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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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

C077846

SACRAMENTO COUNTY DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

(Super. Ct. No. JD232342)

Plaintiff and Respondent,

v.

P.W. et al.,

Defendants and Appellants.

Appellants P.W. (mother) and F.B. (father) appeal from the juvenile court's order terminating parental rights and freeing minor A.B. for adoption. (Welf. & Inst. Code, §§ 366.26, 395 [further undesignated statutory references are to the Welfare and Institutions Code].) They contend the juvenile court's order must be reversed due to

noncompliance with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) notice provisions, failure to give notice of the section 366.26 hearing to the previously identified tribe, denial of mother's request to continue the section 366.26 hearing, and not applying the beneficial parental relationship exception to adoption. We affirm.

### BACKGROUND

In April 2012, the Sacramento County Department of Health and Human Services (Department) filed a section 300 petition on behalf of the then three-and-a-half-year-old minor, alleging that mother had failed to provide adequate care and supervision for the minor and her three older brothers.<sup>1</sup> The petition alleged that mother had not fixed the locks on the doors, allowing the nonverbal minor to leave and enter a busy intersection wearing only a diaper. One of the older boys had climbed on the roof earlier in the year, and mother allowed the oldest brother, who was 12 years old, to supervise the children alone, despite knowing one of the younger brothers acted out sexually. The petition was amended to add that mother has a substance abuse problem and that father failed to protect the minor from mother's improper care.

Mother is a member of the Sherwood Valley Rancheria of Pomo Indians of California (Sherwood Tribe) -- a federally recognized tribe. (Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs (BIA) 74 Fed.Reg. 40218, 40221 (Aug. 11, 2009).) She also has Mishewal Whappo Indian heritage, although that is not a federally recognized tribe. Father reported Indian heritage through Cherokee, Choctaw, and Blackfeet. A representative from the Sherwood Tribe appeared at the April 2012 detention and parentage hearings.<sup>2</sup> The tribal representative informed the juvenile court

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<sup>1</sup> The minor's brothers are not the subjects of this appeal.

<sup>2</sup> The Department had given the Sherwood Tribe telephonic notice of the proceeding.

that the minor was not eligible for tribal enrollment due to separation from the Native American ancestor and insufficient blood heritage. The representative informed the court that the Sherwood Tribe was not intervening on behalf of the minor, but wished to appear on behalf of the mother and participate as a resource for the family. Both parents filled out Indian ancestry questionnaires and the minor was placed in a confidential Indian home.

On May 8, 2012, the Department sent notice of the proceedings to the Sherwood Tribe, as well as the relevant Cherokee and Choctaw tribes. On May 18, 2012, the Department sent out an amended notice, containing the additional information provided by mother. On May 30, 2012, the Department sent notice to the Blackfeet tribe. The Department filed return receipts establishing all the tribes received the ICWA notices.

The jurisdiction/disposition hearing was held on July 3, 2012. The juvenile court found notice of the hearing had been provided in accordance with the ICWA. The juvenile court sustained the allegations in the petition and ordered reunification services for the parents. The minor remained in her confidential Indian home.

The juvenile court held an ICWA compliance hearing on August 14, 2012. It found that the ICWA notice had been properly given, that the noticed tribes had either not responded or informed the court that the minor was not eligible for membership, that the minor was not an Indian child within the meaning of the ICWA, and that the Department need not provide further notice to tribes unless new information were to be obtained.

Reunification services were continued at the six- and 12-month review hearings, held in January 2013 and July 2013, respectively. At a November 5, 2013, hearing, the Department informed the court that it had followed up on a representation by mother that the minor was an enrolled tribal member. Having contacted a representative of the Sherwood Tribe, the Department was informed that the tribal enrollment committee was going to meet on November 1, 2013, to determine whether the minor is eligible to be a member. A follow-up call was made to the representative on November 4, 2013, and the

representative stated that the tribe had determined the minor was eligible for enrollment and asked for another ICWA notice to be sent by certified mail, after which the Sherwood Tribe would send a written reply. The Department sent that notice on November 4, 2013, which notified the Sherwood Tribe of an upcoming November 15, 2013, contested hearing but did not include all of the ancestral and identifying information previously provided to the tribe.<sup>3</sup> Accordingly, the Department requested and received a short continuance to permit at least 10 days to elapse from the time of notice.

