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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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In re I.J., a Person Coming Under the Juvenile Court Law.

C076645

SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

(Super. Ct. No. JD233461)

Plaintiff and Respondent,

v.

N.J.,

Defendant and Appellant.

Nia J., mother of the minor, appeals from orders of the juvenile court terminating her parental rights. (Welf. & Inst. Code, §§ 366.26, 395.<sup>1</sup>) Mother argues that the juvenile court’s order denying her reunification services was not supported by substantial

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

evidence. This issue was previously raised by mother in a petition for extraordinary writ taken from the orders setting the selection and implementation hearing. Additionally, mother argues that the juvenile court failed to make findings of parental unfitness prior to terminating parental rights, and that there was inadequate notice to tribes with a possible connection to the child pursuant to the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.). We affirm.

#### FACTS AND PROCEDURAL BACKGROUND

In September 2011, N.J., the infant half sibling of this minor, was placed in protective custody following reports that mother was observed slapping and shaking him because he was crying and that mother was neglecting his care by not following doctor's instructions on treatment of his broken collarbone. The petition alleged mother's untreated mental illness placed N.J. at risk of physical harm or neglect. Mother was offered reunification services including therapy, anger management counseling, a medication evaluation, parenting classes and substance abuse treatment services. She completed several requirements but did not complete her plan. During the case, mother was diagnosed with depression and was assessed as needing assistance on completing academic tasks and regular responsibilities. Her treatment included psychotherapy and medication. Services were terminated in November 2012 because mother failed to participate and make substantive progress in her plan, did not complete all services, and was not taking her psychotropic medication. Mother's parental rights as to N.J. were terminated in March 2013.

Mother was pregnant during N.J.'s dependency case and gave birth to I.J. in June 2013. Mother was homeless at the time and staying at the Bishop Gallegos Maternity Home (Maternity Home). The Sacramento County Department of Health and Human Services (Department) filed a petition to detain the minor which alleged the minor was at risk due to mother's history of physical abuse of N.J. and her neglect of N.J.'s medical

condition. The petition further alleged mother failed to reunify with N.J. and her parental rights as to N.J. were terminated. The court ordered the minor detained.

The social worker interviewed mother for the jurisdiction/disposition report. Mother denied hitting or shaking N.J., insisting she only tapped him on the leg with one finger and blamed her sister for making up the allegations of abuse. As of June 2013, mother was participating consistently in a parenting class at the Maternity Home and taking her medication regularly. Mother had discontinued psychotherapy in November 2012 and did not follow-up by scheduling a new appointment until July 2013. Mother's medication logs at the Maternity Home indicated mother did not take medications as prescribed four times in July 2013, i.e., July 8, 9, 12, and 17. Maternity Home staff spoke to mother about her medication and mother agreed to be more compliant. Mother had been following the Maternity Home rules, but had a write up for behavior issues on July 10, after not taking medications for two days.

An addendum filed in late July 2013 stated that mother had a second write up at the Maternity Home for her behavior and rules violations which occurred after her repeated failure to maintain her medication regimen. The addendum noted that mother subsequently made efforts to follow through with psychotropic medication, enrolled in parenting classes and referred herself to psychiatric services. Nonetheless, the Department recommended bypassing services for mother based on the prior termination of services (§ 361.5, subd. (b)(10)) and parental rights (§ 361.5, subd. (b)(11)) in N.J.'s case and due to mother's intermittent compliance with her medication, lack of long-term stable housing and the rules violations which placed the stability of her current housing at risk. The Department's assessment was that it was not in the minor's best interest to reunify with mother because the evidence indicated she had not made significant changes in her life.

