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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re K.T. et al., Persons Coming Under  
the Juvenile Court Law.**

**ALAMEDA COUNTY SOCIAL  
SERVICES AGENCY,**

**Plaintiff and Respondent,**

**v.**

**KATRINA S. et al.,**

**Defendants and Appellants.**

**A145295, A145502**

**(Alameda County  
Super. Ct. No. DK06055)**

In these appeals, Katrina S. (Mother) and Joseph V. (Father) challenge an order terminating their parental rights under Welfare and Institutions Code section 366.26.<sup>1</sup> Mother contends the juvenile court erred in denying a section 388 petition she filed seeking to have her children returned to her custody. She also argues the juvenile court erred in finding the parent/child beneficial relationship exception to adoption did not apply.

Father raises only one issue in this court. He contends, for the first time on appeal, that the order terminating his parental rights must be reversed because respondent

<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

Alameda County Social Services Agency (the Agency) failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901, et seq.)

Neither Mother's nor Father's arguments are persuasive. Accordingly, we will affirm the orders from which the appeals are taken.

#### FACTUAL AND PROCEDURAL BACKGROUND

The parties have provided us with lengthy recitations of the facts of the case and of the proceedings below. We confine our statement of facts to those necessary to an understanding of the issues on appeal.

##### *Petition and Detention*

The proceedings giving rise to this appeal began on December 6, 2013, when the Agency filed a section 300 petition on behalf of Y.T. (age nine), K.T. (age seven), and Z.V. (age six weeks).<sup>2</sup> Two days earlier, Minors had been delivered into the protective custody of the Hayward Police Department after they were found alone with their paternal grandfather who was physically unable to care for them. The room in which they were staying was unsafe and hazardous, as it contained “drug paraphernalia, razor blades, knives, loose prescription pills, cigarette butts, and pornographic magazines in open view and within reach of the children.” Minors were subsequently placed in a foster home. Following the Agency's recommendation, on December 12, 2013, the juvenile court ordered Minors detained. It set a jurisdiction/disposition hearing for December 30.

##### *Jurisdiction and Disposition*

The Agency prepared a jurisdiction/disposition report recommending that Minors be declared dependants of the court and that reunification services be offered to the parents. In the section of the report devoted to ICWA status, the Agency stated ICWA “may or may not apply to . . . [Z.V.], as the father . . . reported possible Native American Ancestry at the Continued Detention hearing on 12/10/2013. However, in a previous Dependency case in which [Father] successfully reunified with another daughter . . . , it

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<sup>2</sup> Mother does not challenge the juvenile courts orders regarding Y.T. The appeal concerns only the two youngest children (Minors). Minors have different fathers. Father is the parent only of Z.V. K.T.'s father is not a party to this appeal.

was determined that [ICWA] did not apply. This Dependency case took place in Department 133 of the Alameda County Juvenile Court between 2004 and 2006.” The Agency’s jurisdiction/disposition report indicated the social worker had reviewed court records from Father’s prior dependency case, which, according to the report, had been dismissed in August 2006 after the completion of family maintenance services.

The jurisdiction/disposition report stated both parents had admitted to methamphetamine use. Father smoked methamphetamine using a glass pipe he kept in a drawer easily accessible to the children. Father’s drug use was not new, as it had been “a primary factor” in the prior dependency case. He also had an extensive criminal arrest and conviction history. Mother admitted the children were not attending school consistently due to transportation issues. The parents also did not have safe, adequate housing for their children. The Agency concluded Minors were not safe at home and recommended they be placed out of the home with family reunification services to Mother and Father.

A jurisdictional hearing was scheduled for January 17, 2014. The Agency prepared an addendum report for that hearing. It maintained its recommendations. The report stated Mother and Father had participated in weekly substance abuse testing and parenting education, but they had not begun outpatient substance abuse treatment, and Mother had not yet begun individual therapy. The parents’ visits with Minors continued to go well, and the Minors were doing well in their foster placement.

The jurisdictional hearing began on January 17, 2014, and was continued until March. At the conclusion of the hearing, the juvenile court ordered the petition amended. It sustained the amended section 300, subdivision (b) allegations. It ordered Minors removed from their parents’ custody and directed the Agency to provide family reunification services. The court also scheduled a progress report for June 11, 2014.

