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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re AMBER P. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH &
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

K.A. et al.,

Defendants and Appellants.

D063452

(Super. Ct. No. SJ12586A-B)

APPEAL from a judgment of the Superior Court of San Diego County, Garry G. Haehnle, Judge. Affirmed.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant K.A.

Kathleen M. Mallinger, under appointment by the Court of Appeal, for Defendant and Appellant Brian P.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Lisa M. Maldonado, Deputy County Counsel, for Plaintiff and Respondent.

K.A. and Brian P. appeal a juvenile court judgment terminating their parental rights over their daughter, Amber P., and their son, Nicholas P., and selecting adoption as the preferred permanent plan. (Welf. & Inst. Code, § 366.26.)¹ The parents challenge the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception to the adoption preference (§ 366.26, subd. (c)(1)(B)(i)) is inapplicable. In addition, Brian contends reversal is required because the San Diego County Health and Human Services Agency (the Agency) did not fully comply with the notice provisions of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) K.A. joins in Brian's ICWA claim. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND²

K.A. has four children. She also has a long history of drug abuse and criminal activity. K.A. reported she first starting using methamphetamine when she was about 14 years old. Her first arrest was in 1995 and, over the years, she has been arrested more than a dozen times. K.A.'s oldest daughter, A.A., is a teenager. From 1996 to 2003, six referrals were made to the Agency on A.A.'s behalf because she tested positive for methamphetamine at birth and, because of allegations of sexual abuse, emotional abuse, and general neglect. A.A. now lives in San Bernardino with her legal guardians and K.A. has supervised visits once per month. K.A. gave birth to the children in this matter,

¹ All further statutory references are to the Welfare and Institutions Code.

² To avoid repetition, we address the specific facts pertaining to the parent-child relationship exception to the adoption preference, and the ICWA issue, in the following discussion section.

Amber, in 2008, and Nicholas, in 2011. When K.A. gave birth to Nicholas, she tested positive for THC and amphetamines. Nicholas also tested positive for amphetamines.

Brian is the presumed father of both Amber and Nicholas. At the hospital following Nicholas's birth, Brian admitted to some history of drug usage, but denied knowing K.A. was using drugs while pregnant and refused to take a drug test. Brian admits he used to be addicted to heroin. Brian tested positive for amphetamine, methamphetamine, marijuana, and marijuana metabolite one week after Nicholas's birth. Brian has two children from a prior marriage he no longer sees. He has another daughter, but does not have custody of her either. In 2003 his ex-wife filed a restraining order against him for stalking and harassment. Brian's criminal history includes arrests for domestic violence, possession of drug paraphernalia, stalking, vehicle theft, and petty theft.

The hospital made a referral to the Agency and it placed Nicholas in a licensed foster home. The Agency also petitioned to remove Amber from the parents' care. The Agency placed both children with the paternal uncle, Chris P., and he has continued to care for them and wants to adopt them. The Agency provided K.A. and Brian each with a detailed child welfare services case plan setting out their individual responsibilities in the areas of mental health services, education services, and substance abuse services.

In August 2011 K.A. again tested positive for methamphetamine. She signed up for the "Incredible Families" program aimed at improving parenting skills, but the program discharged the family due to excessive absences. She enrolled in the McAlister drug treatment program, but was terminated for excessive absences and positive drug

tests. She started therapy with Rhonda Smallwood, a marriage and family therapist, but for weeks K.A. denied any problem.

During this same period, Brian also fell short of his case plan. He participated in the intake for Incredible Families, but missed multiple sessions. He enrolled in a domestic violence treatment program at La Mesa Counseling but did not attend any sessions. Further, Brian tested positive for drug use in October 2011.

At the six-month review hearing in January 2012, the court expressed concerns about K.A. and Brian's progress, but gave encouragement to K.A. for "finally admitt[ing] to her relapse" as a positive step to her recovery. The Agency recommended continuing services for another six months to allow the parents more time to make progress on their case plans. The court agreed, but noted that while the parents had made convincing statements, their actions "don't match up" to the statements and "hopefully we're going to see a lot of progress in [the next] six months."

In February 2012 the family started in Incredible Families again. In April, however, Incredible Families discharged them due to excessive absences, routine tardiness, and a "low commitment level." In March K.A. said she was in substance abuse treatment at Harmony West, but Harmony West reported that she came twice and did not return. K.A. then claimed she went to Mental Health Systems for treatment, but there is no record of her attendance there.

Brian stated he was attending Mental Health Systems for drug treatment. His counselor said he came for the intake but only attended one group and the center terminated him for excessive absences. Brian began seeing a therapist, but stopped

attending sessions. Cooperative Parenting, a three-week intensive parenting course was available for both parents, but neither attended.

