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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.C., a Person Coming Under the Juvenile Court Law.	D074418
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. S.C., Defendant and Appellant.	(Super. Ct. No. CJ1331)

APPEAL from a judgment of the Superior Court of San Diego County, Ana L. Espana, Judge. Conditionally reversed and remanded with directions.

Elizabeth C. Alexander, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Jesica N. Fellman, Deputy County Counsel, for Plaintiff and Respondent.

In dependency proceedings under Welfare and Institutions Code section 300, subdivision (b)(1),[1] the juvenile court entered a judgment at a section 366.26 hearing terminating the parental rights of S.C. (Mother) to her son J.C., selecting adoption as his permanent plan, and referring him to the San Diego County Health and Human Services Agency (Agency) for adoptive placement. Mother appeals that judgment, contending the court erred by: (1) finding the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. § 1901 et seq.) did not apply to J.C.'s case; (2) denying her request for an evidentiary hearing on her section 388 petition to modify its prior custody order and instead place J.C. with her; and (3) finding the beneficial parent-child relationship exception to adoption did not apply. Based on our reasoning post, we conditionally reverse the judgment terminating Mother's parental rights and remand the matter with directions for the limited purpose of complying with the ICWA. If after such compliance the court finds J.C. is not an Indian child, the judgment terminating Mother's parental rights shall be reinstated.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2016, J.C. was born to Mother and G.C. (Father).[2] At his birth, both J.C. and Mother tested positive for cocaine and marijuana. After receiving a referral regarding Mother's positive drug tests, Agency learned that Mother did not seek any

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1 All statutory references are to the Welfare and Institutions Code unless otherwise specified.

2 Father is not a party to this appeal.

prenatal care for J.C., had been diagnosed with bipolar disorder before her pregnancy, and had stopped taking her medication once she learned she was pregnant. Mother began using marijuana when she was 19 years old and used it one or two times per week during her pregnancy with J.C. She stated she had smoked cocaine, but stopped doing so about seven months before she knew of her pregnancy. She denied intentionally smoking cocaine during her pregnancy. However, a hospital social worker reported to Agency that Mother had admitted using both marijuana and cocaine during her pregnancy.

Agency filed a section 300, subdivision (b)(1) petition alleging that Mother and J.C. tested positive for cocaine and marijuana at J.C.'s birth and that he had received no prenatal care. At the detention hearing, the juvenile court made a prima facie finding on the petition, detained J.C. in a licensed foster home, and ordered supervised visits for his parents.

In its jurisdiction and disposition report, Agency stated that Mother began smoking marijuana at 19 years old and began using cocaine in her early 20's. Mother and Father had smoked marijuana together. Mother denied using drugs since her hospital discharge, but stated she had resumed taking her psychotropic medication. Father admitted he had a long history of marijuana use and drug-related offenses and was currently on probation for possession of cocaine for sale. At the jurisdiction and disposition hearing, the court made a true finding on the petition, placed J.C. in the licensed foster home, and ordered reunification services for his parents. At the time of the hearing in November 2016, Mother and Father had been visiting J.C. regularly and calling him almost daily.

In January 2017, Mother was admitted to the KIVA residential drug treatment program. Mother participated in parenting classes, saw a psychiatrist, and took her psychotropic medications. By March, she had remained sober for 60 days. Father, however, had tested positive multiple times for cocaine and marijuana after his release from custody.

At the six-month review hearing in May, Agency recommended that Mother and Father receive additional reunification services and continue to have supervised visitation with J.C. Agency reported that Mother had remained at the residential treatment program and was expected to successfully complete it soon. However, she intended to resume living with Father thereafter. She also had discontinued taking her psychotropic medications. Father continued to have positive drug tests. Mother and Father continued to regularly visit J.C. The court found that because there had been no responses to the ICWA notices sent by Agency and there were no other reasons to find J.C. is an Indian child, the ICWA did not apply. The court adopted Agency's recommendations and set a date for the 12-month review hearing.