#### *Interim Status Review*

The Agency’s June 11 interim review report stated Mother and Father had not been in recent contact. The report explained that the parents were only partially participating in their case plans and had engaged in domestic violence in front of the

minors during a visit. The foster mother reported that Mother smelled of alcohol when she picked Minors up after the visit. During the altercation, Father hit Mother in the mouth, causing her to bleed. Both Minors had small spots of blood on their clothing. The Agency suspended unsupervised visitation. At the June 11 hearing, the court ordered that Mother's visits be supervised and granted the Agency discretion to refer the family to therapeutic visitation. It scheduled a report and review for August 20.

The Agency's status review report recommended that Minors remain out of the home with continued family reunification services to Mother and Father. Mother was present for the August 20 hearing. Father did not attend. The juvenile court set the matter for a contested hearing on October 27.

#### *Six-Month Review*

The Agency then prepared an addendum report dated October 27, 2014. It now recommended that the court terminate Mother and Father's family reunification services and schedule a section 366.26 hearing with a permanent plan of adoption for Minors. Mother had stopped engaging in her case plan and with one exception had not had contact with the Agency since the August 20 hearing. She had tested positive for alcohol three times in September 2014, missed one test, and then did not attend a meeting with her case manager. Mother was terminated from the substance abuse program for nonparticipation on September 29. She had only attended three sessions of individual therapy since Minors were removed in December 2013, and although she was referred to the parent advocate program, she failed to participate. Mother was consistent with attending weekly therapeutic visitation with the Minors and was participating in collateral visits with the family therapist. She remained homeless.

Father continued to refuse to engage in his case plan. He failed to participate in his substance abuse program, parenting education classes, or drug testing. Although he worked full time, he remained homeless. He was arrested on August 19, 2014, for driving under the influence and driving with a suspended license, but charges were not pressed. Father attended his weekly supervised visits with Z.V.

The contested review hearing began on October 31, 2014. The juvenile court admitted the Agency's reports into evidence, and it heard testimony from Mother and the child welfare worker (CWW). Mother testified she remained in a relationship with Father and planned to live with him after a previously entered restraining order was lifted. She had been living with a friend for two and a half months but was trying to get into shelter housing. She was drug testing at Terra Firma and Highland Hospital and had completed parenting and relapse prevention courses. Mother acknowledged testing positive for alcohol but denied drinking and could not explain why her tests were positive for alcohol. She denied missing tests at Terra Firma and said no one had told her she had been terminated from their program. She admitted she did not communicate with her CWW. She testified that her visits with the minors went very well and were beneficial to the minors.

The CWW explained that the Agency had changed its recommendation to termination of reunification services because Mother failed to seriously address her case plan even after being told of the urgency of doing so in light of Z.V.'s young age. The Agency urged Mother to participate in her case plan in May, reiterating the statutory time restraints. The CWW had given Mother housing referrals in May and had explained the importance of obtaining stable housing. Despite this, Mother still failed to connect with service providers or stay in touch with the Agency. She tested positive for alcohol on multiple occasions, including twice in October 2014. She had not engaged in counseling because she felt it was repetitive of her work in her other programs. The CWW concluded there was not a substantial probability Minors would return home by February 2015, by which time they would have been in foster care for 12 months.

The juvenile court found the parents' progress toward alleviating or mitigating the problems necessitating placement was minimal. The court noted Mother's "significant problems with alcohol" and stated she had obviously relapsed. Mother's three positive test results and missed tests demonstrated she had a substance abuse problem that interfered with her ability to take care of her children and provide a safe environment for them. Although she had completed some programs, her relapse indicated she did not

have the capacity to complete the objectives of the program. As to Father, the court noted that although he had visited with Z.V., his participation in his case plan was otherwise practically nonexistent. The court found there was not a substantial likelihood of return by the 12-month hearing. It terminated reunification services to both parents and set a section 366.26 permanency planning hearing for February 26, 2015. The juvenile court noted the parents had another 120 days to engage in services. It advised the parents to improve and engage in their case plans, explaining that this could only benefit them and could make a difference in the end.

#### *The Section 388 Petition*

Mother filed a section 388 petition on February 26, 2015, requesting that Minors be returned to her care. She claimed she was participating in substance abuse treatment and individual counseling and stated she had not used illicit substances since December 2013. She claimed she would have a residence at the time of the section 388 hearing. She argued the change was in Minors' best interest because of "Natural law, fulfilling children's and parent's natural and proper desires to live as a family." When the parties appeared on February 26, the court scheduled the section 388 hearing for April 8, 2015, with the permanency planning hearing to trail.

