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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

TARA T. et al.,

Defendants and Appellants.

D060446

(Super. Ct. No. EJ3119)

APPEAL from an order of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

Tara T. and Arthur F. (together, the parents) appeal a juvenile court order terminating their parental rights to their minor son, Wyatt T., under Welfare and Institutions Code section 366.26. (Statutory references are to the Welfare and Institutions Code unless otherwise specified.) Tara contends: (1) she did not receive reasonable

reunification services; (2) the San Diego County Health and Human Services Agency (Agency) did not make active efforts to prevent the breakup of this Indian family; (3) the court erred by failing to comply with the mandates of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) before terminating the parental rights of this Indian child; (4) the evidence supports a finding that terminating parental rights would substantially interfere with Wyatt's connection to his tribal community or membership rights; and (5) the court erred by finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating parental rights. Arthur joins in these arguments to the extent they benefit him. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2009, Agency filed a petition in the juvenile court under section 300, subdivision (b) alleging three-month-old Wyatt was at substantial risk of harm because his parents exposed him to domestic violence. The parents were methamphetamine users. The court detained Wyatt with the maternal grandfather and step-grandmother (together, maternal grandparents), and allowed Tara to continue living in their home. The court ordered no contact between Arthur and Wyatt.

The maternal grandmother, now deceased, had been a registered member of the Barona Band of Mission Indians (Barona Band), and Tara signed an ICWA form stating she may also be a member. In August 2009, Agency sent ICWA notice to the Barona Band, the Campo Band of Mission Indians (Campo Band) and the Bureau of Indian Affairs (BIA).

At a jurisdiction hearing, the court sustained the allegations of the petition, ordered Tara to inquire about her tribal membership and continued the disposition hearing. In the meantime, Tara had moved out of the maternal grandparents' home and was not participating in drug treatment. Arthur's whereabouts were unknown. Agency received notification that Wyatt was not a descendent of the Barona Band, but his enrollment was pending as a descendent of the Campo Band.

At the disposition hearing, the court found ICWA applied. The court declared Wyatt a dependent, removed him from parental custody and ordered reunification services for Tara. After paternity tests showed Arthur was Wyatt's biological father, the court ordered reunification services for him.

In a report prepared for the six-month review hearing, Agency noted Wyatt was stable in the home of the maternal grandparents. The Southern Indian Health Council (Council) was willing to designate the maternal grandparents' home as an Indian home based on Wyatt's Indian ancestry. The Council offered Tara domestic violence treatment at its facility, but she did not follow through. She did not complete a parenting course or substance abuse treatment. Tara was visiting Wyatt and was attentive to his needs. Arthur was incarcerated and unable to have visits with Wyatt. At a contested six-month review hearing on June 9, 2010, at which Tara was present, the court found reasonable services had been offered or provided to the parents, but Tara had made minimal substantive progress with her case plan. The court terminated Tara's services but extended Arthur's services for six more months after finding he had made substantive

progress with his case plan. Tara's counsel agreed to advise Tara of her appellate rights. The court ordered the parents to return for the 12-month hearing.

At the time of the 12-month hearing, Arthur was in prison. He acknowledged he was not ready to have custody of Wyatt, and it was best for Wyatt to remain with the maternal relatives. Agency had had no contact with Tara. Following several continuances, the 12-month hearing was held in January 2011. After considering Agency's reports, the court found proper notice had been given and active efforts had been made to prevent the breakup of the Indian family under ICWA. The court terminated Arthur's services and set a section 366.26 selection and implementation hearing.

The social worker assessed two-year-old Wyatt as generally and specifically adoptable and recommended adoption as his permanent plan. Tara had four supervised visits with Wyatt in two months. Wyatt appeared happy to see Tara, but when visits ended, he was eager to return to his maternal grandparents. He did not view Tara as his mother or look to her to meet his needs. Instead, their relationship was more like extended family members or playmates. Arthur had been incarcerated most of Wyatt's life, and had visited Wyatt only twice. In the social worker's opinion, Wyatt did not have a beneficial parent-child relationship with the parents, and the benefits of adoption outweighed maintaining a relationship with them.

According to an August 2011 addendum report, the Campo Band informed Agency that Wyatt was not eligible for enrollment because he did not meet "the blood quantum." Agency also learned that the Rincon Band of Luiseno Indians (Rincon Band)

declined to research an enrollment request on behalf of Wyatt because all enrollment in that tribe had been suspended.

At a contested selection and implementation hearing, the court found Wyatt was likely to be adopted and none of the exceptions to adoption applied. The court terminated parental rights and referred Wyatt for adoptive placement.

DISCUSSION

I

Tara challenges the court's finding, made at the six-month review hearing, that she received reasonable services. Tara asserts: (1) she may raise this issue on appeal, instead of by extraordinary writ review, because she was not properly served with statutory writ advisements; (2) Agency did not make active efforts to prevent the breakup of this Indian family because it failed to assist her in paying for services she could not afford; and (3) the court erred by failing to apply ICWA when it made its findings and orders at the six-month review hearing. Arthur joins in these arguments.