Mother completed her residential treatment program two weeks later and resumed living with Father. She did not enroll in aftercare and failed to submit to drug testing as Agency required. In October, Mother was arrested when police found four ounces of cocaine in her home. Also, Father's probation officer reported that two weeks before Mother's arrest, Father sold cocaine to an undercover agent. Because of their inability to remain sober and address other protective issues, Agency recommended that Mother's and Father's reunification services be terminated at the 12-month review hearing.

At a contested 12-month review hearing in February 2018, Agency reported that in January Mother had enrolled in aftercare treatment as a condition of her probation. Mother and Father had separated. Mother continued to have her visits with J.C. supervised because of her lack of participation in services, missed drug tests, and police contacts. The court adopted Agency's recommendations, terminating Mother's and Father's reunification services and setting a date for a section 366.26 hearing.

At the section 366.26 hearing in May 2018, Agency recommended that Mother's and Father's parental rights to J.C. be terminated and that a permanent plan of adoption be selected for J.C. Agency reported that Mother and Father continued to regularly visit J.C. However, J.C. easily parted with Mother at the end of their visits. J.C. had never resided with Mother. J.C. had thrived in his placement with his foster caregivers, whom he called "Mommy" and "Daddy." He did not view Mother as a primary caregiver. Agency noted that Mother's October 2017 drug arrest showed that the original protective issue had not yet been addressed. Although she was currently participating in substance abuse classes, after her October 2017 arrest she did not enroll in any substance abuse treatment program until mid-January 2018. Agency opined that the benefit to J.C. of remaining in his caregivers' nurturing care if Mother's parental rights were terminated and he were adopted by them outweighed the benefit to him of any existing relationship he had with Mother. Mother and Father requested a contested hearing on the issues of the parent-child bonds and J.C.'s adoptability. The court set a contested hearing for July.

On July 25, 2018, the date set for the section 366.26 hearing, Mother filed a section 388 petition to modify the court's prior custody order and place J.C. with her. In

support of her petition, she attached three prescription medication labels, signed attendance sheets for 12-step Narcotics Anonymous (NA) meetings during the period of February 2018 through June 2018, and an updated treatment plan. Mother argued that placement of J.C. with her would be in his best interests because it would allow him to maintain a bond with his biological family. Mother asserted that she had been compliant with her medications, had regularly attended AA/NA meetings, and was sober.

At the July 25, 2018 hearing, the court first addressed Mother's section 388 petition. The court acknowledged the attachments to Mother's petition, but noted she did not attach any progress report from a drug treatment program counselor or any random drug test results that would indicate she was sober. After hearing arguments of counsel, the court found Mother did not make a prima facie showing in support of her section 388 petition and therefore denied her petition. The court noted there was, at best, changing circumstances. The court later found that Mother had also failed to make a prima facie showing that her requested change in J.C.'s custody was in his best interests.

The court then received evidence during the contested section 366.26 hearing. The court found that reasonable inquiry had been made as to whether J.C. is or may be an Indian child and concluded no ICWA notice was required. The court entered a judgment adopting Agency's recommendations, terminating Mother's and Father's parental rights, and selecting a permanent plan of adoption for J.C. In particular, the court found that there was no significant beneficial parent-child relationship that outweighed the benefits of adoption for J.C. Mother filed a notice of appeal challenging that judgment.

DISCUSSION

I

ICWA Compliance

Mother contends, and Agency concedes, that the juvenile court erred by finding that the ICWA did not apply to J.C.'s case. In particular, they agree that Agency did not comply with the ICWA's notice requirements because J.C.'s name was misspelled on the notices it sent and the record does not show Agency followed up on additional information provided by Father regarding J.C.'s possible Indian ancestry.