No written response to the new ICWA notice was filed with the court. On February 7, 2014, the Department filed a declaration stating that it had spoken to the Sherwood Tribe's representative by telephone on January 23, 2014, and the representative informed it that the minor was not eligible for membership and that the representative would follow up with a letter to that effect.

At a contested section 366.22 hearing, held on July 9, 2014, the juvenile court terminated reunification services and set a section 366.26 hearing. On July 10, 2014, the Sherwood Tribe sent a letter to the Department stating that mother was an enrolled member of the tribe and that the minor was a lineal descendant of the tribe's base roll and sovereign nation. The tribal council requested that the spirit of the ICWA be considered in any future decisions regarding the minor.

The Department sent notice of the section 366.26 hearing on July 16 and 22, 2014. It did not send notice to the Sherwood Tribe.

The contested section 366.26 hearing took place on October 30, 2014. Mother's counsel again raised the applicability of the ICWA, explaining it was mother's position that she is a member of the Sherwood Tribe and her children are eligible for enrollment, based on e-mails she had received from the tribe's representative. The juvenile court

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<sup>3</sup> The contested hearing was with respect to a jurisdiction/disposition hearing for the minor's brothers.

stated that perhaps the tribe was undergoing some reorganization but the court had not received any information that the minor is eligible and the court had found the ICWA not applicable. After further discussions about the history of the Sherwood Tribe's representations regarding the minor's eligibility and the July 10, 2014, letter sent by the tribe asking that the spirit of the ICWA be applied, the juvenile court found no basis to overturn its previous determination that the ICWA was not applicable.

The Department's report assessed that the minor was specifically adoptable. She has a chromosome disorder, developmental delays and autism, but had begun a "mainstreamed" kindergarten class with an active Individualized Education Plan (IEP) and special services. The minor had developed a significant relationship with her caretakers, along with their large family, with whom she had been placed since detention. The caretakers wished to adopt the minor, had previously adopted so they had an approved adoption home study in the process of being updated, and there was no reason to believe they would not pass a home study update. The social worker opined that, although mother visited the minor, she did not appear to be a significant individual in the minor's life. The Department recommended parental rights be terminated.

Neither parent testified at the hearing. Father made a general objection to termination of parental rights. Mother also objected to termination of parental rights, stating she wanted to maintain her relationship with the minor and that they shared a bond that would render it detrimental to terminate her parental rights.

The juvenile court found there was insufficient evidence of regular and ongoing visitation and contact between the minor and her parents such that the minor would suffer a serious detriment if the parental relationship were terminated. The court noted that both parents missed visitation and there was very little evidence to suggest they occupied a parental role to the minor. The court found the minor adoptable by her caretakers and terminated parental rights.

Additional facts and proceedings are recounted in our discussion as relevant to appellants' contentions on appeal.

## DISCUSSION

### I

#### *Compliance With the ICWA Notice Provisions*

Appellants contend the Department did not provide proper ICWA notice to the Sherwood Tribe because the November 4, 2013, notice sent at the request of the tribe, did not contain ancestral and identifying information. There is no apparent error.

The purpose of the ICWA notice provisions is to enable the tribe or the BIA to investigate and determine whether a child is an Indian child. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.) To that end, once the juvenile court has received information that gives reason to believe a child is an Indian child, notice under the ICWA must be given. (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989.) Notice must include all of the following information, if known: the child's name, birthplace, and birth date; the name of the tribe in which the child is enrolled or may be eligible for enrollment; names and addresses of the child's parents, grandparents, great-grandparents, and other identifying information, and a copy of the dependency petition. (§ 224.2, subd. (a)(5)(A)-(D); *In re Mary G.* (2007) 151 Cal.App.4th 184, 209.)

“[E]rrors in an ICWA notice are subject to review under a harmless error analysis. [Citation.]” (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1415.) We do not presume error. Rather, it is appellants' obligation to present a record that affirmatively demonstrates error. (*In re D.W.* (2011) 193 Cal.App.4th 413, 417-418.) They have not met this burden.

The Sherwood Tribe received both the initial ICWA notice and the amended ICWA notice, which contained the sum of all the ancestral and identifying information available. The November 4, 2013, ICWA notice, which appellants now claim was insufficient because it did not include that previously provided ancestral and identifying

information, was merely a courtesy notice, provided at the request of the Sherwood Tribe *after* it had purportedly changed its position to find the minor eligible for enrollment.