A

Tara purports to appeal the court's June 9, 2010 order terminating her reunification services after the court found those services had been reasonable. However, the order relating to the adequacy of reunification services, made at the six-month review hearing, was appealable "as an order after judgment." (*In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1704.) The time to appeal that order has since passed, and has long since become final. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393.) Where, as here, no timely appeal is taken from an appealable order, "the issues determined by the order are res judicata."

(*Ibid.*; see also *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150 [unappealed post-disposition order is final and binding and may not be attacked on appeal from a later appealable order]; *Melinda K. v. Superior Court* (2004) 116 Cal.App.4th 1147, 1156 [parent may not challenge an earlier finding by way of appeal from a subsequent order].)

Tara was present at the six-month review hearing and was represented by counsel, who agreed to advise her of her appellate rights. No appeal was forthcoming, and it is now too late for Tara to challenge the reasonableness of reunification services, claim Agency should have paid for her to participate in domestic violence counseling, or argue the lack of ICWA compliance. (*In re Cicely L., supra*, 28 Cal.App.4th at pp. 1705-1706.)

B

In an attempt to avoid having forfeited her right to appeal the propriety of the court's reasonable services finding, Tara claims she can raise this issue on appeal because she was not given notice that appellate review was available to her only by filing a writ petition as provided in section 366.26, subdivision (l)(3)(A) and California Rules of Court, rule 5.590. These provisions, however, apply to preserve issues for review when a parent challenges findings and orders made by the juvenile court in setting a selection and implementation hearing under section 366.26. (See *In re Athena P.* (2002) 103 Cal.App.4th 617, 625.) "They in no way restrict, let alone prohibit, appellate review of earlier findings and orders." (*Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1395.)

Tara is not challenging the court's order setting a selection and implementation hearing. That order, made at the 12-month review hearing in January 2011, included no

findings or rulings regarding Tara's services. Reasonable services findings were made much earlier and were immediately appealable. (*In re Cicely L.*, *supra*, 28 Cal.App.4th at p. 1705; *Wanda B. v. Superior Court*, *supra*, 41 Cal.App.4th at pp. 1395-1396.) Because appellate review was not available to Tara by way of extraordinary writ, we need not address her claim of defective notice as to the requirements for filing a writ petition. (Cf. *In re Athena P.*, *supra*, 103 Cal.App.4th at p. 625 [mother excused from failing to file writ petition to challenge findings made at referral hearing because court did not properly advise her of writ petition requirement].)

II

Tara contends the court committed reversible error by terminating her parental rights without complying with the mandates of ICWA. Conceding Wyatt's tribal enrollment or membership status is "unclear from the record," she asserts the court never modified its finding that ICWA applied to this case, and thus, it should have proceeded as if Wyatt were an Indian child. Tara further asserts the court erred by failing to find termination of parental rights would substantially interfere with Wyatt's tribal connection within the meaning of section 366.26, subdivision (c)(1)(B)(vi). Arthur joins in this argument.

A

"ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes and families by establishing certain minimum federal standards in juvenile dependency cases." (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538.) An Indian child is defined as any unmarried person who is under age 18 and is either (1) a

member of an Indian tribe, or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4).) "Each Indian tribe has the sole authority to determine its membership criteria, and to decide who meets those criteria. [Citation.] Formal membership requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership. [Citation.]' [Citation.]" (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 255; *In re Jack C.* (2011) 192 Cal.App.4th 967, 978 [it is tribe's prerogative to determine membership criteria].) The tribe's determination as to a child's Indian status is conclusive. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 702; *Dwayne P. v. Superior Court, supra*, 103 Cal.App.4th at p. 255.)

B

Here, Agency sent notice of the pending proceedings to several tribes and the BIA based on information Wyatt's maternal grandmother had been a registered member of the Barona Band. After Agency was informed that Wyatt's enrollment was pending as a descendent of the Campo Band, the court found ICWA applied, and made subsequent findings in accordance with ICWA. However, before the selection and implementation hearing in August 2011, the Campo Band sent a letter to Agency stating Wyatt was not eligible for enrollment because he did not meet "the blood quantum." Also, the Rincon Band said Wyatt was not eligible for enrollment. Based on this new information regarding Wyatt's eligibility status, the court and the parties proceeded as though ICWA no longer applied.

Tara asserts the letters from the Campo Band and Rincon Band are insufficient to obviate the need for ICWA compliance because enrollment in a tribe is not determinative of a child's membership status unless the tribe confirms in writing that enrollment is a prerequisite for membership under tribal law or custom. (§ 224.3, subd. (e)(1).) However, it is clear that neither the Campo Band, which presumably requires a minimum blood quantum that Wyatt does not meet, nor the Rincon Band, in which enrollment has been indefinitely suspended, has chosen to intervene in these proceedings. By not deciding Wyatt was a member or promptly intervening in the case, their inaction indicates they do not consider him to be an Indian child according to their tribal requirements. Although the court did not expressly find ICWA no longer applied, we can reasonably infer this finding from the record. Moreover, it would not serve ICWA's goals -- to encourage and protect the Indian child's membership in his or her tribe and connection to the tribal community -- to remand this case simply to clarify the membership requirements of tribes who had notice of Wyatt's dependency status since August 2009 and chose not to recognize him as a member or intervene in the proceedings. (§ 224, subd. (a)(2); *In re A.A.* (2008) 167 Cal.App.4th 1292, 1322.) Because both the court and Agency fulfilled their duties under ICWA, reversal is not warranted.