At the section 388 hearing, the juvenile court admitted the Agency's April 8 addendum report into evidence. It also admitted four documents from Mother related to her substance abuse treatment and drug testing. Lastly, the court received testimony from Mother, Mother's substance abuse treatment program case manager, and her current CWW.

The April 8 report explained the Agency's opposition to Mother's request for return. While Mother continued to visit Minors consistently, return to her was not in their best interest because Mother and Father continued to have unresolved substance abuse and homelessness problems that affected their ability to parent the Minors and placed the latter at risk. The report stated Mother had not contacted the Agency until March 26, 2015, when the CWW supervised a visit. Mother was still living temporarily with a friend. She had not provided an address or the date on which she had moved in

with the friend. Mother was evasive about her contact with Father and avoided answering questions about the issue. Her substance abuse was unchanged; Terra Firma reported that five of Mother's seven drug tests in September and October 2014, were positive for alcohol, and Mother no-showed once. Mother failed to test at Terra Firma from November 2014 to February 2015. Despite contacting Mother's program on multiple occasions, the Agency had no confirmation or verification that Mother had attended any substance abuse treatment since October 2014.

Mother had improved her attendance at individual therapy. Her therapist confirmed that she had attended consistently since November 2014. Mother's visits with the children continued to be appropriate and Minors were happy to see her. Although there was a friendly, comfortable interaction between Minors and Mother, the relationship was not parental. Father had a warrant out for his arrest. While visits went well when he attended, he had missed several visits.

Minors' foster parents desired to adopt. Both girls were physically affectionate and comfortable with the foster mother. K.T. was able to voice any concerns in the foster parents' presence, and Z.V. was particularly attached to them and felt comforted by their presence.

Mother testified she was attending a substance abuse treatment program, individual therapy, family therapy, and Narcotics Anonymous (NA). The court admitted evidence of Mother's attendance from her substance abuse treatment program, individual therapy, family therapy, and drug testing, but Mother did not provide any documentation of her NA attendance. She had never told the Agency about her participation in any of these programs. Mother was in "Phase Two" of a four-day per week relapse prevention program at Highland Hospital. She still needed to complete Phase Two, as well as the aftercare portion of her treatment. She had not provided the Agency with any documentation of her participation in the Highland program and had no written evaluations of her progress.

Mother was not drug testing at Terra Firma because she was testing at Highland Hospital. She testified she had most recently used methamphetamines on December 2,

2013. She said she was currently drug testing at Highland Hospital and had all clean tests. Mother completed a six-month alcohol and drug education course in October 2014 and a parenting program in March 2015. She was living with a friend in a two-bedroom apartment in Castro Valley, but she did not know if her friend had any CPS history. Mother slept in the living room, and if Minors were returned to her care, they would sleep in the living room with her. She did not know the status of her friend's lease on the apartment or whether her friend was allowed to have another family live in the apartment with her. Mother had never given the Agency her friend's address so that the Agency could evaluate the home. Mother was working with her parent liaison to obtain housing in a residential drug treatment program, but she had not entered into any program as of April 20, 2015.

Mother had attended weekly individual therapy sessions since November 2014 and weekly family therapy since April 2014. She was no longer in a relationship with Father. Mother's supervised visits with Minors went well, and the children were happy to see her. Mother had only missed one visit with the children in approximately one year but had been unable to return to unsupervised visits. Mother acknowledged she had not met the current CWW until April 2015. She did not contact anyone at the Agency between October 2014 and April 2015. She had not informed the Agency of her substance abuse treatment, counseling, or therapy.

The case manager from Mother's Highland Hospital program testified that she had seen Mother at least once a week since December 2014 and opined that Mother was putting forward great effort. Mother had approximately 14 weeks left in the program. The case manager did not know housing was part of Mother's case plan, and she had not visited the place Mother was living; she believed it was safe for Minors based on Mother's representations.

The CWW who had been assigned the case since October 2014 testified at the hearing. She explained the Agency had recommended denial of Mother's section 388 petition because Mother had failed to maintain contact with the Agency or demonstrate she was able to fully and solely parent the children. The CWW acknowledged Mother

had made some progress on her substance abuse program but said her progress was incomplete. Mother had not progressed beyond therapeutic, supervised visitation with the minors, because she still needed assistance with parenting and modeling. She also lacked appropriate housing for the children. The CWW noted Z.V. did not have a parental bond with Mother. Minors were loving and affectionate toward the foster family. As a result of all these factors, it was not in the Minors' best interest to be removed from their current home and be placed with Mother.

