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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

D.M. et al.,

Defendants and Appellants.

D063345

(Super. Ct. No. J518006)

APPEAL from an order of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed.

Suzanne F. Evans, under appointment by the Court of Appeal, for Defendant and Appellant D.M.

Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant and Appellant T.S.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel and Patrice Plattner-Grainger, Deputy County Counsel for Respondent.

INTRODUCTION

D.M. (father) and T.S. (mother) appeal a court order terminating their parental rights and selecting adoption as the permanent plan for their son, A.M. They contend we must reverse the order because the court erroneously found the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) did not apply. Father additionally contends we must reverse the order because the court erroneously found the beneficial parent-child relationship exception (Welf. & Inst. Code,¹ § 366.26, subd. (c)(1)(B)(i)) did not apply. As we conclude these contentions lack merit, we affirm the order.

BACKGROUND²

The San Diego County Health and Human Services Agency (agency) removed A.M. from his parents because mother tested positive for marijuana at the time of his birth.³ The parents later submitted to an amended juvenile dependency petition alleging they failed or were unable to adequately protect A.M. and they were unable to provide him with regular care because of their mental illness, developmental disability, or substance abuse. The petition noted "[t]he child may have Indian ancestry."

¹ Further statutory references are also to the Welfare and Institutions Code unless otherwise stated.

² Because of the narrow issues raised on appeal, our summary focuses on the facts related to mother's Indian heritage and father's efforts to establish a beneficial parent-child relationship with A.M.

³ A.M.'s meconium also tested positive for marijuana.

Mother completed a "Parental Notification of Indian Status" form on January 3, 2011, indicating she was or may be a member or eligible for membership in a federally recognized Indian tribe, specifically the "Cherokee & Blackfoot" tribes. The same day, the agency filed a detention report informing the court mother stated she could "perhaps" be Cherokee and/or Blackfoot. However, she also stated she was not a member of any tribe and did not know of any family members who associated with any tribe. At the detention hearing, the court deferred making an ICWA finding.

Later in January 2011, the agency filed a jurisdiction/disposition report recommending, among other actions, the court find ICWA did not apply. The report explained the agency inquired into mother's Native American ancestry on January 11, 2011. Mother stated maternal grandmother told mother "she"⁴ was 1/36th Cherokee and Lakota, but mother did not identify as Native American and did not participate in any cultural events growing up.

The agency inquired into mother's Native American ancestry again on January 19, 2011. Mother again stated maternal grandmother had told her they had some Lakota and Cherokee heritage. Nonetheless, mother stated she was not raised on a reservation and did not participate in any services through an Indian health service provider. Mother further stated maternal grandmother was not enrolled in a tribe, but she could not account for maternal great-grandmother. Mother also stated neither she nor maternal

⁴ Although not clear in the report, the record as a whole indicates "she" likely means maternal grandmother.

grandmother speak the language of an Indian tribe or participate in any tribe's cultural or religious activities.

At the jurisdiction/disposition hearing, mother's counsel informed the court mother indicated maternal grandmother "is 1/36th percent Cherokee and Lakota, and that she's not eligible or is not a member at this time. So I think the agency's asking for [a no ICWA notice required] finding today. They have sufficient evidence. If the agency would like to defer it, we have no issue with that, either."

The agency sought further clarification, "The mother appears to be indicating that she does not have heritage that would make [her child] eligible? I'm not understanding. Is the mother claiming that she doesn't have the heritage or that she does? Because under state law, we would need to notice. Under federal law, we would not."

Mother's counsel clarified, "She's indicating that [her tribal connection] is attenuated, and she won't be eligible for membership, nor will her [child] at this time." Based on this representation, the agency requested the court find that no ICWA notice was required.

Before ruling on the agency's request, the court asked mother how many generations back her heritage went. Mother responded, "I have no clue," but she believed it would be a minimum of four generations. She based the information she provided the agency on statements maternal grandmother made a long time ago. However, she had not talked to maternal grandmother, who was incarcerated, in months and had not been able to reach maternal great-grandmother, the purported original source of the information. The court subsequently found ICWA did not apply.

In August 2011, the agency filed a status review report. Three days before the report's submission, the agency asked the parents if they had any new information pertaining to ICWA. *Both parents stated they had no Native American ancestry.* Reports discussing ICWA after this date simply stated ICWA did not apply. The record does not show parents ever disputed the accuracy of the ICWA aspect of these reports.