C

Tara contends the Indian child exception to adoption under section 366.26, subdivision (c)(1)(B)(vi) applies to preclude terminating her parental rights. However, at the time of the selection and implementation hearing, the provisions of ICWA no longer

applied. Indeed, Tara did not argue the applicability of this exception. (*In re A.A., supra*, 167 Cal.App.4th at p. 1323 [court has no sua sponte duty to determine whether an exception to adoption applies if it is not raised by a party].) Thus, there was no need for the court to address whether terminating parental rights would substantially interfere with Wyatt's connection to his tribal community or his tribal membership rights. (§ 366.26, subd. (c)(1)(B)(vi).)

III

Tara challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship of section 366.26, subdivision (c)(1)(B)(i) did not apply to preclude terminating her parental rights. She asserts she maintained regular visitation and contact with Wyatt, who would benefit more from continuing the relationship than from being adopted. Arthur joins in this argument.

A

After reunification services are terminated, the focus of a dependency proceeding shifts from preserving the family to promoting the best interests of the child, including the child's interest in a stable, permanent placement that allows the caregiver to make a full emotional commitment to the child. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At the selection and implementation hearing, the court has three options: (1) terminate parental rights and order adoption as the permanent plan; (2) appoint a legal guardian for the child; or (3) order the child placed in long-term foster care. (*Ibid.*)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be

returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one or more of the enumerated statutory exceptions. (§ 366.26, subd. (c)(1)(A) & (B)(i)-(vi); *In re Celine R.* (2003) 31 Cal.4th 45, 53.) "The parent has the burden of establishing the existence of any circumstance that constitutes an exception to termination of parental rights." (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039.) Because a selection and implementation hearing occurs "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.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if terminating parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the [parent/child] relationship" to refer to a parent-child relationship that "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 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.*, *supra*, 27 Cal.App.4th at p. 575; accord *In re Jason J.* (2009) 175 Cal.App.4th 922, 936-937.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Jason J.*, *supra*, 175 Cal.App.4th at pp. 936-937.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment from child to parent. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

We review the court's finding regarding the applicability of a statutory exception to adoption for substantial evidence. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) In this regard, we do not consider the credibility of witnesses, resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) On appeal, the parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B

At the time of the selection and implementation hearing, Tara was having regular, supervised visits with Wyatt. She did not, however, meet her burden of showing there

was a beneficial parent-child relationship sufficient to apply the exception of section 366.26, subdivision (c)(1)(B)(i).

Although Tara was affectionate, attentive and playful during supervised visits and brought Wyatt diapers, clothes and food, she did not act in a parental manner by placing his needs above her own. Her appearance and demeanor at visits suggested she was still using drugs. Tara related to Wyatt like an extended family member or playmate rather than a parent. She made inappropriate comments to Wyatt, such as calling him "you sucker," telling him he probably has attention deficit/hyperactivity disorder, and saying he was "mean" when he tried to be playful with her. Although Wyatt appeared happy to see Tara, he did not view her as his mother or look to her to meet his needs. When visits ended, he was eager to return to his maternal grandparents, and there was no indication he was negatively impacted by the absence of Tara from his daily life. Any warmth and affection Wyatt shared with Tara was not enough to show the existence of a "significant, positive, emotional attachment" such that terminating the parent-child relationship would result in great harm to Wyatt. (*In re Jason J.*, *supra*, 175 Cal.App.4th at pp. 936, 937.)

Further, Tara has not shown that maintaining a relationship with Wyatt outweighed the benefits of adoption for him. Wyatt was removed from parental custody when he was two months old. Since that time, he has had to depend on caregivers other than Tara to meet his daily physical, medical, developmental and emotional needs. Wyatt is now almost three years old and deserves the stability, continuity and permanence that only an adoptive home can provide. The court was entitled to accept the social worker's opinion that the benefits of adoption for Wyatt outweighed the benefits of maintaining a

relationship with Tara. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 191 [child's interest in stable and permanent home is paramount once a parent's interest in reunification is no longer at issue].) We cannot reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.)

Tara's reliance on *In re S.B.* (2008) 164 Cal.App.4th 289, 298-300, is misplaced. We are compelled to reiterate "*S.B.* is confined to its extraordinary facts," none of which are present here. (*In re C.F.* (2011) 193 Cal.App.4th 549, 558.) Substantial evidence supports the court's finding there was no beneficial parent-child relationship to preclude terminating parental rights.

DISPOSITION

The order is affirmed.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.