The juvenile court denied Mother's section 388 petition on April 20, 2015. It commended Mother's new participation in a treatment program, but found her progress was too little, too late. Mother had failed to engage in services during the statutory reunification period. Although she had recently begun to participate, her situation was changing, not changed. Mother still had significant time left in her substance abuse program, and thus there were no changed circumstances. The court also found return to Mother would not be in Minors' best interests due to Mother's significant drug history and the fact she had not yet completed her program. The juvenile court therefore denied Mother's petition and continued the matter to May 4 for a section 366.26 hearing.

#### *Section 366.26 Hearing*

On February 11, 2015, the Agency filed a report in advance of the hearing, which was originally set for February 26. The report addressed the Agency's ICWA compliance efforts. On or around November 3, 2014, the Agency sent notice to the Bureau of Indian Affairs (BIA) and the Blackfeet Tribe on behalf of Z.V.<sup>3</sup> On November 25, 2014, a representative of the Blackfeet Tribe responded that neither Mother nor Father was listed on the tribal rolls, and thus Z.V. was not an Indian child under ICWA.

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<sup>3</sup> Using Judicial Council Form ICWA-020, Father indicated he might have Indian ancestry through the "Blackfoot" band of the Navajo tribe. The Agency appears to have assumed Father was referring to the Blackfeet tribe, which is a tribal entity recognized by the BIA. (See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1943, col. 2 (Jan. 14, 2015).) The Navajo tribe does not appear to have a Blackfoot band.

The Agency reported on Father's recent arrests, including one for domestic battery following the physical altercation with Mother during an unsupervised visit. The Agency believed Mother had coached K.T. not to discuss the incident with her CWW. As of the writing of the report, Mother and Father remained in a relationship. Both parents' visits were going well.

The Agency's adoption assessment found Minors adoptable, and it recommended adoption as the permanent plan. Minors' foster caregivers were ready to adopt the children, and the Agency therefore recommended that the juvenile court terminate Mother's and Father's parental rights and order a plan of adoption.

The permanency planning hearing took place on May 4, 2015. The juvenile court admitted the Agency's February 26, 2015 report and its April 8, 2015 addendum report into evidence without objection. Mother's counsel stated he had no evidence to present but "objects to the actions that are requested by the Agency on all grounds" and submitted the matter. Father's counsel also disagreed with the Agency's recommendation but submitted the matter on the report.

The juvenile court adopted the Agency's recommendations. It found ICWA did not apply to the case. It noted it had already decided K.T. was not an Indian child, and it likewise found Z.V. was not an Indian child. The court referred to the Agency's notice to the Blackfeet tribe and the BIA, as well as to the Blackfeet tribe's response. There was no objection to this finding. The court stated Minors were adoptable and explained it had not heard "any evidence that would support an exception that would then allow for the Court not to terminate parental rights." It therefore terminated Mother and Father's parental rights.

Mother filed a notice of appeal from the order denying her section 388 petition on May 28, 2015. She filed a notice of appeal from the order terminating her parental rights on June 23, 2015.

#### DISCUSSION

Both Mother and Father challenge orders of the juvenile court. Mother argues the court erred in denying her section 388 petition because she demonstrated changed

circumstances justifying Minors' return to her custody. She further contends the order terminating her parental rights must be reversed because she demonstrated that the parent/child beneficial relationship exception to adoptive placement applied. Father also contests the order terminating his parental rights, but he argues only that the Agency's failure to comply with ICWA mandates reversal.

I. *The Juvenile Court Did Not Err in Denying Mother's Section 388 Petition.*

We turn first to Mother's arguments regarding her section 388 petition. We will address their merits after setting forth the law governing such petitions and our standard of review.

