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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.K. et al., Persons Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.K. et al.,

Defendants and Appellants.

E061737

(Super.Ct.Nos. J247820, J247821
& J248064)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey,
Judge. Affirmed in part and reversed in part with directions.

Linda J. Vogel, under appointment by the Court of Appeal, for Defendant and
Appellant L.K.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and
Appellant A.B.

Jean-Rene Basle, County Counsel, and Danielle E. Wuchenich, Deputy County Counsel, for Plaintiff and Respondent.

Defendants and appellants L.K. (Father) and A.B. (Mother) are the parents of six-year-old Z.K., four-year-old J.K., and almost two-year-old K.K. On appeal, Father argues San Bernardino County Children and Family Services (CFS) failed to comply with the notice and inquiry requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). Mother argues the juvenile court erred in failing to find the beneficial parental relationship exception to termination applied.¹ We remand for further compliance with ICWA but otherwise affirm the matter.

I

FACTUAL AND PROCEDURAL BACKGROUND

The family came to the attention of CFS on January 27, 2013, when Fontana police officers followed Mother's then 14-year-old daughter E.S. home after observing E.S. sitting by the street crying. The officers found the home to be extremely filthy and unfit for habitation. Father and Mother were not at home but three younger children, Z.K., J.K., and J.S., and Father's elderly father were at the home.² The children were filthy and very hungry. A CFS social worker responded to the home and was informed by the officers that they had tried to contact Mother for over two hours but she did not

¹ Both parents adopt by reference the arguments in the other's briefs.

² Father is not the father of E.S. and J.S. CFS had filed section 300 petitions on behalf of these girls. The juvenile court placed these girls with their father and eventually dismissed the case as to E.S. and J.S.

respond. Mother had warrants for her arrest and was pregnant with her fifth child. The children were taken into protective custody and asked to pack their belongings. The children, however, responded that they did not have anything to take.

The social worker had also attempted to contact the parents; however, neither parent responded. The social worker left a message with the father of E.S. and J.S. Mother had a prior child welfare history for substantiated allegations of general neglect in 2002 and 2011. Mother and Father had lengthy criminal histories. Both parents also had a substance abuse history.

On January 29, 2013, petitions pursuant to Welfare and Institutions Code³ section 300, subdivisions (b) (failure to protect) and (g) (no provision for support), were filed on behalf of the children.

At the January 30, 2013 detention hearing, the children were formally detained. Neither Mother nor Father were present and were in custody. Mother was in custody for burglary and child abuse. The hearing was continued to the next day. Mother appeared, but father did not. Mother informed the court that she was due to deliver her baby in two weeks and that she had no Indian heritage. Mother also signed the ICWA form (Judicial Council forms, form ICWA-020) stating she had no Indian ancestry. E.S. and J.S. were placed with their father. J.K. and Z.K. were placed in foster care and provided visitation with their half sisters. The court ordered J.K. and Z.K. to be placed with a relative upon

³ All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

approval and provided the parents weekly, two-hour supervised visits with the children upon their release from custody.

On February 6, 2013, Father informed the social worker that he had “Native American Indian Ancestry from the Cherokee tribe,” but could not provide ancestry, reservation, or membership information. The social worker had asked Father for further information in regard to his Indian heritage on February 8 and 11, 2013, but had received none. Father knew his mother’s name, but did not know her whereabouts since she had left him when he was four or five years old. Based on the information provided by Father, on March 14, 2013, CFS sent ICWA notices to the Bureau of Indian Affairs (BIA) and the Cherokee tribes. The notices included Mother’s and Father’s names, former addresses, dates and places of birth, and the tribe names for Father. The notices also included the maternal grandparents’ names and birthdates and the paternal grandfather’s name. The notices stated “unknown” as to the paternal grandmother’s name and “No information available” as to the paternal grandparents’ birthdates, addresses, and tribal information. Information as to the maternal and paternal great-grandparents was listed as “unknown” or “No information available.” The Cherokee tribes responded that based on the information provided, J.K. and Z.K. were not considered Indian children.

In February 2013, Mother gave birth to K.K. while in custody. The baby was born with hypoglycemia, transition difficulty, and had decreased activity with some nasal flaring. He was provided with oxygen and fed by a tube. He remained in the hospital

until February 20, 2013, due to low blood sugar and poor eating. Mother remained incarcerated and was unaware of her release date. Although this was her fifth pregnancy, Mother claimed that she did not know that she was pregnant until seven months and had insufficient prenatal care. Father had visited K.K. for approximately 15 minutes over the course of K.K.'s hospital stay. The child was taken into protective custody; and since neither Mother nor Father could provide the social worker with available relatives for placement of K.K., he was placed with his brothers, J.K. and Z.K., in foster care upon his release from the hospital.

