

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

M.A.,

Defendant and Appellant.

D060449

(Super. Ct. No. J509334)

APPEAL from a finding and order of the Superior Court of San Diego County,
Michael J. Imhoff, Commissioner. Affirmed.

M.A. appeals an order terminating her daughter's dependency case under Welfare
and Institutions Code section 366.3, subdivision (a),¹ which governs termination of

¹ Unless otherwise indicated, further references are to the Welfare and Institutions
Code.

juvenile court jurisdiction following establishment of a legal guardianship. She contends the court should have retained jurisdiction to ensure compliance with its order granting her visitation with her daughter. M.A. also maintains the matter must be remanded for compliance with the Indian Child Welfare Act (ICWA), title 25 United States Code section 1901 et seq., and section 224 et seq. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

M.A. A. has a 20-year history of polysubstance abuse and bipolar disorder. Due to noncompliance with mental health and substance abuse treatment, and periodic incarceration on drug-related criminal charges, M.A. lost custody of her five children at various times throughout those years. M.A. is also estranged from family members, including those caring for her children.

This appeal concerns the fourth of M.A.'s five children, S.A., who is now 12 years-old. S.A.'s alleged biological father was never located. S.A. was a dependent of the juvenile court from 2001 to 2005, and again from June 2009, when she was detained in protective custody after her mother's arrest on drug charges at a San Diego County courthouse.

The court granted presumed father status to Jeffrey G.,³ who had been involved with M.A. since 2002 and is the father of her youngest child. Jeffrey, too, has a significant substance abuse and criminal history.

2 The factual background concerning ICWA is detailed in Discussion, part C, *post*.

In October 2009, the San Diego County Health and Human Services Agency (Agency) placed S.A. in the care of her maternal aunt, A.C. (Aunt C.), who lived approximately 60 miles from San Diego. To facilitate visitation with her siblings, mother and other relatives, S.A. often stayed overnight with family members in San Diego, including her maternal grandmother (grandmother) and maternal aunt F.A. (Aunt A.)

After S.A. was declared a dependent of the juvenile court, M.A. was arrested in August, October and December 2009, and January, April and September 2010. After her arrest on charges of domestic violence in April, M.A. was hospitalized with toxic encephalopathy, acute delirium and acute respiratory failure, all related to methamphetamine use. In September 2010, M.A. was charged with possession of drug paraphernalia and impersonating her sister A.C., which had long-lasting adverse consequences to A.C.'s personal finances.

M.A. and Jeffrey (the parents) were released from jail in November 2010. They complied with substance abuse treatment.

In March 2011, the court selected a plan of guardianship for S.A. and appointed Aunt C. as her guardian. The court found that S.A. would benefit from continuing her relationship with M.A. and ordered unsupervised visits not to exceed four hours in length. In April, the court ordered liberal visitation a minimum of four hours a week and gave the social worker discretion to increase visitation.

3 Jeffrey does not appeal. He is mentioned when his circumstances are relevant to M.A.'s appellate claims.

With the social worker's assistance, M.A., Aunt C. and other relatives set up a visitation and transportation schedule. S.A. would visit her parents in San Diego every other weekend but would not stay overnight with them. Instead, she would stay with her grandmother or another relative, and M.A. and Jeffrey would pick her up on Sunday morning. When school was not in session, S.A. would also visit her parents on Thursdays. This schedule was implemented with minor problems.

In approximately late spring, M.A. began to request overnight visits with S.A. S.A. said she did not want to spend the night with her parents. In July, S.A. said she was willing to stay with her parents overnight but expressed concern about their histories of substance abuse and domestic violence. Aunt C. adamantly opposed overnight visits. The social worker also opposed overnights visits, noting that S.A. had expressed reservations about staying overnight with her parents and did not have the emotional makeup to withstand her mother's manipulative behavior and pressure.

The juvenile court held a special hearing on M.A.'s request for overnight weekend visits on August 4. The court admitted the Agency's reports in evidence and heard testimony from M.A. and Jeffrey concerning their sobriety and participation in services. The social worker reported that the family had "for the most part" worked out a visitation schedule, and recommended that the court dismiss dependency jurisdiction.

