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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.M. et al.,

Defendants and Appellants.

E056641

(Super.Ct.No. SWJ009916)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso,
Judge. Affirmed.

Grace Clark, under appointment by the Court of Appeal, for Defendant and
Appellant M.M.

Donna P. Chirco, under appointment by the Court of Appeal, for Defendant and
Appellant S.B.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

M.M. (the father) and S.B. (the mother) appeal from an order terminating parental rights to their son, D.M.

The mother contends that proper notice was not given as required by the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and related federal and state law.

Both parents contend that that the juvenile court should have found that the “beneficial parental relationship” exception applied. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)

The father also appeals from an order made at the same hearing denying his “changed circumstances” petition pursuant to Welfare and Institutions Code section 388 (section 388).

We find no error. Accordingly, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

The mother and the father were married and had one child together — D.M. The mother’s parental rights to two older children had previously been terminated due to her methamphetamine use.

In March 2010, the mother attempted to commit suicide by taking an overdose of the father’s prescription depression medication. The police took her to the emergency room.

The next day, a social worker visited the home. The mother admitted using methamphetamine on the day she attempted to commit suicide. She claimed that she had not used methamphetamine for a long time, but she had started using it again about two weeks earlier.

The father claimed that he had not used methamphetamine for over 11 years. Following his conviction in 1998 of possession of drugs for sale, he had quit on his own.

The mother said that, as far as she knew, the father was not using drugs. The father likewise said that, as far as he knew, the mother was not using drugs.

D.M. was developmentally delayed; at the age of a year and a half, he still was not walking or talking. The Riverside County Department of Public Social Services (the Department) detained him, placed him in foster care, and filed a dependency petition concerning him.

On March 29, 2010, at the detention hearing, the juvenile court ordered the father to submit to a hair follicle drug test “forthwith.”

Meanwhile, the father had provided a urine sample for drug testing. On March 29, 2010, the test results showed that the urine was diluted, which made it unsuitable for further testing.

The social worker told the father to report for a hair follicle test on March 30, 2010. He said he was busy and asked if he could postpone it, but the social worker refused.

Accordingly, on March 30, 2010, the father showed up for a hair follicle test. However, his hair, which previously had been ponytail-length, was now less than half an inch long, which made it unsuitable for testing. He also had no suitable body hair. The social worker concluded that the father was “intentionally avoiding any drug testing.”

On April 13, 2010, the father submitted another urine sample. A drug test of this urine was negative. Subsequent urine tests were also negative.

On or about May 12, 2010, the father showed up again for hair follicle testing. However, his hair still was not long enough, and it appeared that he had shaved his body hair.

On May 21, 2010, the father finally had a hair follicle test. The results were negative.

In July 2010, at the jurisdictional/dispositional hearing, the juvenile court found jurisdiction over D.M. based on failure to protect. (Welf. & Inst. Code, § 300, subd. (b).) It authorized the Department to place D.M. with the father, subject to several conditions, including that the mother not live with them and not have unsupervised contact with them. In August 2010, D.M. was, in fact, placed with the father. Later in August, D.M. was diagnosed as having cerebral palsy.

On December 5, 2011, both parents submitted urine samples for drug testing. On December 12, the social worker learned that the mother’s test was negative, but the father’s test was positive for methamphetamine. When confronted with this result, the father admitted using methamphetamine on December 3.

On December 13, 2011, a saliva drug test was administered to both parents. This time, both parents tested positive for methamphetamine. The saliva test could reveal drug use only within the previous 72 hours. Thus, the father must have used methamphetamine at least once after December 3.

The Department redetained D.M., placed him in foster care, and filed a supplemental petition concerning him.

In February 2012, at a jurisdictional/dispositional hearing, the juvenile court sustained the supplemental petition, denied reunification services, and set a hearing pursuant to Welfare and Institutions Code section 366.26 (section 366.26).

In April 2012, D.M. was placed in a prospective adoptive home.

In July 2012, on the date set for the section 366.26 hearing, the father filed a section 388 petition. The mother brought an oral section 388 petition. The juvenile court denied both petitions. It found that D.M. was adoptable and that there was no applicable exception to termination. Accordingly, it terminated parental rights.