A

The ICWA provides that "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" of the pending proceedings and their right to intervene. (25 U.S.C. § 1912(a); *In re Isaiah W.* (2016) 1 Cal.5th 1, 8 (*Isaiah W.*).) California law also requires such notice. (§§ 224.2, subd. (f)(5), 224.3, subds. (a), (b); *In re Damian C.* (2009) 178 Cal.App.4th 192, 196-198.) The juvenile court therefore has an affirmative duty to inquire whether a child who is the subject of dependency proceedings is an Indian child. (*Isaiah W.*, at p. 6.) If proper and adequate ICWA notice has not been given, any finding by the court that the ICWA is inapplicable, is not conclusive, and does not relieve the court of its continuing duty under section 224.3, subdivision (a) to inquire into a child's Indian status in all dependency proceedings. (*Isaiah W.*, at p. 11.) "Only after proper and adequate notice has been

given and neither a tribe nor the BIA [federal Bureau of Indian Affairs] has provided a determinative response within 60 days does section 224.3[, subdivision](e)(3) authorize the court to determine the ICWA does not apply." (*Ibid*.)

"Notice to the . . . Indian child's tribe is required by [the] ICWA in state court proceedings seeking . . . termination of parental rights 'where the court knows or has reason to know that an Indian child is involved.' [Citation.]" (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 784.) A "reason to know" under the ICWA includes circumstances where a person who has an interest in the child 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. (*Ibid*.) When Agency knows or has reason to know that an Indian child is involved, it must "make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by . . . contacting . . . any . . . person [who] reasonably can be expected to have information regarding the child's membership status or eligibility." (§ 224.3, subd. (c).) Notices sent to the Bureau of Indian Affairs (BIA) and Indian tribes must contain enough information to be meaningful. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) Notices must include the following information, if known: (1) the name, birthplace, and birth date of the Indian child; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) the names and addresses of the child's parents, grandparents, great-grandparents, and other identifying information; and (4) a copy of the dependency petition. (*Ibid*.) Agency must file with the juvenile court the ICWA notice, return receipts, and responses received from the BIA

and tribes. (*Id*. at pp. 175, 178-179.) A failure of Agency to comply with the ICWA notice requirements requires conditional reversal of the juvenile court's finding that the ICWA does not apply and remand to the court for such compliance. (*In re O.C.* (2016) 5 Cal.App.5th 1173, 1189 (*O.C.*).)

B

At the September 2016 detention hearing, Mother stated that she had no Indian ancestry. Father stated that he may have Cherokee Indian ancestry arising on his deceased maternal great-grandmother's side. He was unaware of any California relatives who could provide Agency with additional information regarding his Cherokee heritage, but stated he could call out-of-state relatives. The court deferred ruling on the applicability of the ICWA and ordered Father to provide further information regarding his Cherokee ancestry.

In October 2016, Agency sent out ICWA notices. In response, Agency received letters from the Eastern Band of Cherokee Indians and the United Keetoowah Band of Cherokee Indians stating that the child named in the notice was not a descendent of an enrolled tribe member and therefore they would not intervene in the dependency proceedings. At a special hearing in November, the court found that ICWA notice was not required because it had no reason to know that J.C. is or may be an Indian child. In December, Agency received a letter from the Cherokee Nation requesting additional information regarding the paternal relatives of the child named in the notice, including their birth dates, relationship to the child, and the maiden names of all females listed. Father subsequently provided Agency with information regarding his paternal female

relatives. Agency sent that updated information to all three tribes. In response, the Cherokee Nation stated it still had insufficient information to make a determination of the named child's tribal eligibility and the other two Cherokee tribes stated the named child was ineligible and they would not intervene in the proceedings. The Cherokee Nation requested that it be informed if Agency received any additional information.

At a special hearing in March 2017, Father provided the court with further information stating that his paternal great-aunt informed him that J.C.'s paternal great-great-grandfather, J.T., was his relative who had Cherokee ancestry. The court directed Father's counsel to provide that information in writing to Agency, directed Agency to provide that information to the three tribes, and deferred making an ICWA finding until the six-month review hearing.