In August 2013, the juvenile court sustained the petition, adopted the recommended findings and orders, and set a section 366.26 hearing. The ruling included

findings by clear and convincing evidence supporting removal of the minor from mother. The court also found by clear and convincing evidence that the bypass provisions of section 361.5, subdivisions (b)(10) and (b)(11) applied because mother did not complete the previous plan and she continued to fail to adhere to her psychotropic medication regimen. In making its ruling the juvenile court explained that the question was whether mother made reasonable efforts to treat the issues that led to the removal of the half sibling following termination of services and parental rights in the prior case. The court acknowledged that mother completed anger management therapy but in both the prior case and this case, the evidence showed that mother did not adhere strictly to the medication regimen to treat her mental health disorders. The medication was critical to mother's ability to stabilize her mood and, without that, the minor was at the same risk of abuse and neglect as was N.J. The court also questioned the benefit mother derived from the parenting classes and other services and whether she continued, in light of her write ups at the Maternity Home, to make reasonable efforts to treat the problems which led to the sibling's removal. Further, without mother's adherence to the medication schedule, the minor remained at risk and the court was unable to find that services would benefit the minor.

Mother filed a Notice of Intent and a Petition for Extraordinary Writ to review the juvenile court's ruling. In the petition mother argued that substantial evidence did not support the juvenile court's finding that she failed to make subsequent reasonable efforts to treat the issues which led to N.J.'s removal. The petition was summarily denied on the merits in October 2013.

The assessment for the section 366.26 hearing stated mother had liberal visitation from June to September 2013, thereafter, the minor was placed in Long Beach, California with the maternal grandparents with a resulting decrease in frequency of visits. The assessment concluded the minor was generally adoptable and there was no detriment to the minor in terminating parental rights. The hearing was continued several times and

finally commenced at the end of May 2014. Neither parent was present and the court adopted the recommended orders to terminate parental rights and free the minor for adoption.

Additional facts appear where necessary in the following discussion.

## DISCUSSION

### I

#### *The Juvenile Court's Order Bypassing Services*

Mother contends that there was insufficient evidence to support the juvenile court's order bypassing services for her pursuant to section 361.5, subdivisions (b)(10) and (11) because the evidence showed that she had made reasonable efforts to treat the problems which led to removal of N.J.<sup>2</sup>

“Subsequent appellate review of findings subsumed in an order setting a section 366.26 hearing is dependent upon an antecedent petition for writ review of those findings having been ‘summarily denied . . . .’ ” (*Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501, 1513; § 366.26, subd. (ℓ).) Mother did file a petition arguing the court erred in denying her services pursuant to section 361.5, subdivisions (b)(10) and (11) because the evidence showed she had “subsequently made a reasonable effort to treat the problems that led to removal of the sibling.” (§ 361.5, subd. (b)(10); see also subd. (b)(11).) The petition was summarily denied in October 2013. When “the denial is summary, the petitioner retains his or her appellate remedy (§ 366.26, subd. (ℓ)(1)(C)) but is limited to the same issue on the same record (§ 366.26, subd. (ℓ)(1)(B)) and thus is

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<sup>2</sup> Section 361.5 subdivisions (b)(10) and (11) permit the court to bypass services when the court finds by clear and convincing evidence that the parent “failed to reunify with [a] sibling or half sibling” (subd. (b)(10)) of the child or “[t]hat the parental rights of a parent over any sibling or half sibling of the child had been permanently severed” (subd. (b)(11)) and that, as to either predicate circumstance, the parent “has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent. . . .” (§ 361.5 subd. (b)(10); see also subd. (b)(11).)

destined on appeal to receive the same result.” (*Joyce G.*, *supra*, 38 Cal.App.4th at p. 1514.)

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence--that is, evidence which is reasonable, credible and of solid value--to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. (*In re Jason L.*, at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.) The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Mother limits her argument on appeal to whether substantial evidence supports the juvenile court’s finding that she failed to make a reasonable effort to treat the problems which led to N.J.’s removal. Mother argues there was no evidence that she failed to take her medication as prescribed, only that she had to be reminded to take her medication while at the Maternity Home on four occasions in July 2013. Mother argues that the juvenile court’s conclusion the minor was at risk if returned to her care was based upon speculation.