II

ICWA NOTICE

The mother contends that the trial court failed to give notice as required by ICWA and related federal and state law.

A. *Additional Factual and Procedural Background.*

On March 24, 2010, the father told a social worker that he had Cherokee ancestry. The mother said she, too, had Indian ancestry. However, she admitted that, in the dependency cases involving her two older children, “[t]hey could not find it.”

On March 29, 2010, both parents filed a form “Parental Notification of Indian Status” (form ICWA-020), signed under penalty of perjury. In his, the father stated that he might have Cherokee ancestry. In hers, the mother stated that she had no Indian ancestry.

On April 20, 2010, the father told a social worker that he had “recently learned from his sister” that he had Apache ancestry. The mother, despite her form ICWA-020, said that she had Cherokee ancestry on her mother’s side.

The Department gave notice to the Cherokee and Apache tribes and to the Bureau of Indian Affairs. The notice included the mother’s name, birthdate, and birthplace. However, it did not include any information about the mother’s parents or other ancestors.¹

At the jurisdictional/dispositional hearing, the juvenile court found “good ICWA notice” and further found that ICWA did not apply.

¹ Curiously, the response from one tribe included the names and birthdates of the mother’s parents, as well as the names of one set of the mother’s grandparents. The record does not indicate how that tribe obtained this information.

B. *Analysis.*

“Congress enacted ICWA to further the federal policy “that, where possible, an Indian child should remain in the Indian community” [Citation.]” (*In re W.B., Jr.* (2012) 55 Cal.4th 30, 48.) “In certain respects, California’s Indian child custody framework sets forth greater protections for Indian children, their tribes and parents than ICWA. [Citations.] Both federal and state law expressly provide that if a state or federal law provides a higher level of protection to the rights to the parent or Indian guardian of an Indian child, the higher standard shall prevail. [Citations.]” (*In re Jack C.* (2011) 192 Cal.App.4th 967, 977.)

“ICWA requires that when a court knows or has reason to know that an Indian child is involved in a dependency matter, it must ensure that notice is given to the relevant tribe or tribes. [Citation.]” (*In re J.O.* (2009) 178 Cal.App.4th 139, 154.) However, “[t]he juvenile court “needs only a suggestion of Indian ancestry to trigger the notice requirement.” [Citation.]” (*In re J.M.* (2012) 206 Cal.App.4th 375, 380.)

“Under the implementing federal regulation, the required ICWA notices must include ‘[a]ll names known, and current and former addresses of the Indian child’s biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information.’ [Citation.] California law requires that the notices contain

substantially the same data, including ‘any other identifying information, if known.’ [Citation.]” (*In re C.B.* (2010) 190 Cal.App.4th 102, 140, italics omitted.)

“‘The [trial] court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings. [Citation.] We review the trial court’s findings for substantial evidence. [Citation.]’ [Citation.]” (*In re Christian P.* (2012) 208 Cal.App.4th 437, 451.)

“A deficiency in notice may be harmless when it can be said that, if proper notice had been given, the child would not have been found to be an Indian child and ICWA would not have applied. [Citations.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1530.)

The mother argues that the ICWA notice was defective because it did not include any information about her ancestors. However, she admitted that, in the dependency cases involving her two older children, ICWA notices were sent, and yet those children were found not to be Indian children. Moreover, our record includes the minute order finding from one of the previous dependency cases that “notice has been given as required by law pursuant to all I.C.W.A. requirements” and that that child was not an Indian child. (Capitalization omitted.) These findings are collateral estoppel. (See generally *In re Joshua J.* (1995) 39 Cal.App.4th 984, 992-993.)

This court has previously held that defective ICWA notice as to one sibling is harmless when there has been good ICWA notice as to another sibling who has been found not to be an Indian child. (*In re E.W.* (2009) 170 Cal.App.4th 396, 400-402

[Fourth Dist., Div. Two].) That is the case here. We conclude that the error was harmless.

III

THE FATHER'S SECTION 388 PETITION

The father contends that the juvenile court erred by denying his section 388 petition.