The court found that M.A. had been diligent in her recovery and Jeffrey had made substantive progress. However, the evidence showed that S.A. continued to have doubts about her parents' long-term stability. In view of the parents' substance abuse and criminal histories, the court denied their request for overnight weekend visits and found

that Aunt C., as S.A.'s guardian, was in the best position to gauge any improvement in the parents' circumstances. The court said it was not delegating visitation decisions to the guardian. It ordered non-overnight weekend visits to occur every other weekend and stated the parties could implement additional visitation on agreement. The court dismissed dependency court jurisdiction, subject to reinstatement.

DISCUSSION

A

M.A. Has Forfeited Her Claim the Court Abused Its Discretion in Terminating Dependency Jurisdiction

M.A. contends the court abused its discretion when it terminated its jurisdiction because it abdicated its responsibility to oversee visitation. She acknowledges she did not raise the argument at trial. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222 (*Dakota H.*) [a party forfeits the right to claim error as grounds for reversal on appeal when she fails to raise the objection in the trial court].) M.A. argues this case is similar to *In re K.D.* (2004) 124 Cal.App.4th 1013 (*K.D.*), in which this court exercised its discretion to consider whether the juvenile court erred when it terminated jurisdiction, and concluded that in view of the circumstances, the juvenile court was required to maintain jurisdiction to safeguard the parent's visitation with her child. (*Id.* at pp. 1018-1019.)

This case differs from *K.D.* There, the child's foster parent was appointed his guardian (non-relative guardianship). (*K.D.*, *supra*, 124 Cal.App.4th at pp. 1017-1018.) Here, S.A.'s aunt is her guardian (relative guardianship). This distinction is determinative

in this case. When considering whether to terminate dependency court jurisdiction, section 366.3, subdivision (a), distinguishes between relative and non-relative guardianships in some instances. It provides:

"Following establishment of a legal guardianship, the court may continue jurisdiction over the child as a dependent child of the juvenile court or may terminate its dependency jurisdiction and retain jurisdiction over the child as a ward of the legal guardianship, as authorized by Section 366.4. *If, however, a relative of the child is appointed the legal guardian and the child has been placed with the relative for at least six months, the court shall, except if the relative guardian objects, or upon a finding of exceptional circumstances, terminate its dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship, as authorized by Section 366.4.*" (Italics added.)

In non-relative guardianships, the juvenile court has the discretion to continue or terminate jurisdiction. (§ 366.3, subd. (a).) In *K.D.*, this court held that the juvenile court was obligated to maintain dependency jurisdiction and hold regular review hearings to monitor whether regular visitation was occurring. The juvenile court had found that preserving the child's relationship with his parent was in the child's best interest and the parties' circumstances indicated regular parent-child visitation would be difficult, primarily because the guardian and child had moved from California to the Midwest. (*K.D.*, *supra*, 124 Cal.App.4th at pp. 1017, 1019.)

In contrast, here, the juvenile court was *required* to terminate dependency jurisdiction *unless* the guardian objected or the court found there were exceptional circumstances that would merit continued court and agency supervision of the child. (§ 366.3, subd. (a) (italics added).) Aunt C. did not object to terminating dependency court jurisdiction. There was no showing of exceptional circumstances, nor can such a

showing be inferred from the record. As a child of a parent with protracted substance abuse problems, mental health issues, and repeated incarceration, S.A.'s circumstances were, unfortunately, fairly typical. The record shows that M.A. was estranged from her family because of her history of theft, lies, chronic substance abuse and recidivism. It further shows that Aunt C. was protective of her ward and did not trust M.A. However, with the assistance of other family members, Aunt C. facilitated visitation in accordance with court orders throughout the dependency proceedings. The social worker said the visitation plan appeared to be working. Thus the circumstances in this case are both legally and factually dissimilar to *K.D.*

We decline to apply *K.D.* to this case procedurally or, were we to review the case on its merits, substantively. M.A. has forfeited the issue on appeal. (*Dakota H., supra*, 132 Cal.App.4th at pp. 221-222.)