The phrase “reasonable effort to treat” found in section 361.5, subdivisions (b)(10) and (11) is not synonymous with “cure.” (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464.) However, the evidence must show a sustained positive effort by the parent. (*K.C. v. Superior Court* (2010) 182 Cal.App.4th 1388, 1393.) Mother’s efforts do not meet this test.

Several issues led the court to conclude that mother had not made reasonable efforts to treat the problems which led to N.J.’s removal. In N.J.’s case, mother was

diagnosed with chronic depression which severely impacted her ability to function. Her treatment consisted of medication and psychotherapy. Mother discontinued her therapy six months before I.J. was born and did not make any effort to re-engage until a month after I.J. was detained. During that month, mother also undermined her treatment by failing to take her medication as prescribed. The record is clear that she was not “reminded” to take the medication on those days, but instead had a conversation with Maternity Home staff and agreed to be more compliant after she was presented with logs showing lapses in taking her medication. Treatment of her mental health issues was critical to her ability to use the tools she learned in anger management counseling and parenting classes and to decrease the risk of physical abuse and neglect to a minor in her care. Mother’s failure to maintain the treatment was the direct cause of the termination of services and parental rights in N.J.’s case.

Further, while mother had completed an anger management class and participated in psychotherapy, she still did not take responsibility for the physical abuse of N.J., minimizing her actions and blaming her sister. Mother was also unable to apply the information and techniques of the anger management class to prevent engaging in altercations which led to two write ups at the Maternity Home thereby placing her housing at risk. Since the altercations occurred after periods when mother was not compliant with her medication and the lack of therapy and medication directly affected her functioning, the court could reasonably infer that the lack of medication contributed to the altercations.

At best, it can be said that mother made inconsistent efforts to remedy the issues which led to N.J.’s removal. She still did not understand why the first case had led to termination of parental rights. Without that understanding, her efforts to remedy the previous problems were scattered. Substantial evidence supports the juvenile court’s conclusion that mother had not made reasonable efforts to treat the problems that led to the removal of N.J. and that the elements of both bypass provisions had been satisfied.

## II

### *Evidence Supporting the Termination of Parental Rights*

Mother argues that substantial evidence does not support a determination of unfitness based upon the juvenile court's prior findings.

“Parents have a fundamental interest in the care, companionship, and custody of their children. (*Santosky v. Kramer* (1982) 455 U.S. 745, 758 [71 L.Ed.2d 599].) *Santosky* establishes minimal due process requirements in the context of state dependency proceedings. ‘Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations *by at least clear and convincing evidence.*’ [Citation.] ‘After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge.’ [Citation.] ‘But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.’ [Citation.]

“California’s dependency system comports with *Santosky*’s requirements because, by the time parental rights are terminated at a section 366.26 hearing, the juvenile court *must* have made prior findings that the parent was unfit. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.) ‘The number and quality of the judicial findings that are necessary preconditions to termination convey very powerfully to the fact finder the subjective certainty about parental unfitness and detriment required before the court may even consider ending the relationship between natural parent and child.’ [Citation.] The linchpin to the constitutionality of the section 366.26 hearing is that prior determinations ensure ‘*the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the state must align itself.*’ [Citation.]” (*In re Gladys L.* (2006) 141 Cal.App.4th 845, 848, some italics added; accord *In re Frank R.* (2011) 192 Cal.App.4th 532, 537.)

California’s dependency scheme does not use the term “parental unfitness,” requiring instead that the juvenile court find that awarding custody of a dependent child to a parent would be detrimental to the child. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 224, fn. 3.) This finding can be made in various ways, i.e., denial of services, abandonment, conviction of a felony showing parental unfitness or continued removal from parental custody coupled with termination of reunification services. (§ 366.26, subd. (c)(1).)<sup>3</sup> Where any of these findings have been made during the reunification period no further finding of detriment is required at the section 366.26 hearing. The fact that reunification services are bypassed pursuant to section 361.5 does not lessen the degree of detriment that has been found to exist as a matter of law. And, to comport with due process, it is only necessary that such a finding is made at some point in the dependency *prior* to termination of parental rights. (*In re Gladys L., supra*, 141 Cal.App.4th at pp. 848-849.)