A. *Additional Factual and Procedural Background.*

In his section 388 petition, the father asked the juvenile court to reinstate reunification services and to vacate the section 366.26 hearing.

As changed circumstances, he alleged: (1) He had completed phase 2 of the family preservation court program;² (2) he had had 25 negative drug tests since his relapse in December 2011; (3) he had been attending 12-step meetings; and (4) he had completed a 10-week parenting course.

At the hearing on both parents' petitions, the juvenile court gave the parties an opportunity to present evidence and argument. It then denied the petitions. It explained: "[T]he situation today isn't much different. I give all the credit in the world for the hard work both parents have done. The evidence is impressive that they've maintained sobriety and their heart is into it, their minds are into it, their bodies are into it. But . . . if I were to find . . . that their situation has totally changed to where I think that their

² This was a court-supervised substance abuse program. It had four phases and lasted a minimum of a year.

substance abuse problems are overcome, it would be one of those situations where I have . . . my fingers crossed on both hands. . . . I can't sit here with confidence and say that it's resolved. . . . And I think you show that you have the acumen that you could do it, but you've been down this road before. I can't just simply find that the situation has changed substantially such that . . . they should be given another chance." The court concluded, ". . . I cannot find that it's in [D.M.]'s best interest for me to grant [the] relief [the parents] are requesting."

B. *Analysis.*

1. *Evidence to be considered.*

During the hearing on the section 388 petition, the juvenile court stated, "I spent a considerable amount of time not just reviewing the reports that were prepared for today's hearing but also paperwork prepared by father's counsel pursuant to his 388 [m]otion. *I also went back and looked at some of the past reports* to get a better sense as to where the parents were and what they had been doing leading up to the decision . . . for [D.M.] to be removed again and, ultimately, the decision to terminate services." (Italics added.)

This presents a threshold issue: What evidence can we consider? "[A]n appeal reviews the correctness of a judgment as of the time of its rendition, *upon a record of matters which were before the trial court* for its consideration.' [Citation.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, italics added.) Thus, ordinarily, when we review the juvenile court's ruling after an evidentiary hearing on a section 388 petition, we can consider only the evidence admitted at the hearing.

We applaud the juvenile court for trying to get a better grasp of the case as a whole. Nevertheless, we cannot recommend the way it went about it. While the earlier reports were potentially admissible (see Welf. & Inst. Code, § 281; *In re M.B.* (2011) 201 Cal.App.4th 1057, 1069-1072 [Fourth Dist., Div. Two]), they were never actually offered or admitted. The parties had no way of knowing what portions of the earlier reports the juvenile court considered. Thus, they had no way to object to them or to rebut them with other evidence or argument.

The parties, however, forfeited any resulting error by failing to object. Indeed, the father's counsel arguably invited the error by asking the juvenile court to consider certain earlier events in the case and citing several previous reports.

The more immediate problem is that we have almost no way of knowing exactly what the juvenile court considered. Admittedly, it did mention, on the record, some of the earlier events in the case. But what about other information in the earlier reports? Would it be proper for us to affirm based on such information? Or, even more problematic, to reverse?

The solution lies in standard principles of appellate review. ““““[E]rror is never presumed, but must be affirmatively shown, and the burden is upon the appellant to present a record showing it, any uncertainty in the record in that respect being resolved against him.”” [Citation.]” (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1452.)

Here, the father never objected to the juvenile court's consideration of earlier reports; he never asked it to clarify precisely which portions of which reports it

considered. Accordingly, to the extent that information in earlier reports would support the juvenile court's ruling, we must presume that the juvenile court considered it. Conversely, to the extent that such information would undercut its ruling, unless it affirmatively mentioned that information on the record, we must presume that that information was not before it.

2. *Legal background.*

“A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child. [Citation.]” (*In re A.A.* (2012) 203 Cal.App.4th 597, 611-612 [Fourth Dist., Div. Two].)

“The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citation.]” (*In re A.A., supra*, 203 Cal.App.4th at p. 612.) “. . . ‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’ [Citation.]” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319, original quotation marks corrected.) “‘The

denial of a section 388 motion rarely merits reversal as an abuse of discretion.’