On February 13, 2013, CFS filed a petition on behalf of K.K. pursuant to section 300, subdivisions (b) (failure to protect), (g) (no provision for support), and (j) (abuse of sibling).

The child was formally detained at the detention hearing on February 14, 2013. At that time, both Mother and Father denied Indian ancestry; and on that same day, Mother and Father had also each signed an ICWA form (Judicial Council Forms, form ICWA-020) stating under penalty of perjury that she/he had no "Indian ancestry as far as I know." The court found that the ICWA did not apply as to K.K.

Father claimed that he had been working on the day the children were taken into protective custody and that the children knew how to reach him. Mother, however, stated that the children did not know how to reach Father. Mother reported that she did not return home due to fear of being arrested, and blamed others for her children's removal. The parents denied that there was no food in the home or that the home and yard were in

deplorable conditions. Mother denied current drug use, claiming she had last used drugs approximately three to four years ago. She had admitted to having a history of smoking methamphetamine and having issues of relapsing. Father denied having a criminal history or a history of substance abuse or current drug use. However, a neighbor reported that the parents “ ‘sold and used drugs’ ” and that “ ‘several persons would frequent the home at all hours and that the home was never clean.’ ” In addition, Father had missed his first on-demand drug test and Father’s second drug test was positive for methamphetamine and marijuana. Moreover, when the social worker visited Father in his home on February 20, 2013, Father had appeared to be under the influence.

The jurisdictional/dispositional hearing was held on March 7, 2013. Mother was still in custody, and the parents waived their constitutional rights.⁴ The juvenile court sustained the dependency petitions and declared the children dependents of the court. The parents were provided with reunification services and ordered to participate.

At a non-appearance review hearing on May 31, 2013, the court found that CFS had given adequate ICWA notices as required by ICWA and that ICWA did not apply as to Z.K. and J.K.

By the time of the September 9, 2013 six-month review hearing, the parents had made minimal efforts in completing their case plan. Despite being provided with numerous referrals, they had not addressed their substance abuse issues or their role in

⁴ Mother was released from custody on March 28, 2013.

parenting and maintaining a safe home environment for the children. They had only participated in their parenting classes and individual counseling. Their respective therapists reported that they had not taken responsibility for their actions and instead blamed CFS and their neighbor for the children's removal. They also believed that they did not need to participate in substance abuse programs and had come up with numerous reasons for their failure to participate and drug test. They had, however, made improvements to their home and yard, and had shown "great love" and affection for their children. The social worker therefore recommended continuing the parents' services for an additional six months.

Both parents were unemployed and had struggled financially. They were residing in the paternal grandfather's home and had relied on the paternal grandfather and the children's benefits for financial support. Father had worked odd jobs occasionally as an auto mechanic, and had informed the social worker that he and Mother wanted their children returned and were tired of having no money. The social worker advised Father that it was not the children's responsibility to take care of the family's financial needs. The parents saw themselves as victims and had refused to take responsibility for their actions and acknowledge their issues with substance abuse.

The six-month review hearing was held on September 9, 2013. At that time, CFS's counsel informed the court Father had not been cooperative. The court advised Father to cooperate with the social worker and ordered the parents to drug test that day.

The court found the parents' progress in their case plan had been minimal and continued the parents' reunification services.

By the 12-month review hearing, the social worker recommended terminating the parents' services and setting a section 366.26 hearing. The parents had failed to complete the substance abuse components of their case plan and had refused to acknowledge that their substance abuse interfered with their ability to obtain stable employment. Between September 9, 2013, and January 24, 2014, Father had failed to drug test seven times; missed his February 20, 2014 on demand test; and on February 6, 2014, Father had tested positive for marijuana, amphetamines, and methamphetamines. Between September 9, 2013, and February 21, 2014, Mother had failed to drug test 10 times; and her February 6, 2014 drug test was positive for amphetamines and methamphetamines. In addition, both parents were dropped from their outpatient drug treatment program for their failure to participate and lack of attendance.

The parents continued to view themselves as victims and refused to acknowledge their abuse of illegal substances, despite their positive drug tests. They also continued to make excuses for their failure to participate in substance abuse programs, despite numerous referrals provided to them by the social worker. Mother was still unemployed and Father worked side jobs as an auto mechanic. They had relied on Father's terminally ill father for financial support and benefits from the Transitional Assistance Department (TAD). However, without the children's TAD benefits and the paternal grandfather's

trustee not allowing the parents access to the paternal grandfather's finances, the parents had continued to struggle financially.