The August 2011 report, as well as reports filed in September 2011 and March 2012, indicated father had regular, unsupervised visits with A.M., including two overnight visits in a motel. Nonetheless, in June 2012, the agency filed a status review report recommending the court terminate the parents' reunification services and set a hearing to terminate their parental rights. Regarding father's visitation efforts, the report stated father visited A.M. regularly. However, he usually arrived late and spent his time with A.M. running personal errands. In addition, A.M. began clinging to paternal grandmother, with whom he was placed, and was returning from his visits angry, causing him to act out and be hard to handle.

In July 2012, the agency filed an addendum report. The report stated father primarily picks up A.M. for the parents' visits, but at least twice asked the paternal grandmother for money to buy food for A.M.

At a contested hearing in August 2012, father testified he had unsupervised visits with A.M. at least five days a week for up to six and a half hours each day. During the visits, he took A.M. to McDonalds or the park and let him run around. According to father, his two overnight visits with A.M. went "great," A.M. was very attached to him, and A.M. did not like leaving him.

The social worker testified that, during the visits she observed, father provided more care to A.M. than mother. However, in the past, the social worker had to plead with father to have more visits with A.M. so A.M. would attach to him. At the conclusion of the hearing, the court found returning A.M. to parents would create a substantial risk of detriment to A.M. and it did not believe it could return A.M. to their care within the next six months.

In November 2012, the agency filed a report for the permanent plan selection and implementation hearing recommending the court terminate parents' parental rights and order a permanent plan of adoption for A.M. Regarding father's relationship with A.M., the report noted A.M., who was then almost two years old, had never lived with his parents. He was placed in a foster home when he was three days old and he was placed with paternal grandmother when he was two months old. Parents began supervised visitation in January 2011. By August 2011, father was allowed to have unsupervised visits. During that month, one visit lasted only 30 minutes, one visit father focused on his cell phone rather than A.M., one visit he arrived late, and one visit he cancelled.

By September 2011, father's unsupervised visits were increased to between three to five and a half hours at least three days a week. By the middle of the month, father began cancelling or failing to show up for visits.

In October 2011, parents and paternal grandmother entered into a visitation contract. The social worker observed at the time that father seemed to make excuses not to visit more frequently. By November 2011, however, father was visiting consistently.

In February 2012, father missed two visits and, by April 2012, he was habitually late for visits. The social worker personally observed some of father's late arrivals for visits. The social worker also noted that, while A.M. recognizes his father from his visits with him, he looks to his paternal grandmother to meet his daily needs and for nurturing.

In November 2012, the agency filed an addendum report recommending parents' visitation be changed from unsupervised to supervised. According to the report, paternal grandmother forwarded the social worker e-mails indicating parents were engaging in conversations to buy drugs and exchange sex for drugs and money. The e-mails included the address of the motel where the parents had been staying and their cell phone numbers. At an ex parte hearing in December 2012, the court ordered the recommended change.

In January 2013, the agency filed an addendum report continuing to recommend parents' parental rights be terminated and the court order adoption as A.M.'s permanent plan. The report stated the social worker began observing A.M.'s visits with father in September 2012 and did not note a parent-child bond between them despite the large amount of unsupervised contact father had had with A.M. At one of the visits in September 2012, A.M. appeared to recognize father and allowed father to pick him up and hug him, but A.M. was not excited to see father and resumed playing with toys once father put him down. Although A.M. did not seek father's attention, he accepted a snack from father that paternal grandmother had provided.

The social worker observed father arrive late for two visits in October 2012. When father arrived to one of the visits, A.M. acknowledged father, but continued interacting with the social worker, who had been helping him draw a picture. A.M.

allowed father to hug him, but did not reciprocate the affection. Father sat with A.M. on the floor and played with A.M. appropriately, but when A.M. wanted a drink, A.M. went to paternal grandmother and pointed to and reached for his sippy cup. Paternal grandmother, not father, took A.M. to the kitchen to fill it.

At another visit approximately a week later, A.M. once again acknowledged father when he arrived, but he did not run to father or appear excited to see father. Instead, he continued to play with his toys on the floor.

In November 2012, the social worker saw A.M. with father at a grocery store. A.M. was contentedly eating a snack father was feeding him. In December 2012, after parents' unsupervised visits were suspended, father arrived fifteen minutes late to the social worker's office for a supervised visit. A.M. was playing on the floor with paternal grandmother. A.M. looked at father when father arrived then looked back to paternal grandmother and resumed playing with her. A.M. then went to the main entrance door, pushed it open, and ran out of the office. Father did nothing when this occurred. Instead, father allowed the social worker and paternal grandmother to retrieve A.M.