[Citation.]” (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

“The fact that the parent ‘makes relatively last-minute (albeit genuine) changes’ does not automatically tip the scale in the parent’s favor. [Citation.]” (*In re D.R.* (2011) 193 Cal.App.4th 1494, 1512.) This is particularly true in cases involving substance abuse. “[R]elapses are all too common for a recovering drug user. ‘It is the nature of addiction that one must be “clean” for a . . . long[] period . . . to show real reform.’ [Citation.]” (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424.)

For example, in *In re Amber M.* (2002) 103 Cal.App.4th 681, 685-687, the appellate court concluded that it was not an abuse of discretion to deny the mother’s section 388 petition, based in part on the fact that she had a 17-year history of drug abuse, had relapsed twice previously, and had been clean for only 372 days. Likewise, in *In re C.J.W.* (2007) 157 Cal.App.4th 1075 [Fourth Dist., Div. Two], this court concluded that it was not an abuse of discretion to deny the parents’ section 388 petitions, given that they had extensive histories of drug use, they had failed to reunify with other children, and “[t]heir recent efforts at rehabilitation were only three months old” (*C.J.W.*, at p. 1081.)

The father claims that, until his relapse in December 2011, he had been drug free for over 11 years. However, the juvenile court had only his word for this. At the start of the dependency, he had evidently tried to evade drug testing. His first urine test was diluted and unusable; he did not provide a usable urine sample until about two weeks into

the dependency. Significantly, he also evaded a hair follicle test, which would have revealed drug use going back even before the dependency. First, he tried to postpone the test; then, when that failed, he cut his hair and shaved his body. He did not provide a usable hair sample for nearly two months. The most reasonable inference is that the father had joined the mother in using methamphetamine for at least two weeks before the start of the dependency, and possibly even longer than that.

Thus, one of the jurisdictional allegations that the juvenile court found true was that “[t]he father . . . has a history of abusing controlled substances.” His case plan required him to enroll and participate in a substance abuse program and to submit to random drug testing. It also required him to complete a parenting class.

Between April and October 2010, he completed the required substance abuse program. He attended 12-step program meetings regularly. Up until his relapse in December 2011, all of his drug tests were negative.

Similarly, between April and June 2010, the father completed a cooperative parenting course. Between November 2010 and April 2011, he also completed an in-home parenting program.

Nevertheless, in December 2011, he had two positive drug tests. He entered another substance abuse program, continued attending 12-step program meetings, and took another parenting class. All of his subsequent drug tests were negative.

However, none of these were truly changed circumstances; they had all existed prior to December 2011, yet they had not prevented the father from relapsing. Moreover,

he had not even completed his latest substance abuse program; he was only in phase two of a year-long, four-phase program. Thus, the juvenile court could reasonably find no changed circumstances.

The juvenile court could also reasonably find that the requested modification was not in the best interest of the child. The father admitted that he first started using drugs in his “late twenties” — i.e., around the mid-1980’s. Even if he quit in 1998, he must have been using drugs for over 10 years. He apparently relapsed in 2010. Then, even after completing a substance abuse program, he relapsed again in 2011. He was in another substance abuse program, but he would not complete it for nearly six months. The juvenile court could reasonably doubt that he would *ever* be reliably and consistently drug free.

“Once services have been terminated, the juvenile court’s focus shifts from family reunification to the child’s permanent placement and well-being [Citation.]” (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1235.) ““A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent . . . might be able to reunify at some future point, does not promote stability for the child or the child’s best interests. [Citation.] ““[C]hildhood does not wait for the parent to become adequate.”” [Citation.]” (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206.)

We therefore conclude that the juvenile court did not abuse its discretion by denying the father’s section 388 petition.

IV

THE BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION

Both parents contend that the juvenile court erred by refusing to find that the beneficial parental relationship exception to termination applied.

A. *Additional Factual and Procedural Background.*

At the section 366.26 hearing -- unlike at the section 388 hearing (see part III.B.1, *ante*) -- the juvenile court specified precisely what evidence had been offered and admitted. That evidence consisted of two social worker's reports, along with the documentary evidence that the parents had submitted in support of their section 388 petitions. We therefore confine our review to this evidence; we disregard earlier reports that were not before the juvenile court when it made the challenged ruling. (See § 366.26, subd. (c)(1).)