A. *Section 388 Petitions and the Appellate Standard of Review*

Section 388, subdivision (a)(1) provides in relevant part: "Any parent or other person having an interest in . . . a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made[.]" At a hearing under section 388, "[t]he burden of proof . . . is on the moving party to show by a preponderance of the evidence both that there are changed circumstances or new evidence and that also a change in court order would be in the best interest of the child." (*In re D.B.* (2013) 217 Cal.App.4th 1080, 1089; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*))

A ruling on a section 388 petition is "committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established." (*Stephanie M., supra*, 7 Cal.4th at p. 318.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Id.* at pp. 318-319.) Where the appellant contends the trial court has abused its discretion, the appellant's showing on appeal "is wholly insufficient if it presents a state of facts . . . which . . . merely affords an opportunity for a difference of opinion. An

appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138, quoting *Brown v. Newby* (1940) 39 Cal.App.2d 615, 618.) As we have said before, “[t]he Court of Appeal is not a second trier of fact[.]” (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.) Given the wide latitude afforded to the juvenile court, the denial of a section 388 petition rarely merits reversal as an abuse of discretion. (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

In this case, Mother’s task on appeal is particularly difficult, because she bore the burden of proof in the court below. (*In re D.B., supra*, 217 Cal.App.4th at p. 1089.) Thus, to the extent she challenges the juvenile court’s factual findings, “the question becomes whether [Mother’s] evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’ ” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528, quoting *Roesch v. DeMota* (1944) 24 Cal.2d 563, 571.)

B. *Mother Fails to Show that the Evidence Compelled a Finding of Changed Circumstances.*

To prevail on her section 388 petition, Mother was required to show changed, not merely changing, circumstances. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 49 [juvenile court entitled to deny § 388 petition where it found mother’s “circumstances were changing, rather than changed”].) To support such a petition, “the change in circumstances must be *substantial*.” (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223, italics added.) Indeed, “[t]he change of circumstances or new evidence ‘must be of such significant nature that it *requires* a setting aside or modification of the challenged prior order.’ ” (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615, italics added, quoting *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.) Last-minute changes, even if genuine, do not “automatically tip the scale in the parent’s favor.” (*In re D.R.* (2011) 193 Cal.App.4th 1494, 1512.)

Mother’s opening brief does not point to any specific error in either the juvenile court’s findings or in the manner in which the lower court exercised its discretion.

Instead, Mother’s brief recounts in detail “evidence in the record that might have supported a conclusion different from that reached by the juvenile court.” (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1164.) This cannot satisfy Mother’s burden of showing error on appeal. (*Ibid.*) We long ago admonished counsel that “[a]rguments should be tailored according to the applicable standard of appellate review.” (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388.) And “counsel’s failure to acknowledge the proper standard of review might, in and of itself, be considered a concession of lack of merit.” (*James B. v. Superior Court, supra*, 35 Cal.App.4th at p. 1021.) Here, Mother ignores the applicable standard of review and essentially invites us to examine the evidence she cites and substitute our judgment for that of the juvenile court. We have no authority to do so. (*Stephanie M., supra*, 7 Cal.4th at p. 319.)

Moreover, although Mother claims changed circumstances existed, her brief states she was “successfully participating and making progress in her service plan and was on track to complete it shortly.” The quoted sentence effectively admits Mother had not yet completed the service plan; it claims only that she was on track to complete it. While Mother touts her progress in the Highland Hospital program, her case manager testified that at the time of the hearing on the section 388 petition, Mother had approximately 14 weeks left before she would complete that program.<sup>4</sup> This is perfectly consistent with the juvenile court’s finding that “we’re in a situation where the circumstances are changing,

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<sup>4</sup> This time period assumes greater significance because Z.V. was under three years of age at the time of her removal. In cases involving children under three years of age, the Legislature has chosen to grant parents six months of services from the time of the dispositional hearing. (§ 361.5, subd. (a)(1)(B).) Services may not extend beyond 12 months from the date the child entered foster care. (*Ibid.*) In this case, the juvenile court ordered reunification services to Mother on March 7, 2014. It terminated those services on October 31, 2014. Mother did not file her section 388 petition until February 26, 2015. Thus, by the time of the section 388 petition, almost a year had elapsed since services were ordered to Mother. Although the 14 weeks remaining before the anticipated completion of Mother’s program may not seem like a long time, such periods are of greater significance to very young children like Z.V. (See *In re Marilyn H.* (1993) 5 Cal.4th 295.) As the California Supreme Court has remarked, “[c]hildhood does not wait for the parent to become adequate.” (*Id.* at p. 310.)

but they have not changed, and so the first prong of the test that's required for the 388 has not been satisfied.” Indeed, the fact that the quoted sentence from Mother's brief is phrased in the past progressive tense is a tacit concession that, as of the time of her section 388 petition, her circumstances were—at most—changing but had not yet changed. As we have explained, a showing of changing circumstances is not sufficient to support a section 388 petition. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 49.) Even if Mother had already completed the Highland Hospital program, her “completion of a drug treatment program, at this late a date, though commendable, is not a substantial change of circumstances.” (*In re Ernesto R.*, *supra*, 230 Cal.App.4th at p. 223.)