In this case, the court removed the minor from parental custody and denied services pursuant to section 361.5, subdivisions (b)(10) and (11) at the disposition hearing. The court’s findings were made by clear and convincing evidence. The removal was not directly challenged and, as we have concluded, the bypass ruling was supported by substantial evidence. No further finding of detriment was required. The juvenile court did not err in terminating parental rights.

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<sup>3</sup> Section 366.26 provides in part: “A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered, under subdivision (e) of Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months, or that the parent has been convicted of a felony indicating parental unfitness, or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights.” (§ 366.26, subd. (c)(1).)

### III

#### *Notice Under the Indian Child Welfare Act*

Mother contends reversal is required due to failure to comply with the notice provisions of the ICWA because the final notice did not identify the paternal great-great-grandmother Emma Jeane W. and because the notice did not state that Sandra W. and Emma Jeane W. were tribal members.

#### *A) ICWA Facts*

In June 2013, both mother and father filed ICWA 020 forms. Mother claimed no Indian heritage. Father claimed Cherokee heritage through Sandra W. and Emma Jeane W. The form is unclear as to whether one or both were paternal great-great-grandmothers and suggests that they were members of a federally recognized tribe.

A declaration in July 2013 from a Department paralegal, who dealt with ICWA noticing, stated she attempted to get contact information for the paternal relatives by contacting mother who had no information but said she would try to get the information and call the paralegal back. The paralegal also attempted to contact father who was in jail. The paralegal called mother the next day to ask about paternal relative information, however, mother told her the W.'s telephone number could not be disclosed. The paralegal asked mother to give the paternal relatives the paralegal's contact information. The declaration stated that no one had contacted the paralegal with any information. Notice to the tribes was mailed July 12, 2013, but the notice included only the parents' names. The Department filed the return receipts from the notices. Both the United Keetoowah Band of Cherokee Indians and the Eastern Band of Cherokee Indians responded that there was no evidence the minor was descended from either tribe.

A social worker interviewed father in mid-July for the jurisdiction/disposition report and found that the paternal grandmother, Lashauna Wa., lived in Hayward, California. Father also told the social worker he had been raised by the paternal great-grandmother, Sandra Wa., who died in 2010. Sandra Wa. was married to Charles Wa.,

the paternal great-grandfather. Father identified some of his brothers and sisters, although he did not know them all, and an uncle, Laurence Wa.

An ICWA declaration filed October 4, 2013, stated that the Cherokee Nation had asked for additional information for the paternal grandparents and great-grandparents of the minor. The paralegal contacted the social workers, who said they had no information regarding the father's family, and attempted to contact father, who remained in jail. The paralegal sent a letter to the Cherokee Nation with the names of the paternal grandmother, Lashauna Wa. in Hayward, California; the paternal grandfather, Melvin Freddy J. who died in 1990; the paternal great-grandmother, Sandra W. and the paternal great-grandfather, Charles Wa. Twice more the Cherokee Nation asked for additional information on the paternal relatives before informing the Department it was closing the inquiry.

An ICWA declaration filed March 14, 2014 stated the paralegal finally was able to contact the paternal grandmother who provided all information available to her regarding the father's maternal line but did not know the name of the tribe or if anyone in the family was a member. New notice was sent with this information. The notice included both parents of the minor and their information; the names of the maternal grandparents, Diane B. and Louis R.; the name of the paternal grandmother, Lashaunda Evette Wa. (aka Lashonda Drew W.) and her birth date; the name of the paternal grandfather, Melvin Freddy J.; the name of the maternal great-grandmother, Betty Jean B.; the name, birthday and year of death of the paternal great-grandmother, Sandra W.; the name, birth date and place of birth of the paternal great-great-grandmother Emogene E. and the name, partial birth date and place of birth of the paternal great-great-grandfather Lawrence W. A subsequent ICWA declaration provided copies of the return receipts.