Although the Department complied with the Sherwood Tribe's request to send another ICWA notice, that notice was superfluous and unnecessary, as the tribe already had notice of the proceedings and could intervene at any time if it determined the minor was a member or eligible for membership. There is nothing in the record to indicate that the tribe requested the additional notice because it had lost the earlier amended notice or that the tribe was requesting additional information in order to make an eligibility determination. Indeed, the tribe's request was made *after* it had purportedly changed its position to find the minor eligible for enrollment. Thus, appellants' claim that this "defective notice was prejudicial" because the tribe needed the ancestral and identifying information to determine whether the minor was eligible for enrollment, is specious. Any error in the omission of the ancestral and identifying information in the courtesy notice was clearly harmless.

## II

### *Notice of Section 366.26 Hearing*

Appellants next contend reversal is required because the Sherwood Tribe was not provided with the statutorily prescribed notice of the section 366.26 hearing. We disagree because notice to the tribe was not required.

Until parental rights are terminated, parents are entitled, as a matter of due process and statute, to notice of the juvenile proceedings. (*In re DeJohn B.* (2000) 84 Cal.App.4th 100, 106; § 294.) Similarly, the tribe is entitled to notice of all hearings *until it is determined the ICWA does not apply.* (§ 224.2, subd. (b).)

Here, the juvenile court determined the ICWA does not apply to this case at the ICWA compliance hearing held on August 14, 2012. It found that the ICWA notice had been properly given, that the noticed tribes (including the Sherwood Tribe) had either not responded or informed the court that the minor was not eligible for membership, and that

the minor was not an Indian child within the meaning of the ICWA. The juvenile court never made any later determination that the ICWA may apply and had ruled that the Department need not provide further notice to tribes unless new information were to be obtained. The only “new information” ever received was an oral representation that the Sherwood Tribe may have changed its position regarding the eligibility of the minor to enroll. However, the Sherwood Tribe ultimately sent a letter indicating the minor was merely a lineal descendant of an enrolled member and asking that the spirit of the ICWA be applied, regardless. That letter was sent to the Department prior to the setting of the section 366.26 hearing. Accordingly, the Department was not required to send notice of the hearing to the Sherwood Tribe.

Appellants appear to assume, with no citation to authority, that the Department’s compliance with the Sherwood Tribe’s request to send another ICWA notice in November 2013, after it had purportedly changed its position regarding the minor’s eligibility, somehow invalidated the juvenile court’s previous ICWA finding. We disagree. The juvenile court’s findings and orders that the ICWA does not apply were never vacated or set aside, and no subsequent findings were ever made. Thus, the Sherwood Tribe was not entitled to formal notice of the section 366.26 hearing.

### III

#### *Continuance of Section 366.26 Hearing*

Appellants also contend it was error for the juvenile court to deny mother’s request to continue the section 366.26 hearing to, once again, allow for additional notice to the Sherwood Tribe so as to provide the tribe with an opportunity to intervene in the proceedings. We find no error.

First, we disagree with mother’s characterization of the record to construe her counsel’s comments as a request for a continuance. Mother’s counsel stated that mother believed that the Sherwood Tribe had, within the last two weeks, again revised its position regarding the minor’s eligibility, that she was told a letter was sent to the BIA

along those lines, and that she understood that a representative of the tribe originally intended to appear at the hearing. This statement was made as an offer of proof after the Department volunteered to continue the proceedings if the court wanted clarification regarding the Sherwood Tribe's July 10, 2014, letter (stating the minor was a lineal descendant and requesting the "spirit" of the ICWA be applied). Mother's counsel's offer of proof did not adequately constitute a motion or request for a continuance of the hearing.

In any event, the offer of proof was insufficient to warrant a continuance under the circumstances. In dependency cases, continuances are disfavored, shall be granted only upon a showing of good cause, and shall not be granted if to do so would be contrary to the minor's interests. (§ 352, subd. (a); *In re David H.* (2008) 165 Cal.App.4th 1626, 1635; *In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1186-1187.) "[T]he court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (§ 352, subd. (a).) "[T]ime is of the essence in offering permanent planning for dependent children." [Citations.] (*In re Gerald J.*, *supra*, at p. 1187.) The juvenile court is accorded broad discretion in determining whether to grant a continuance. (*Id.* at pp. 1186-1187; § 352, subd. (a).) We review the denial of a continuance for an abuse of discretion. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 180.)