At the time of the hearing, in July 2012, D.M. was not quite four years old. He was “a happy, engaging, and cooperative young boy.”

In March 2010, D.M. had been placed in a foster home. In August 2010, he had been placed with the father. In December 2011, he had been removed from the father and placed back in the previous foster home. Finally, in April 2012, he had been placed with a prospective adoptive family.

Although developmentally delayed, he was “making great strides” Since his second removal, he had “thrived.” “[H]is speech ha[d] developed significantly and he engage[d] more with his peers.”

Both parents were visiting weekly. “[T]he visits have gone well and . . . the parents interact well with [D.M.]” Several times, however, the social worker reported that the father did not “interact[]” or “engag[e]” with D.M. as much as the mother did.

From the very first time that D.M. met the prospective adoptive family, he “interact[ed] easily” with them. He “ha[d] bonded well to the family and vice versa.” The prospective adoptive parents “ha[d] come to love [D.M.]” His prospective adoptive siblings “ha[d] fully accepted [D.M.] as their brother and [we]re excited to legally adopt him into their family.” He “indicated that he likes living with the family and wants them to become his parents so he can live with them forever.” “[E]veryone agreed this was a very good match.”

At the section 366.26 hearing, counsel for both parents asked the juvenile court to find that the beneficial relationship exception applied.

The court found that “the parents do visit on a very regular basis [and] they have very positive visits” However, it also found that “the detriment of [D.M.] losing out in having [a] relationship [with the parents] is minimal compared to the benefit he will have in the long run to be able to have parents who have adopted him permanently” It said it could not find “that it would be detrimental to the child to cut the parents off.”

B. *Analysis.*

As a general rule, at a section 366.26 hearing, if the juvenile court finds that the child is adoptable, it must terminate parental rights. (§ 366.26, subds. (b)(1) & (c)(1).) This rule, however, is subject to a number of statutory exceptions. (*Id.*, subd. (c)(1)(A),

(1)(B)(i)-(1)(B)(vi).) One of these is the beneficial parental relationship exception, which applies when “termination would be detrimental to the child” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (*Id.*, subd. (c)(1)(B)(i).)

“[C]ourt[s] ha[ve] interpreted the phrase ‘benefit from continuing the relationship’ in section 366.26, subdivision (c)(1)(B)(i) to refer to a ‘parent-child’ relationship that ‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and 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.* (2011) 193 Cal.App.4th 549, 555.)

“‘The burden falls to the parent to show that the termination of parental rights would be detrimental to the child under one of the exceptions. [Citation.]’ [Citations.]” (*In re C.B.*, *supra*, 190 Cal.App.4th at p. 122.) “A parent 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, . . . 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.)

“We review the trial court’s findings for substantial evidence. [Citation.]” (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228; see also *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) ““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.’ [Citation.]” (*In re C.F., supra*, 193 Cal.App.4th at p. 553.) Thus, “a challenge to a juvenile court’s finding that there is no beneficial relationship amounts to a contention that the ‘undisputed facts lead to only one conclusion.’ [Citation.] Unless the undisputed facts established the existence of a beneficial parental . . . relationship, a substantial evidence challenge to this component of the juvenile court’s determination cannot succeed.” (*Bailey J.*, at p. 1314.)

Here, there was *zero* evidence that termination of parental rights would be detrimental to D.M. The parents point to how long he had been in their custody; they also assert — based on earlier reports — that their visitation with him was positive and beneficial. As already stated, those earlier reports were not before the juvenile court. And even assuming they were, the juvenile court could reasonably find that they showed only “frequent and loving contact” and “pleasant visits.” The earlier reports did not show

that D.M. would be harmed if the visits were to cease. To the contrary, it appeared that he was bonded with the prospective adoptive family and that they would be able to provide for his physical and emotional needs.

Thus, the juvenile court did not err by finding that the beneficial parental relationship exception did not apply.

V

DISPOSITION

The orders appealed from are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.