By April 2014, all three Cherokee tribes had concluded the minor was not an Indian child as to any of the tribes.

## B) ICWA Discussion

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) The juvenile court and the Department have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (Cal. Rules of Court, rule 5.481(a).) If, after the petition is filed, the court “knows or has reason to know that an Indian child is involved,” notice of the pending proceeding and the right to intervene must be sent to the tribe. (25 U.S.C. § 1912; see also Welf. & Inst. Code, § 224.2; Cal. Rules of Court, rule 5.481(b).)

The Department is required to interview the minor’s parents and extended family, if known, concerning the child’s membership status or eligibility. (§ 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4).) State statutes, federal Regulations and the federal guidelines on Indian child custody proceedings all specify the contents of the notice to be sent to the tribe in order to inform the tribe of the proceedings and assist the tribe in determining if the child is a member or eligible for membership. (Welf. & Inst. Code, § 224.2; 25 C.F.R. § 23.11(a), (d), (e); 44 Fed.Reg. (Nov. 26, 1979) No. 228, B.5, p. 67588.) If known, the Department should provide name and date of birth of the child; the tribe in which membership is claimed; the names, birthdates, and places of birth and death, current addresses and tribal enrollment numbers of the parents, grandparents and great-grandparents as this information will assist the tribe in making its determination of whether the child is eligible for membership and whether to intervene. (Welf. & Inst. Code, § 224.2; 25 C.F.R. § 23.11(a), (d), (e); 44 Fed.Reg. (Nov. 26, 1979) No. 228, B.5, p. 67588; *In re D.T.* (2003) 113 Cal.App.4th 1449, 1454-1455.)

While the earlier notices failed to provide adequate ancestral information, once the paralegal was able to contact the paternal grandmother, extensive information became available and was provided to the tribes. The paternal grandmother’s information

clarified that Sandra W. was a paternal great-grandmother while Emogene E. W. was a paternal great-great-grandmother. Mother argues that the Department failed to provide the homophonic “Emma Jeane” spelling of the paternal great-great-grandmother’s first name. Inclusion of information about great-great-grandparents is not required, and in this case, where there was ample information about other ancestors, any error was harmless. (*In re J.M.* (2012) 206 Cal.App.4th 375, 381-382.)

Similarly, mother complains that the notices did not indicate that Sandra W. and Emogene W. were tribal members. There is conflicting evidence in the record about whether either ancestor was, in fact, a member of any Cherokee tribe. Father’s ICWA 020 form suggested they were. However, the paternal grandmother, who gave detailed and extensive information about the paternal ancestors, did not know what tribe the family could claim or whether any ancestor was a tribal member. Because it is the province of the tribe to examine the names and information of the ancestors to determine whether the minor who is subject to the dependency proceeding is, or may be, eligible for tribal membership (*In re D. T.* (2003) 113 Cal.App.4th 1449, 1454), any error in failing to include the fact that a paternal great-grandmother or a paternal great-great grandmother may have been a tribal member is harmless. If the person was a member, the tribal records will reflect that fact and the tribe will take the fact into consideration in determining whether the minor is eligible for membership or ask for further clarification. Neither circumstance occurred here and any error in failing to include father’s claim that the paternal great-grandmother and paternal great-great-grandmother were tribal members is harmless.

DISPOSITION

The orders of the juvenile court are affirmed. Appellant's request to incorporate by reference or take judicial notice of the transcript of the hearing on July 29, 2013, is denied as unnecessary.

\_\_\_\_\_ RENNER \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.