When father subsequently picked up A.M. to take him to the visitation room, A.M. went easily to father. Father interacted appropriately with A.M. throughout the visit and allowed A.M. to spend most of the time in an outdoor play area. However, while playing, A.M. bumped his head. Instead of turning to father, A.M. ran to the social worker for comfort and sat with her until the father urged A.M. to resume playing. When the visit was over, father returned A.M. to the paternal grandmother. A.M. had no difficulty separating from father and did not wave goodbye to him.

Other visits throughout December 2012 followed a similar pattern. Although father was attentive to A.M.'s needs and played with A.M. appropriately, A.M. did not show father affection and had no difficulty separating from father. During two of the visits, A.M. actively sought the social worker's attention rather than father's. Additionally, during one of the visits, father did not prevent A.M. from climbing on a chair and did not respond when A.M. started to fall. Fortunately, the social worker caught A.M.

At a contested hearing in January 2013, the parties stipulated father would testify A.M. runs to father when father arrives for a visit, A.M. enjoys his time with father, and father has never placed A.M. in danger. A.M. gets upset whenever father is out of eyesight and does not want to leave father at the end of a visit.

The parties further stipulated the social worker would testify she carefully observed the visits between A.M. and his parents and never saw A.M. initiate any affection with either parent. In addition, she never saw A.M. become upset during a visit or have a change in emotion when his parents came and went from his sight.

At the conclusion of the hearing, the court terminated parents' parental rights, found A.M. was adoptable, found the benefits to him of maintaining his relationship with his father did not outweigh the benefits of his adoption, and designated adoption as the permanent plan for him. In addition, the court again found ICWA notice was not required because the court knew or had reason to know A.M. was not an Indian child.

DISCUSSION

I

Application of ICWA

"ICWA provides: 'In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.' (25 U.S.C. § 1912, subd. (a).)

"In 2007, the state legislature enacted section 224 in accordance with ICWA. Section 224.2, subdivision (a) similarly provides: 'If the court, a social worker, or probation officer knows or has reason to know that an Indian child is involved, any notice sent in an Indian child custody proceeding under this code shall be sent to the minors parents or legal guardian, Indian custodian, if any, and the minors tribe' 'The circumstances that may provide reason to know a child is an Indian child include . . . the following: [¶] (1) A person having an interest in the child, including the child . . . or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe.' (§ 224.3, subd. (b)(1).)

'The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.' [Citation.] Section 224.3, subdivision (a) places an 'affirmative and continuing duty' on the court and county welfare department in a dependency proceeding to 'inquire whether a child . . . is or may be an Indian child' Thus, if the court or social worker knows or has reason to know that an Indian child is involved, 'the social worker . . . is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members . . . and contacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility.' (§ 224.3, subd. (c).)" (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1466-1467.)

Whether there is reason to know an Indian child is involved in a juvenile proceeding depends on the nature and specificity of available information as well as the credibility of the source of information and the basis of the source's knowledge. (See *B.H. v. People ex rel. X.H.* (Colo. 2006) 138 P.3d 299, 303.) "We review a court's ICWA findings for substantial evidence." (*In re Hunter W.*, *supra*, 200 Cal.App.4th at p. 1467.) If there is insufficient reason to believe the child is an Indian child, notice need not be given. (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538.)

Here, mother's initial report of possible Indian heritage was both equivocal and speculative as the report was based on aged hearsay statements by maternal grandmother, who had long-standing mental health and substance abuse issues and who, according to mother, had once tried to kill mother. In addition, mother was unable to confirm the statements with maternal great-grandmother because mother had lost contact with her. Mother had also lost contact with maternal grandmother, who was purportedly serving time for a violent crime. Moreover, although mother did not know maternal great-grandmother's tribal status, mother stated maternal grandmother was not enrolled in a tribe. Mother also stated she was not raised on a reservation, she had not receive any Indian health services, neither she nor her maternal grandmother spoke an Indian language, and neither she nor maternal grandmother participated in Indian cultural or religious activities.

Several months after the court made its first ICWA finding, agency asked mother if she had any new ICWA information. Instead of telling agency she had no new information, mother effectively retracted her initial report by telling agency she did not have any Indian heritage. Given the equivocal and speculative nature of the initial report, this retraction provides sufficient evidence to support the court's finding ICWA did not apply in this case. (See *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1521 [no ICWA notice required where father retracted earlier equivocal claim he may have Indian heritage].)