At the six-month review hearing, Agency initially recommended that the court defer making an ICWA finding, noting that one of its social workers had been asked to follow-up on the new information but it had not yet received his response or any new information regarding the applicability of the ICWA. The court found that the ICWA did not apply to J.C.'s case and no ICWA notice was required because, after reasonable inquiry, it had reason to know that J.C. is not an Indian child. Nevertheless, the court stated that if a tribe further communicated with Agency, it should request a special hearing of the matter.

At the July 25, 2018 contested section 366.26 hearing, the court found that reasonable inquiry had been made whether J.C. is or may be an Indian child and concluded no ICWA notice was required because it knew J.C. was not an Indian child.

The court then terminated Mother's parental rights and selected a permanent plan of adoption for J.C.

C

Mother asserts that the juvenile court erred by terminating her parental rights at the section 366.26 hearing because Agency did not comply with the ICWA. In particular, she argues Agency's notices to the three Cherokee tribes were deficient because J.C.'s name was misspelled in those notices. Although J.C.'s birth certificate was attached to the notices and correctly spelled his name, Mother nevertheless argues the notices were defective and did not comply with the ICWA's notice requirements. She also argues that there was no documentation showing that the additional information that Father provided to Agency was provided to the tribes.

Agency concedes that it did not comply with the ICWA and therefore the matter must be remanded to the juvenile court for such compliance. In particular, Agency concedes that it must send out new ICWA notices with the correct spelling of J.C.'s name. Agency further concedes that it must follow-up on the additional relative information that Father provided it at the March 2017 hearing.

We agree with Mother and Agency and conclude the juvenile court erred by finding that Agency complied with the ICWA and that no ICWA notice was required because the court knew J.C. was not an Indian child. Accordingly, we will conditionally reverse the judgment terminating Mother's parental rights and selecting a permanent plan of adoption for J.C and remand the matter to the juvenile court with directions that it order Agency to comply with the ICWA. (*Isaiah W.*, *supra*, 1 Cal.5th at pp. 6, 11; cf. *In*

re E.H. (2018) 26 Cal.App.5th 1058, 1075-1076; *O.C.*, *supra*, 5 Cal.App.5th at p. 1189; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 711.)

II

Section 388 Petition

Mother contends the juvenile court erred by denying her request for an evidentiary hearing on her section 388 petition to modify its prior custody order and instead place J.C. with her. In particular, she argues that she made a prima facie showing of changed circumstances and that her request to grant her custody of J.C. was in his best interests.

A

Section 388 allows a parent or other interested person to petition the juvenile court to change, modify, or set aside a previously made dependency order. (§ 388, subd. (a)(1).) The petitioner has the burden of proof to show that there are changed circumstances or new evidence and that the requested change would be in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie*); *In re G.B.* (2014) 227 Cal.App.4th 1147, 1157; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) A section 388 petition must be liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461 (*Angel B.*).)

The petitioner "need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310 (*Marilyn H.*).) However, if the petitioner does not meet that threshold showing, the juvenile court in its discretion may deny a request for a section 388 hearing. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415 (*Jasmon O.*).) "The prima facie requirement is not met unless the facts

alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*).) In deciding whether a prima facie showing has been made, the court may consider the entire factual and procedural history of the case. (*Jasmon O.*, at p. 415; *In re Mickel O.* (2011) 197 Cal.App.4th 586, 616 (*Mickel O.*).) A summary denial of a section 388 petition does not violate due process. (*Jasmon O.*, at p. 415; *Angel B.*, *supra*, 97 Cal.App.4th at p. 460.)