Mother fails to demonstrate that the evidence of her allegedly changed circumstances “was . . . ‘uncontradicted and unimpeached’ and . . . ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’ [Citation.]” (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) Since the juvenile court could properly conclude Mother did not show her circumstances had changed, we may affirm its order without considering whether she could demonstrate a change of order would be in Minors' best interests. (See *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 49.)

## II. *Mother Fails to Establish the Applicability of the Parent/Child Beneficial Relationship Exception.*

Mother also argues the order terminating her parental rights must be reversed because the parent/child beneficial relationship exception to adoption applied. The Agency contends Mother forfeited this argument by failing to raise it before the juvenile court. Mother responds that she objected “on all grounds” to the actions requested by the Agency. She also notes the Agency's counsel in the court below argued against application of the exception.<sup>5</sup>

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<sup>5</sup> In the course of her argument at the permanency planning hearing, the Agency's counsel stated, “The evidence before the Court supports that both children are adoptable and that there's absolutely no evidence that would support placing the children in long-term foster care because although there is a relationship between the children and the

A. *Forfeiture*

We conclude Mother forfeited her claim that the beneficial relationship exception to adoption applied. It is the parent’s “burden to raise any relevant exception at the hearing[.]” (*In re Erik P.* (2002) 104 Cal.App.4th 395, 403.) Mother failed to do so, and she may not raise the issue for the first time on appeal. “The application of any of the exceptions enumerated in section 366.26, subdivision (c)(1) depends entirely on a detailed analysis of the relevant facts by the juvenile court. [Citations.] If a parent fails to raise one of the exceptions at the hearing, not only does this deprive the juvenile court of the ability to evaluate the critical facts and make the necessary findings, but it also deprives this court of a sufficient factual record from which to conclude whether the trial court’s determination is supported by substantial evidence.” (*Ibid.*)

B. *The Evidence Regarding the Parent/Child Beneficial Relationship Exception Was Not Undisputed.*

Even if Mother had not forfeited this issue, her argument would be unavailing. (See *In re Erik P.*, *supra*, 104 Cal.App.4th at pp. 403-405 [reviewing merits of argument regarding applicability of sibling relationship exception after concluding issue had been forfeited].) *In re J.C.* (2014) 226 Cal.App.4th 503 thoroughly sets out the law regarding the parent/child beneficial relationship exception: “At a [section 366].26 hearing, the court may order one of three alternative plans: (1) adoption (necessitating the termination of parental rights); (2) guardianship; or (3) long-term foster care. (§ 366.26, subd. (c)(1), (4)(A).) If the child is adoptable, there is a strong preference for adoption over the other alternatives. [Citation.] Once the court determines the child is adoptable . . . , a parent seeking a less restrictive plan has the burden of showing that the termination of parental rights would be detrimental under one of the exceptions listed in section 366.26, subdivision (c)(1)(B). [Citation.]

“Section 366.26, subdivision (c)(1)(B)(i) provides for one such exception when ‘[t]he parents have maintained regular visitation and contact with the child and the child

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parents, there’s not such a relationship that would require the Court to find an exception to terminating parental rights.”

would benefit from continuing the relationship.’ The ‘benefit’ necessary to trigger this exception has been judicially construed to mean, ‘the relationship 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.’ [Citations.]

“A parent asserting the parental benefit exception has the burden of establishing that exception by a preponderance of the evidence. [Citation.] It is not enough to show that the parent and child have a friendly and loving relationship. [Citation.]

‘ “Interaction between [a] natural parent and child will always confer some incidental benefit to the child. . . .” ’ [Citation.] For the exception to apply, ‘a *parental* relationship is necessary. . . .’ [Citation.] ‘ “While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.” [Citation.]’ [Citation.]” (*In re J.C.*, *supra*, 226 Cal.App.4th at pp. 528-529.)

