See *G.B.*, *supra*, 227 Cal.App.4th at p. 1166.) M.T. is happy, healthy and well cared for by her foster parents. She is “a loved member of their family” in a stable home. “When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued

³ We note that *S.B.* has been the subject of considerable criticism and limited to its unique facts. (*In re C.F.* (2011) 193 Cal.App.4th 549.) *S.B.* must be “confined to its extraordinary facts. [*S.B.*] does not support the proposition a parent may establish the parent-child beneficial relationship exception by merely showing the child derives some measure of benefit from maintaining parental contact.” (*Id.* at pp. 558–559.)

parent/child relationship, the court should order adoption. [Citation.]” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

Mother has not shown that the juvenile court erred in terminating her parental rights and establishing permanency and stability for M.T.

III.

DISPOSITION

The juvenile court’s order terminating parental rights and referring M.T. for adoptive placement is conditionally reversed. The matter is remanded to the juvenile court with directions to proceed in compliance with the notice provisions of ICWA. If, after proper notice to the Cherokee Nation, the court finds the minor is an Indian child, the juvenile court shall proceed in accordance with ICWA. If, however, the juvenile court finds the minor is not an Indian child, the court shall reinstate the order terminating parental rights.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.

A144161, *In re M.T.*