In April 2012 the Agency made a referral to Community Services for Families to help with parenting and toilet training for Amber, but K.A. never responded. Also in April Smallwood reported, "[K.A.] has not had therapy with any consistency." In June Smallwood opined that K.A. did not have any motivation for therapy. In July K.A. went for an intake appointment at Harmony West. Ten days later, her counselor at Harmony West observed K.A. " 'just can't engage' " and "hasn't made any changes in the last few months." She opined K.A. needed residential treatment. Smallwood told the social worker not to bother sending a reauthorization for K.A.'s therapy because it had been a " 'total waste of time' " and she "no showed for about 75% of their appointments."

In July 2012 the social worker observed that both K.A. and Brian smoked cigarettes continuously during a visit, near the children. The social worker observed smoke going directly into Nicholas's face. When asked about why they smoke around the children, K.A. got visibly upset and responded, "[I]t is not against the law."

At the 12-month review hearing in July 2012, the Agency recommended terminating services to the parents and setting a section 366.26 hearing for a permanency plan. The court found that although K.A. and Brian were visiting the children on a near-daily basis, neither had made substantial progress on their case plans. The court adopted the Agency's recommendation.

While this case was pending, K.A. gave birth to another son, Brian Jr.

Approximately five weeks later, K.A. was arrested on charges related to possessing drug paraphernalia. A few weeks after that, she tested positive for methamphetamine again.

On November 7, 2012, the Agency took Brian Jr. into protective custody. One week later, K.A. and Brian were arrested. K.A. was charged with felony auto theft and driving on a suspended license, and Brian was charged with grand theft. K.A. was incarcerated for the next few weeks. When released, she started the drug court program. Brian was incarcerated more than a month. When released, he reported to his probation officer.

In January 2013 K.A.'s drug counselor reported she was doing well with the program and had 20 negative drug tests in the past month. She noted, however, that K.A. does not have any feelings of guilt or responsibility for what has happened and does not feel sorry for what she has put her children through.

At the contested section 366.26 hearing in February 2013, the court found by clear and convincing evidence that termination of parental rights would not be detrimental to the children and that adoption is in their best interest.³ The court found none of the exceptions to the adoption preference in section 366.26, subdivision (c)(1)(B)(i) through (vi) applied, specifically highlighting that the parent-child bond exception did not apply.

³ Minors' counsel also asked for parental rights to be terminated.

DISCUSSION

I

Beneficial Parent-Child Relationship Exception

K.A. and Brian challenge the sufficiency of the evidence to support the juvenile court's finding the beneficial parent-child relationship to the adoption preference is inapplicable. "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." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*).

Adoption is the Legislature's preferred permanent plan. (*Autumn H., supra*, 27 Cal.App.4th at p. 573.) At a section 366.26 hearing, the court must terminate parental rights and free the child for adoption if it determines by clear and convincing evidence the child is adoptable within a reasonable time, and the parents have not shown termination of parental rights would be detrimental to the child under any of the statutory exceptions to adoption found in section 366.26, subdivision (c)(1)(B)(i) through (vi). (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642; *In re Asia L.* (2003) 107 Cal.App.4th 498, 509-510.) The beneficial parent-child relationship exception applies if the parent proves 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).)

The Agency concedes K.A. and Brian regularly visited the children except for periods of incarceration. Even if they satisfied the first prong of the test, however, substantial evidence supports the court's finding they did not satisfy the second prong.

To show a beneficial parent-child relationship, a parent must show more than frequent and loving contact or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . [Citation.] The relationship arises from day-to-day interactions, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*Autumn H., supra*, 27 Cal.App.4th at p. 575; see also *In re Casey D.* (1999) 70 Cal.App.4th 38, 51 [clarified that given the limitations of visitation, day-to-day contact is not necessarily required].)

This court has interpreted the exception "to mean the relationship 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 to 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." (*Autumn H., supra*, 27 Cal.App.4th at p. 575.)

We "tak[e] into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

Both Amber and Nicholas are very young. Nicholas has been in protective custody since his birth and Amber since she was just two years old. K.A. and Brian have never been Nicholas's primary caregivers and were Amber's primary caregivers for less than half of her life.

Chris is the children's paternal uncle and has known the children their entire lives. He has been Amber and Nicholas's primary caregiver since June 2011. He wants to provide the children "stability and a safe home." Chris noted that because the parents visit so frequently, all three share in daily responsibilities. Chris felt the children will go to whichever adult is closest to have their needs met, not appearing to have a preference. Chris said the children were not distressed about being separated from K.A. and Brian when he took the children for a month-long vacation in October 2012. Likewise, the children did not appear distressed when the parents were gone in November and December 2012 due to their incarceration.

The social worker observed K.A. and Brian having loving interactions with the children and both children going willingly to the parents. She reported that the parents filled parental roles by interacting with them, feeding them, bathing them, and playing with them. The social worker, however, noted that she had "not observed the children

initiating or seeking affection from the parents." The social worker noted that Nicholas became upset when separated from Chris, both in her presence and as reported by a preschool provider. The social worker noted Chris is employed and does not have a criminal record. She opined, "[Chris] has demonstrated that he can meet the children's medical, developmental, and emotional needs" and "Amber and Nicholas appear comfortable and happy in [his] care."