Since the parent seeking application of the exception bears the burden of proof in the juvenile court, the court’s determination that the exception is inapplicable necessarily entails a conclusion “that the party with the burden of proof did not carry the burden[.]” (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) Thus, when the losing parent appeals, “the issue on appeal turns on a failure of proof at trial, [and] the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’ [Citation.]” (*Ibid.*) “Thus, . . . a challenge to a juvenile court’s finding that

there is no beneficial relationship amounts to a contention that the ‘undisputed facts lead to only one conclusion.’ [Citation.] Unless the undisputed facts established the existence of a beneficial parental or sibling relationship, a substantial evidence challenge to this component of the juvenile court's determination cannot succeed.” (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)

In this case, the evidence was not undisputed. Mother argues that she visited Minors consistently and notes the visits went well. The Agency does not appear to dispute that Mother visited consistently. Instead, it correctly observes that Mother had not been able to progress to unsupervised visitation, and it directs us to evidence in the record showing that while Mother may have had a positive relationship with Minors, the relationship was not parental. For example, the Agency’s April 8, 2015 addendum report stated, “there is a friendly, comfortable interaction between the minors and the mother, [but] the relationship is not one of a parent/child relationship to the biological parents.” The same report also explained that Mother’s “unresolved substance abuse and homelessness” continued to affect her ability to parent Minors. Mother’s briefs do not confront this evidence and focus instead only on the evidence favorable to her. “Such a selective discussion of the evidence would not satisfy [Mother’s] burden of showing error even under the substantial evidence standard of review. [Citation.] It necessarily cannot suffice to demonstrate [Mother’s] evidence ‘was . . . “uncontradicted and unimpeached” and . . . “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” [Citation.]’ [Citation.]” (*In re Aurora P.*, *supra*, 241 Cal.App.4th at p. 1164.) Mother has failed to carry her burden on appeal.<sup>6</sup>

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<sup>6</sup> We note Mother also contends there were concerns about the suitability of the foster family’s home. We have concluded Mother’s challenge to the order terminating her parental rights fails. Regardless of that conclusion, we could not properly reach issues regarding Minors’ adoptive placement because they are not yet ripe. Such questions will become justiciable only if the Agency approves the foster parents’ home study and after the foster parents submit an adoption petition. (*In re R.C.* (2008) 169 Cal.App.4th 486, 494.)

### III. *Any Defect in the Agency's ICWA Notice Was Harmless.*

Father's sole contention on appeal concerns the alleged inadequacy of the Agency's ICWA notice regarding his youngest daughter, Z.V.<sup>7</sup> He argues that while the form ICWA-020 he filed with the court stated he might have Indian ancestry through two different Indian tribes, the Agency sent notice only to one. In addition, Father contends the notice that was sent failed to provide information sufficient to verify his daughter's eligibility for membership in the tribe. The Agency responds by arguing notice was adequate but even if it was not, any error was harmless. We address these arguments after setting out the factual background.

#### A. *Facts*

On December 9, 2013, Father filed a "Parental Notification of Indian Status" (Judicial Council form ICWA-020, Jan. 1, 2008). On it, he checked box 3.b., which states, "I may have Indian ancestry." In the space provided for "Name of tribe(s)" he wrote "Navajo tribe." In the space for the "Name of band (*if applicable*)" he wrote "Blackfoot."

Beginning with the December 30, 2013 jurisdiction/disposition report, the Agency's filings with the juvenile court explained that in a previous dependency case involving Father, a department of the Alameda County Juvenile Court had determined ICWA did not apply. This statement was repeated in subsequent reports, and it does not appear to have been disputed at any time.

In or about November 2014, the Agency notified the BIA, the Secretary of the Interior, and the Blackfeet Tribe on behalf of Z.V. The Blackfeet Tribe responded that Z.V. was not an Indian child as defined in ICWA. The tribe's representative stated in the response, "If you are able to gather more information on the ancestry of the parents, please contact me again and I will review the tribal rolls."

The Agency's February 26, 2015 report for the section 366.26 hearing concluded ICWA did not apply, and it explained the efforts the Agency had made to determine

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<sup>7</sup> Mother joins in Father's ICWA argument.

whether Z.V. had Indian ancestry. It filed a copy of Judicial Council form ICWA-030 (Notice of Child Custody Proceeding for Indian Child) documenting its efforts. At the permanency planning hearing on May 4, 2015, the juvenile court found Z.V. was not an Indian child. The record reflects no objection either to the adequacy of the Agency's efforts or to the court's finding that ICWA did not apply.

B. *The Prior ICWA Finding Makes Any Deficiency in the Agency's ICWA Notices Harmless Error.*

The Agency argues both that the ICWA notices were proper and that any error was harmless. We focus on the latter argument, because we conclude it is dispositive.