The decision whether to grant or deny a section 388 petition is within the discretion of the juvenile court. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228 (*B.D.*); *In re Y. M.* (2012) 207 Cal.App.4th 892, 920 (*Y.M.*).) Likewise, a decision to summarily deny a section 388 petition without an evidentiary hearing is within the juvenile court's discretion. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 460; *Zachary G.*, *supra*, 77 Cal.App.4th at p. 808.) On appeal, a reviewing court will not disturb a discretionary decision by the juvenile court unless it abuses its discretion by making an arbitrary, capricious, or patently absurd determination. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 318; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642.) The appellant has the burden on appeal to affirmatively show that the juvenile court abused its discretion. (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.)

B

Mother asserts that the juvenile court abused its discretion by denying her section 388 petition because her petition made a prima facie showing of changed circumstances and that her requested changed order would be in J.C.'s best interests.

In support of her allegation that there had been changed circumstances, Mother attached three prescription medication labels dated in June 2018, signed attendance sheets for 12-step NA meetings during the period of February 2018 through June 2018, and an updated treatment plan showing she began treatment in January 2018. She asserted that she had been compliant with her medications, had regularly attended AA/NA meetings, and was sober. However, as Agency notes, Agency and the juvenile court were aware at the contested 12-month review hearing in February 2018 that Mother stated she had resumed taking her prescription medications and had submitted a November 2017 prescription list. Furthermore, the court was aware in February 2018 that Mother had enrolled in an aftercare program as a condition of her probation after her October 2017 arrest because the court received a January 2017 letter confirming her enrollment. Also, although Mother submitted a purported "updated" treatment plan in support of her section 388 petition, that treatment plan was not signed by Mother or her treatment counselor, showed only Mother's January 2018 admission date and treatment goals, and did not contain any specific dates or information regarding her actual treatment or compliance with her plan after January 2018. Finally, although Mother submitted NA attendance sheets showing she attended meetings from February 2018 through June 2018, she did

not submit any drug test results for that period or other evidence definitively showing she was sober and had overcome her substance abuse problems.[3]

Based on our review of the evidence *ante*, we conclude the juvenile court properly found that Mother did not make a prima facie showing of changed circumstances. In particular, the court reasonably could conclude her prescription medication evidence did not show any change in circumstances since the February 2018 hearing because she was compliant with her psychotropic medications at that time. It could further conclude that even accepting her updated treatment plan and NA attendance sheets at face value, they showed at most that Mother was engaged in substance abuse treatment. While this was certainly commendable, it did not demonstrate sufficient *changed* circumstances since the February 2018 hearing with respect to the fundamental issue of Mother's long-term sobriety.

In support of her allegation that her requested changed order was in J.C.'s best interests, Mother asserted J.C. was extremely bonded to her, she had resolved the issues that led to his protection, and that placement with her would allow J.C. to maintain ties with his biological family. In deciding whether Mother made a prima facie showing that her requested changed order was in J.C.'s best interests, the juvenile court could consider the entire factual and procedural history of the case. (*Jasmon O.*, *supra*, 8 Cal.4th at p. 415; *Mickel O.*, *supra*, 197 Cal.App.4th at p. 616.) The record shows J.C. had been in the

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[3] In denying Mother's petition, the juvenile court stated in part: "What I don't have here is a progress report from the program or any random tests to indicate that she's been clean. So the attachments are fairly thin in terms of content."

juvenile dependency system since birth and had never lived with Mother. Although Mother regularly visited J.C., she had not progressed beyond supervised visitation. Based on our review of the record, we conclude the juvenile court reasonably could find that Mother had not carried her burden to make a prima facie showing that placement of J.C. with her would be in his best interests.

