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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Sutter)

In re R.S., a Person Coming Under The Juvenile
Court Law.

SUTTER COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

D.K.,

Defendant and Appellant.

C072172

(Super. Ct. No. DPSQ116745)

The mother of minor R.S. appeals from the juvenile court’s order terminating her parental rights. (Welf. & Inst. Code, §§ 366.26, 395.) She correctly contends that the juvenile court failed to comply with the requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) by applying the wrong standard of proof at the selection and implementation hearing. However, because mother fails to head and argue any claim of prejudice, we shall affirm.

BACKGROUND

The Sutter County Department of Human Services filed a dependency petition on behalf of the minor, who was eligible for membership in the White Earth Band of Chippewa Indians, a federally recognized tribe, as his father was an enrolled member. The tribe participated in the case. The juvenile court denied reunification services and set a section 366.26 hearing.

After a hearing, the juvenile court found by clear and convincing evidence that the minor was adoptable, and terminated parental rights.¹ Mother timely filed this appeal. The appeal lies. (Welf. & Inst. Code, § 395.)

DISCUSSION

Mother contends the juvenile court's failure to apply the correct standard of proof--beyond a reasonable doubt--is reversible error per se, despite her failure to object in the juvenile court. Regardless of mother's evident forfeiture of this issue *in the juvenile court* by the failure to object (see *In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412 (*Riva M.*)), we find the error is subject to harmless error analysis and mother's claim of reversible error is forfeited *in this court* by the failure to head and argue any claim of prejudice in her briefing.

In cases subject to ICWA, termination of parental rights is not allowed "in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(f); see Welf. & Inst. Code, § 366.26, subd. (c)(2)(B)(ii) [state-law provision also requiring reasonable doubt standard].) Here, the juvenile court applied the clear and convincing evidence standard.

¹ The tribe did not oppose the termination of parental rights.

However, as mother concedes, the statutes authorizing termination of parental rights in cases subject to ICWA are not *constitutionally* mandated. She cites no authority supporting the proposition that the error was structural error compelling reversal in all cases. And there is California authority contrary to her position. (See *Riva M.*, *supra*, 235 Cal.App.3d at pp. 412-413 [failure to apply correct standard of proof in ICWA case harmless]; see also *In re L.B.* (2003) 110 Cal.App.4th 1420, 1426 [ICWA notice violation subject to harmless error analysis].)

Recently, in a criminal case, our Supreme Court described the difference between “structural” and “trial” errors subject to harmless error analysis as follows:

“In short, trial errors can be fairly examined in the context of the entire record and are amenable to harmless error review. Structural errors, on the other hand, go to the very reliability of a criminal trial as a vehicle for determining guilt or innocence and are reversible per se. [Citations.] A structural error requires per se reversal because it cannot be fairly determined how a trial would have been resolved if the grave error had not occurred. For example, it would be impossible to divine how a trial would have proceeded if a defendant had been allowed counsel or the trial judge not been biased. There is a strong presumption that any error falls within the trial error category, and it will be the rare case where a constitutional violation will not be subject to harmless error analysis.” (*People v. Anzalone* (2013) 56 Cal.4th 545, 554.)

Here, as we noted *ante*, mother concedes the error was not of constitutional dimension, but was a statutory error. And the application by a fact-finder of an incorrect burden of proof does not necessarily infect the proceedings, because the record may show that the prevailing party would have prevailed regardless of which burden properly applied.

For example, in *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, the trial court placed the burden of proof on the wrong party. (*Id.* at pp. 385-393.)

Nonetheless, such error did not *compel* reversal, and we examined the evidence, instructions, and arguments, in order to find the error prejudicial. (*Id.* at pp. 393-398.)

But our duty to assess the effect of a trial error arises when and only when the appellant has properly headed and argued prejudice in the briefing. “Absent an explicit argument that a procedural error caused prejudice, we are under no obligation to address the claim of error.” (*Quail Lakes Owners Assn. v. Kozina* (2012) 204 Cal.App.4th 1132, 1137; see *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106.)

Here, mother’s failure to head and argue prejudice forfeits any contention that she would have obtained a different result had the juvenile court not erred as to the burden of proof.² Therefore, we presume the error was harmless.

DISPOSITION

The order terminating parental rights is affirmed.

DUARTE _____, J.

We concur:

NICHOLSON _____, Acting P. J.

MAURO _____, J.

² We note that overwhelming evidence demonstrated continued custody of the minor by either parent was likely to result in serious emotional or physical damage to the minor. Both parents had repeatedly refused to follow no contact orders entered for the protection of mother and the minor. Mother had previously failed to reunify with her older children and consistently refused to protect the minor from father, despite his having beaten her during her pregnancy and having inflicted brain damage on another infant son. She continued to engage in domestic violence with father in the presence of the minor and continued to allow father contact with the minor, despite her promises and a no-contact order. She also continued to struggle with drug abuse.