We find this case similar to *In re E.W.* (2009) 170 Cal.App.4th 396. In that case, the social services agency notified the identified tribes of minor E.'s dependency. However, the agency failed to include notices for E.'s sibling, P. (*Id.* at p. 399.) Two of the three tribes responded, stating E. was not eligible for membership. (*Id.* at pp. 399-400.) The agency recommended that the court find ICWA inapplicable for both minors. (*Id.* at p. 400.) The court adopted the recommendation and found ICWA did not apply. On appeal, the mother contended the order terminating her parental rights should be reversed because the ICWA notices referred only to E. but not P. (*Ibid.*)

The Court of Appeal rejected the argument because it concluded any error was harmless. (*In re E.W., supra*, 170 Cal.App.4th at p. 400.) It explained "there is no reason to believe that providing separate notice regarding P. 'would have produced different results concerning [P.'s] Indian heritage.' [Citations.]" (*Ibid.*) The court reasoned that because both minors had the same parents, there was "no doubt" the tribes and the BIA would respond to notices regarding P. just as they had responded to those regarding E. (*Id.* at pp. 401, 402.) The court added, "We cannot condone delaying that permanence for an empty exercise with a preordained outcome, especially where that exercise does nothing concrete to further the purposes of ICWA—'to give tribes the opportunity to investigate and determine whether a child is an Indian child, and to advise the tribe of the pending proceeding and its right to intervene.' [Citations.]" (*Id.* at p. 402.)

*In re E.W.* distinguished *In re Robert A.* (2007) 147 Cal.App.4th 982 (*Robert A.*), the case upon which Father principally relies.<sup>8</sup> (*In re E.W.*, *supra*, 170 Cal.App.4th at p. 401.) It observed that the ICWA notices the agency sought to provide in *Robert A.* postdated the father's notice of appeal. *In re E.W.* also pointed out that "one of the court's reasons for declining to allow judicial notice of the ICWA documents was that the half sibling's dependency case was heard by the juvenile court in a different city and by a different judicial officer." (*Ibid.*)

Father contends *Robert A.* should control here, contending "no actual documents regarding notice from the half-sibling's case were provided to the juvenile court for its review, nor any minute order showing the previous dependency court found ICWA did not apply in that case." He also argues that because the prior dependency case was heard 10 years ago, it was most likely heard in a different city, in a different courthouse, and involved a different judicial officer. We fail to understand why the age of the prior finding is significant. Since, if Father has Indian ancestry, he was born with it, his ancestry could not have changed in the past 10 years. In addition, although Father makes much of the possibility that the prior case was heard in a different courthouse by a different judicial officer, the record shows that the finding was made in another department of the same superior court.

Perhaps more significant, in making his eleventh hour ICWA claim, Father does not argue the prior ICWA finding was actually erroneous. He simply asks us to *presume*

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<sup>8</sup> In *Robert A.*, the Agency sent no ICWA notices at all after it removed the minor from parental custody, and it conceded this was error. (*Robert A.*, *supra*, 147 Cal.App.4th at p. 989.) It nevertheless contended the error was harmless and sought to augment the record with ICWA notices that were filed in the separate dependency case of the minor's half sibling. (*Ibid.*) The appellate court remarked that the half sibling's dependency case was heard in another town and presided over by a different judicial officer than the one who presided over Robert's case. (*Id.* at p. 989.) It denied the motion to augment the record, explaining that the notices were sent two months *after* appellant father had filed his notice of appeal in the minor Robert's case. (*Id.* at pp. 989-990.) "Because ICWA documents from the half sibling's case were not before the juvenile court at the time of the proceedings in question nor part of the juvenile court case file, it is inappropriate to augment the record with them." (*Id.* at p. 990.)

that the ICWA notices sent in the prior case were somehow deficient and invites us to speculate on what those deficiencies might be. But we must presume that the Agency and the juvenile court in the prior case properly performed their duties. (Cf. *In re L.B.* (2003) 110 Cal.App.4th 1420, 1425 [“when a social worker’s report or other documentation indicates that ICWA notice has been provided, it can properly be presumed that such notice complied with the requirements of the ICWA in the absence of any evidence in the record to the contrary or any challenge to this representation in juvenile court”].)

Here, Minors “deserve permanency and stability as soon as possible.” (*In re E.W.*, *supra*, 170 Cal.App.4th at p. 402.) We refuse to condone further delay at this late stage of the proceeding, particularly where Father makes no specific claim that the ICWA finding in his prior dependency case was erroneous.

DISPOSITION

The orders from which the appeals are taken are affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.