Our decision *In re Damien C.* (2009) 178 Cal.App.4th 192 (*Damien C.*) does not alter our conclusion. In *Damien C.*, maternal grandfather believed his family might have Indian heritage through maternal great-grandfather; however, the information maternal grandfather possessed was equivocal, maternal great-grandfather not available to ask, and the family lacked sufficient information to research the matter further. (*Id.* at pp. 195-196, 199.) We concluded these circumstances did not relieve the agency of its obligation to provide notice under ICWA. (*Damien C.*, *supra*, 178 Cal.App.4th at p. 199.) As *Damien C.* did not involve nor discuss whether the agency must provide ICWA notice when a parent effectively retracts an initial, equivocal or speculative report of possible Indian heritage, *Damien C.* has no application here.

II

Application of Beneficial Parent-Child Relationship Exception

"Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). [Citation.] An exception to the adoption preference applies if termination of parental rights would be detrimental to the child because the 'parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.' (§ 366.26, subd. (c)(1)(B)(i).)" (*In re C.F.* (2011) 193 Cal.App.4th 549, 553.) Father contends the court erroneously determined this exception did not apply in this case. We review the court's determination for substantial evidence. (*Ibid.*)

Here, the court found father had established the first prong of the exception—that father maintained regular visitation and contact with A.M. The parties do not seriously dispute there is sufficient evidence to support this finding. Consequently, we need only decide whether there is sufficient evidence to support the court's finding father had not established the second prong of the exception—that A.M. would benefit from a continued relationship with father.

This court has interpreted the second prong to require "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 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.' [Citation.]" (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 555.)

To establish the second prong, father "must show more than frequent and loving contact or pleasant visits. [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child The relationship arises from the day-to-day interaction, companionship and shared experiences.' [Citation.] The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.] Further, to establish the [beneficial parent-child relationship] exception the parent must show the

child would suffer detriment if his or her relationship with the parent were terminated. [Citation.]" (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 555, fn. omitted.)

Here, A.M. was two years old at the time the court terminated father's parental rights and selected adoption as A.M.'s permanent plan. Although father had numerous visits with A.M. after A.M.'s removal and detention, A.M. had never lived with father and had only stayed overnight with father twice. While the evidence shows A.M. enjoyed his visits with father, it does not show A.M. viewed father as a parent and or was attached to father. Rather, the evidence shows A.M. did not have any difficulty separating from father after visits and, when other adults were present, A.M. did not turn to father for comfort or sustenance. In addition, father did not assume a parental role when A.M. engaged in potentially harmful conduct, such as running out of the social worker's office and climbing on a chair. Father also did not intervene to prevent the conduct and he did not respond to it after it occurred. Instead, he let paternal grandmother and the social worker handle it. Thus, the record does not show A.M. would suffer detriment from the termination of his relationship with father.

Father's reliance on *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) is misplaced. As we recently explained, "in *S.B.* we required that the father relying on the [beneficial parent-child relationship exception] establish the existence of a significant, positive, emotional attachment between him and his daughter. (*S.B.*, at p. 297.) In finding the father met this requirement, we noted he maintained regular, consistent and appropriate visitation with the child; he was the child's primary caretaker for three years; when she was removed from his custody he immediately acknowledged his drug use was

untenable, started services, maintained his sobriety, sought medical and psychoanalytic services and complied with every aspect of his case plan; and after a year apart the child continued to display a strong attachment to her father. (*Id.* at p. 298.) We stated: 'The record shows *S.B.* loved her father, wanted their relationship to continue and derived *some measure of benefit* from his visits. Based on this record, the only reasonable inference is that *S.B.* would be greatly harmed by the loss of her significant, positive relationship with [her father].' (*Id.* at pp. 300-301.)" (*In re C.F.*, *supra*, 193 Cal.App.4th at pp. 557-558.)

Because parents were repeatedly misapplying the italicized language, we later clarified, "*S.B.* is confined to its extraordinary facts. It does not support the proposition a parent may establish the [beneficial parent-child] relationship exception by merely showing the child derives some measure of benefit from maintaining parental contact." (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 559; accord, *In re Jason J.* (2009) 175 Cal.App.4th 922, 937.)

This case bears scant resemblance to the *S.B.* case. Although father visited regularly with *A.M.*, he never acted as *A.M.*'s primary caregiver and *A.M.* never formed a strong attachment to him. Further, while father grudgingly complied with his case plan, he never complied with his aftercare plan and there were strong indications in the record he had relapsed into substance abuse before the court terminated his parental rights. The *S.B.* case, therefore, is inapposite and does not compel a reversal of the termination order in this case.

DISPOSITION

The order is affirmed.

McCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.