B

ICWA Notice Was Not Required

M.A. contends there was insufficient compliance with ICWA notice provisions, requiring a limited reversal of the court's order terminating jurisdiction. Specifically, she argues in addition to the notices sent to the Bureau of Indian Affairs (BIA), the Chickasaw Nation and Choctaw tribes, notices of S.A.'s dependency proceedings should have been sent to the Cherokee Nation, United Band of Cherokee Indians, Eastern Band of Cherokee Indians and Blackfeet Tribe of Montana.

ICWA protects the interests of Indian children,⁴ their tribes and families by establishing minimum federal standards for proceedings involving foster care placement or termination of parental rights. (25 U.S.C. § 1912; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421; *In re Jullian B.* (2000) 82 Cal.App.4th 1337, 1344.) Under California law, a social worker must provide notice in accordance with section 224.2, subdivision (a)(5), if he or she knows or has reason to know that an Indian child is involved in the proceedings. (§ 224.3, subd. (d).) The circumstances that may provide "reason to know" the child is an Indian child exists when a member of the child's extended family provides information suggesting one or more of the child's great-grandparents, grandparents or parents are or were a member of a tribe. (§ 224.3, subd. (b)(1).)

With respect to Jeffrey, any alleged Indian heritage in his family is not relevant to the question whether S.A. is, or may be, an Indian child. (Cf. *In re E.G.* (2009) 170 Cal.App.4th 1530, 1533 [absent a biological connection, a child cannot claim Indian heritage through an alleged father].) ICWA inquiry and notice is not required for any claims of Indian heritage through a non-biological parent family unless that parent has lawfully adopted the child.⁵ (25 U.S.C. § 1903(9) ['parent' means any *biological* parent

4 An Indian child is "any unmarried person who is under age [18] and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); see, § 224.1, subd. (a).)

5 The social worker was required to inquire into Jeffrey's Indian heritage on behalf of Jeffrey's son, S.A.'s half-brother, who was also a dependent of the juvenile court.

or parent of an Indian child or any Indian person who has lawfully adopted an Indian child]; accord, § 224.1, subd. (c).) We therefore consider only the claims of Indian heritage through M.A.'s family.

M.A. said she believed, but did not know for certain, that her grandmother had Cherokee heritage. She also asserted that her deceased paternal grandfather was "100% Blackfoot from Michigan."⁶ M.A. did not know her grandfather's name. She referred the social worker to other family members for additional information. The social worker contacted the grandmother, who said she would contact the paternal side of the family.

Initially, Aunt A. told the social worker that S.A.'s maternal great-grandmother had Indian heritage "from [the] Chippewa tribe in Oklahoma." Later, Aunt A. and the grandmother said they had researched the matter and learned the maternal great-grandmother was born on a reservation and was Choctaw Indian. They did not have any information about any Indian heritage on the paternal side of the family.

The record shows the social worker investigated M.A.'s claim of Indian heritage and learned through other family members, including the maternal grandmother, that the maternal great-grandmother was Choctaw Indian. There was no further claim of Cherokee heritage. The Agency then sent notice of the proceedings to the BIA, the Chickasaw Nation and Choctaw tribes, and filed the notices and responses with the juvenile court, in accordance with ICWA requirements.

⁶ The BIA does not recognize the "Blackfoot" as a federal tribe eligible to receive services. The Blackfeet Tribe of the Blackfeet Indian Reservation of Montana is a federally-recognized tribe. (75 Fed.Reg. 60810 (Oct. 1, 2010).)

M.A.'s claim the paternal grandfather was "100% Blackfoot from Michigan" was insufficient to trigger ICWA notice requirements. She did not have any information about him, including his name. M.A. does not explain how notice that does not contain any information about the relative with the alleged tribal heritage would allow the Blackfeet Tribe of Montana or the BIA to conduct a meaningful search of membership rolls. She does not claim inadequate inquiry. In the absence of *any* identifying information about a relative with alleged Indian heritage, the law does not require the juvenile court and Agency to engage in the futile act of complying with ICWA notice requirements. (Cf. *People v. Herrera* (2010) 49 Cal.4th 613, 622 [law does not require the doing of futile act]; see also *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1516 [vague reference to Indian heritage is not sufficient to invoke ICWA notice requirements].)

The juvenile court correctly found that ICWA did not apply.

DISPOSITION

The finding and order are affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.