Here, according to mother's representation at the hearing, the Sherwood Tribe had purportedly changed its position and decided the minor was eligible for enrollment *two weeks earlier*. Additionally, mother's counsel referred to e-mails from the tribe's representative that indicated he was aware of the hearing being held that day. Yet, as the juvenile court noted, despite the representation that the tribe had changed its position, and the tribe's indisputable knowledge of the ongoing dependency proceedings which could result in the termination of parental rights, the tribe did *not* intervene *or* inform the court

of the minor's eligibility. Under these circumstances, the juvenile court was not obligated to further delay the proceedings.

#### IV

##### *Beneficial Parental Relationship Exception*

Mother contends the juvenile court erred by failing to apply the beneficial parental relationship exception to adoption and thus avoid terminating their parental rights. Father joins in mother's argument to the extent a favorable determination would reverse the termination of his parental rights, as well.

“ ‘At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . The permanent plan preferred by the Legislature is adoption. [Citation.]’ [Citations.] If the court finds the child is adoptable, it must terminate parental rights absent circumstances under which it would be detrimental to the child. [Citation.]” (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368, original italics.)

There are only limited circumstances permitting the court to find a “compelling reason for determining that termination [of parental rights] would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B).) One of these is where the parent has “maintained regular visitation *and* contact with the child and the child would benefit from continuing the relationship” (original italics), often referred to as the beneficial parental relationship exception. (§ 366.26, subd. (c)(1)(B)(i).) The “benefit” to the child must promote “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.” (*In re Autumn*

*H.* (1994) 27 Cal.App.4th 567, 575; *In re C.F.* (2011) 193 Cal.App.4th 549, 555.) Even frequent and loving contact is not sufficient to establish this benefit absent a significant, positive, emotional attachment between parent and child. (*In re C.F.*, *supra*, at p. 555; *In re Autumn H.*, *supra*, at p. 575.)

“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.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

The party claiming the exception has the burden of establishing the existence of any circumstances which constitute an exception to termination of parental rights. (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 553.) As such, the parent must establish the existence of the factual predicate of the exception -- that is, evidence of the claimed beneficial parental relationship -- and the juvenile court must then weigh the evidence and determine whether it constitutes a compelling reason for determining detriment. Substantial evidence must support the factual predicate of the exception. However, the juvenile court exercises its discretion in weighing that evidence and determining detriment. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) “On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citation.]” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) “ ‘[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge.’ ” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)<sup>4</sup>

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<sup>4</sup> We acknowledge the parties’ discussion in their respective briefing regarding the split of authority as to whether the substantial evidence standard, the abuse of discretion

First, as the juvenile court determined, mother failed to prove regular visitation. Mother missed visits (including three out of seven Parent-Child Interaction Therapy (PCIT) sessions), at least two times with the excuse that she “forgot” the scheduled visit. She often had to be reminded by the caretaker to request visits at all.

Even if mother’s visitation were deemed regular, mother did not establish she and the minor had such a significant, positive relationship the minor would be greatly harmed if it were severed. In fact, the evidence established minor had behavioral problems before and after visits. Her distress, both in anticipation of visits and after visits, is not demonstrative of a *positive* relationship with mother. Moreover, the minor often resisted going to visits and there was no evidence the minor showed any signs of distress when visits would end.

The pediatric doctor who examined the minor at the time she was detained stated it appeared “nobody had spent any real time with the child.” And the minor returned from unsupervised visits during the pendency of these proceedings with sopping wet diapers or having urinated in her pants, indicating mother was not being attentive to the minor’s needs during visits. Mother did not even call in between visits to inquire as to how the minor was doing.

On the other hand, the minor was bonded with her caretaker and thriving in her prospective adoptive home. She had been removed from mother’s care at age three and a half and had been out of the home for almost half of her young life.

Indeed, the only evidence of any positive relationship was a statement from the PCIT therapist, who saw minor and mother on four occasions, that the minor was “excited to see her mother” and noted no concerns. That is insufficient, especially in

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standard, or a hybrid standard applies in reviewing the juvenile court’s rejection of exceptions to adoption. We apply the hybrid standard, but note that “[t]he practical differences between the two standards are not significant” in this context. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

light of all the other evidence, to establish the type of significant, positive relationship, the severing of which would be greatly harmful, so as to overcome the preference for adoption. The juvenile court did not abuse its discretion by finding the beneficial parental relationship exception to adoption did not apply.

DISPOSITION

The orders of the juvenile court are affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.