The court acknowledged the social worker's positive comments about K.A. and Brian's visits with the children, but noted, "that's not the end-all, be-all." The court explained, "The kids need parents that don't violate laws. How far were we into the system when they got re-arrested for the vehicle theft and drug possession, testing positive? . . . That does not show a parental role. That shows parents that look at their own needs above the children's needs."

Substantial evidence supports the court's finding that the beneficial parent-child exception to the adoption preference is inapplicable. The children deserve the permanence and stability of adoption. "Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent." (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 854.)

Contrary to K.A. and Brian's assertion, the children's needs would not be just as easily satisfied through a guardianship. "Unlike adoption, other permanency options are not equivalent to the security of a permanent home." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 231.) "A guardianship is "not irrevocable and thus falls short of the

secure and permanent placement intended by the Legislature." ' ' " (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1156.)

II

ICWA Notice

We do not agree with K.A. and Brian that the Agency did not comply with the notice requirements of ICWA. When the facts are undisputed, as here, we review the matter independently. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254.)

"Congress enacted ICWA in 1978 'to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families' (25 U.S.C. § 1902.) 'The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource.' [Citation.] Section 1911 of ICWA provides that a tribe may intervene in state court dependency proceedings. (25 U.S.C. § 1911(c).) Notice to the tribe provides it the opportunity to exercise its right to intervene." (*In re Damian C.* (2009) 178 Cal.App.4th 192, 196.)

ICWA provides "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(a).) Under California's implementing rules, the court has reason to know a child is an Indian child when, among other circumstances, an interested person "informs or otherwise provides information

suggesting that the child is an Indian child to the court." (Cal. Rules of Court, rule 5.481(a)(5)(A).)

Here, from the very beginning, the court and the Agency made inquiry into whether Amber and Nicholas may be Indian children. In K.A.'s initial parentage questionnaires, she indicated the father may have American Indian heritage in the "BareFoot Cherokee" or "BareFoot Cheeroke" tribe. On his initial parentage questionnaires, Brian also indicated he had American Indian heritage and listed the tribe as "Bear Foot." K.A. wrote on the ICWA-020 form that she may have "Cheekawa" Indian ancestry. On Brian's ICWA-020 form, he indicated he may have Indian ancestry in the "Bearfoot" tribe in the "Cheerokee" band.

At the first hearing, the court stated that ICWA may apply, noted that both parents were given the "three-page long form regarding [their] Native American ancestry," and asked K.A. and Brian to fill out the ICWA-030 forms and return them to the social worker "as soon as possible." At the end of that hearing, the court again reminded K.A. and Brian to "get those [ICWA] forms as quickly as possible" back to the social worker. K.A. and Brian never returned the ICWA-030 forms.

Following the hearing, K.A. met with social worker Natalie Dinneny. K.A. stated her maternal grandmother was part "Chikuwawa Indian" and requested help with filling out the ICWA-030 form. Dinneny said she would be able to help K.A. with the form if she would bring the packet to her office, but K.A. never did this. On the same day, Dinneny met with Brian. Brian claimed he was "1/32 Cherokee, but not enough to

claim Indian [h]eritage, or anything by [c]ourt,' " and said he did not celebrate Indian cultural events.

The next day, Dinneny followed up with both K.A. and Brian. Dinneny talked with the maternal grandmother. The grandmother gave Dinneny the name of her mother and the year of her death, but she did not know her birth date or maiden name. After gathering what little information was available from K.A., the maternal grandmother, and Brian, Dinneny consulted with the Agency's ICWA specialist, who determined that there was not enough information to notice any tribes.

Based on the social worker's testimony at the jurisdictional and dispositional hearing, the court found that reasonable inquiry had been made into whether Amber and Nicholas were Indian children. The court found no notice was required because there was not enough information to notice the tribes, and secondly, the court has no reason to believe that either child is subject to ICWA. Neither parent objected to the court's finding. The court made its finding without prejudice "in case something comes forward in the future and we are able to make another determination." In the Agency's January 2012 status review report, a social worker noted that in December 2011 both K.A. and Brian denied any Indian heritage. Subsequently, neither Brian nor K.A. asserted any new information had emerged regarding their ancestry.

The social worker fulfilled her affirmative duty to inquire whether the children were or may be Indian children. (§ 224.3, subd. (a).) K.A. and Brian's responses to her inquiry did not provide reason to know the children were Indian children. (§ 224.3, subd. (b).) On this record, the court or social worker was not required to provide ICWA

notice. (§ 224.3, subd. (d); *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539 [an attenuated, speculative or vague claim of Indian heritage is insufficient to trigger notice requirements under ICWA].) "Where, as here, the record is devoid of any evidence a child is an Indian child, reversing the judgment terminating parental rights for the sole purpose of sending notice to the tribe would serve only to delay permanency for a child . . . rather than further the important goals of and ensure the procedural safeguards intended by ICWA." (*In re Shane G.*, *supra*, at p. 1539.)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

O'ROURKE, J.