Because the juvenile court properly found that Mother had not made a prima facie showing of changed circumstances or that placement with her would be in J.C.'s best interests, we conclude the court did not abuse its discretion by denying her request for a hearing and summarily denying her section 388 petition. (*B.D.*, *supra*, 159 Cal.App.4th at p. 1228; *Y. M.*, *supra*, 207 Cal.App.4th at p. 920; *Angel B.*, *supra*, 97 Cal.App.4th at p. 460; *Zachary G.*, *supra*, 77 Cal.App.4th at p. 808.) *In re Hashem H.* (1996) 45 Cal.App.4th 1791 (*Hashem*), cited by Mother, is factually inapposite to this case and does not persuade us to reach a contrary conclusion.[4]

III

Beneficial Parent-Child Relationship Exception

Mother contends the juvenile court erred by finding the beneficial parent-child relationship exception to adoption did not apply. In particular, she argues there is insufficient evidence to support the court's findings that she did not have a beneficial

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4 In *Hashem H.*, *supra*, 45 Cal.App.4th 1791, the parent submitted a *current* letter from her therapist stating that she had successfully addressed the emotional and mental problems that led to the dependency proceeding. (*Id*. at pp. 1798-1799.) Likewise, *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, cited by Mother, is factually inapposite to this case and does not persuade us to reach a contrary conclusion.

parent-child relationship with J.C. and that she did not show termination of that relationship would be detrimental to him.

A

The purpose of a section 366.26 hearing is to determine the appropriate permanent plan for a dependent child and then implement that plan. (*Marilyn H.*, *supra*, 5 Cal.4th at pp. 295, 309.) The juvenile court can choose among three permanent plans: adoption, legal guardianship, and long-term foster care. (§ 366.26, subd. (b).) When a child is adoptable, adoption is the preferred permanent plan unless there are countervailing circumstances or if adoption is not in the child's best interests. (*In re Heather B.* (1992) 9 Cal.App.4th 535, 546; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574 (*Autumn H.*).)

At a section 366.26 hearing, it is the parent's burden to show an exception to termination of parental rights. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534; *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.) One exception to termination of parental rights applies when termination of those 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).) That requisite beneficial parent-child relationship means that there is a relationship between the parent and child 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." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) In making the determination of whether the beneficial parent-child relationship exception applies, the juvenile 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." (*Ibid.*) Because interaction between a child and his or her parent will generally confer some incidental benefit to the child, the parent must prove the child will benefit to such a degree as to overcome the preference for adoption. (*Ibid.*) For the beneficial parent-child relationship to apply, the parent must show that the emotional attachment between the child and the parent is of a parental nature rather than one of a friendly visitor or friendly nonparent relative. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 467; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.)

On appeal, we apply both substantial evidence and abuse of discretion standards in reviewing a juvenile court's determination that the beneficial parent-child relationship exception to termination of parental rights does not apply. (*In re J.C.* (2014) 226 Cal.App.4th 503, 530-531 (*J.C.*).) *In re J.C.* stated:

> "[T]he juvenile court's decision whether an adoption exception applies involves two component determinations. 'Since the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental or sibling relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court's determination.' [Citation.] The second determination in the exception analysis is whether the existence of that relationship or other specified statutory circumstance constitutes ' "a *compelling reason* for determining that termination would be detrimental to the child." ' [Citation.] This ' " 'quintessentially' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can

> be expected to have on the child and to weigh that against the benefit to the child of adoption[,]" is appropriately reviewed under the deferential abuse of discretion standard.' [Citation.]"[5] (*Ibid*.)

B

Mother asserts that because she showed she maintained regular visitation and contact with J.C. and he would benefit from continuing his relationship with her, the court erred by concluding the beneficial parent-child exception to termination of her parental rights did not apply. (§ 366.26, subd. (c)(1)(B)(i).) However, based on our review of the record, we conclude there is substantial evidence to support the court's findings that Mother did not prove both prongs of that exception and further conclude it did not abuse its discretion by finding that exception did not apply.

Regarding the first prong, we conclude that although Mother regularly visited and called J.C. and had a good and loving relationship with him, there is substantial evidence to support the court's finding that those visits did not result in J.C. viewing Mother in a

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[5] To the extent Mother argues that the substantial evidence standard applies in reviewing both components of the juvenile court's determination that the beneficial parent-child exception does not apply, we disagree and decline to follow earlier case law in support thereof. (See, e.g., *Autumn H*., *supra*, 27 Cal.App.4th at pp. 575-576; *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947, 955; *In re C.F.* (2011) 193 Cal.App.4th 549, 553.) Rather, we believe that more recent cases applying the hybrid standard of review are more persuasive and therefore apply that standard in reviewing the juvenile court's determination in this case. (See, e.g., *J.C.*, *supra*, 226 Cal.App.4th at pp. 530-531; *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315; *In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.) In any event, even if we had solely applied the substantial evidence standard of review, we would have concluded there is substantial evidence to support the juvenile court's determination that the beneficial parent-child relationship exception did not apply in the circumstances of this case.

parental role. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) An Agency social worker observed during one visit that when J.C. was frightened by a balloon, he went to his caregiver, and not to Mother, for comfort. Also, at times J.C. rejected Mother's attempt to kiss him. He also easily parted with Mother at the end of their visits. J.C. referred to his foster parents as "Mommy" and "Daddy." He did not consider Mother a primary caregiver and instead went to his foster parents for all of his daily needs. J.C had never lived with Mother and her visitation with him did not progress to unsupervised visits. Accordingly, the evidence supports a finding that J.C. viewed Mother more as a friendly adult than as a parent.

Regarding the second prong, we conclude that there is substantial evidence to support the court's finding that J.C. would not benefit from continuing his relationship with Mother to the extent that preserving that relationship would outweigh the benefits he would gain in a permanent home with new, adoptive parents. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) As discussed *ante*, there is substantial evidence that J.C. did not view Mother in a parental role. Although J.C. presumably benefited from his regular visits with Mother, the court reasonably could conclude that continuation of that nonparental relationship would not outweigh the benefits he would gain in a permanent home with new, adoptive parents. (*Ibid*.) Based on the evidence, the court reasonably could conclude that Mother did not carry her burden below to show that severing J.C.'s relationship with her would deprive him of a substantial, positive emotional attachment such that he would be greatly harmed. (*Ibid*.) To the extent Mother cites evidence and

inferences therefrom that would have supported a contrary finding, she misconstrues and/or misapplies the standard of review.

Finally, we conclude the court did not abuse its discretion by finding that the benefit to J.C. of continuing his relationship with Mother would not outweigh the benefit to him of a permanent home with adoptive parents and finding a permanent plan of adoption was therefore in his best interests. (*J.C.*, *supra*, 226 Cal.App.4th at pp. 530-531.) J.C. and Mother tested positive for cocaine and marijuana at his birth. J.C. never lived with Mother and she never had a parental role in his life. Because of her inability to remain sober, Mother did not reunify with J.C. and her visits with him did not progress to unsupervised visits. In contrast, J.C.'s foster parents provided him with a loving, safe, nurturing home environment and were committed to adopting him. Accordingly, we conclude the court reasonably exercised its discretion by concluding that the benefits to J.C. of adoption outweighed the benefits to him of continuing his relationship with Mother. Mother has not carried her burden on appeal to show otherwise. Therefore, the court did not err by concluding the beneficial parent-child relationship exception to termination of Mother's parental rights and selection of adoption as J.C.'s permanent plan did not apply. (*Ibid*.; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

DISPOSITION

The judgment terminating mother's parental rights is conditionally reversed and the case is remanded to the juvenile court with directions to order Agency to comply with the ICWA's notice requirements, relevant case law interpreting the ICWA, and the views expressed in this opinion, and to file all required documentation with the juvenile court

for the court's review. If, after such notice is provided and documentation is filed, the court finds that J.C. is an Indian child, it shall proceed in conformity with the ICWA. If, after such notice is provided and documentation is filed, the court finds that J.C. is not an Indian child, the judgment terminating mother's parental rights shall be reinstated.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

DATO, J.