The children had been placed together in the home of Mr. W. and Mrs. G. since February 20, 2013. They had adjusted well to the home and its structure. They referred to the foster parents as "grandma" and "grandpa" at the request of the foster parents so the children would not be confused. The foster parents were very supportive of the children's emotional, educational, and developmental needs, and the children had a healthy bond with the foster parents. Although Z.K. had struggled with following directions, he had improved in the home of Mr. W. and Mrs. G., and was doing well academically and adjusting to structure. J.K.'s vocabulary had continued to expand and K.K. was crawling and beginning to learn to walk. Z.K. and J.K. were very social, active, and happy boys. All three children were healthy, without any developmental concerns other than Z.K. being diagnosed with "Attention Deficient Hyperactivity Disorder" (ADHD). Z.K. had been prescribed medication to combat his ADHD. The foster parents desired to adopt the children, if the children could not be reunited with their parents.

The parents had consistently attended their weekly, two-hour supervised visits with the children, and the children excitedly looked forward to the visits with the parents and their half sisters. The children had a healthy bond with their family. The parents had a strong bond with the children and had appropriately interacted with them. The parents had also shown progress in providing structure for the children during the visits.

However, their visits never progressed to unsupervised and were never more than once a week.

The contested 12-month hearing was held on April 1, 2014. Both parents objected to the termination of services and setting a section 366.26 hearing; however, neither parent offered any testimonial evidence. The court found the parents had failed to participate regularly and make progress in their case plan, terminated the parents' reunification services, and set a section 366.26 hearing.

The social worker recommended terminating parental rights and finding the children adoptable due to their young ages and the fact that an adoptive home had been identified. By the time of the July 30, 2014 section 366.26 report, Z.K. was six years old, J.K. was three years old, and K.K. was 18 months old, and they had been living in their prospective adoptive home for 18 months. Initially, the foster parents had assumed a "grandparent" role with the children, since they had hoped the parents would reunify with their children. But, as the case progressed, the foster parents had begun to incorporate the children into their lives and extended family and had "developed a mutual attachment and fell in love with the children." The foster parents loved the three boys as their own and were committed to giving the children a good education and future. The children were attached to the foster parents and turned to them for comfort and attention. The foster parents had shown "great patience and kindness along with structure in raising the children" and were open with the children having contact with Mother and Father and their half sisters.

At the July 30, 2014 section 366.26 hearing, Mother was in custody for violating her probation and not present. Father also was not present. The parents' attorneys set the matter contested and the matter was continued to the following day to allow Mother to be transported.

Both Mother and Father were present at the July 31, 2014 hearing. Mother was still in custody. Following a hearing on Father's request to relieve his attorney, the court granted Father's request and appointed new counsel to represent Father. The matter was continued to August 15, 2014, to allow Father's new counsel time to prepare.

At the contested August 15, 2014 section 366.26 hearing, Mother, Father, and the social worker testified. In relevant part, Mother stated that K.K. was only in her care for four days while in the hospital after his birth; that she had consistently visited him; and that the child knew her as his mother and called her "momma." She also asserted that she and Father were the primary caregivers of the two older boys; that they worked with the boys' educational needs; and they wanted to go home with her when the visits ended. She further claimed that when a recent visit ended, K.K. pushed the foster mother away and grabbed Mother because he wanted to stay with her and that the children had repeatedly asked if they could go home with her and Father. Mother also stated that the foster mother had recently informed her that Z.K. had been out of control and that the foster mother was glad when a visit occurred with Mother because that would help Z.K. relax and have a good night. She acknowledged that her visits never progressed to unsupervised or more than once a week and that she had missed visits while incarcerated

for two months from January 27 to March 27, 2013, and an additional three weeks from July 21 until August 13, 2014.

Father admitted that K.K. never lived with him and that his visits with the children never increased. He claimed that when the children saw him at visits, they ran to him, calling “Daddy, Daddy,” and that Z.K. had repeatedly asked when he was going home.

The social worker testified that the children were bonded both to their parents and their prospective adoptive parents; and that the children had initially called the prospective adoptive mother “Mom,” but then referred to her as “Grandma” at the prospective adoptive mother’s suggestion so the children would not be confused. The social worker also stated that the children had been living with the prospective adoptive parents for 18 months; that the home had been stable the entire time; and that it would not be detrimental to break whatever bonds there were between the children and the parents. Minors’ counsel informed the court that Z.K., who appeared to be aware of the proceedings, had told her to tell the judge that he loved his parents; that he likes to visit with them; and that if he could not go home with his parents, he wanted to stay with his “grandma.”

The juvenile court found that the parental beneficial relationship exception to termination of parental rights did not apply. The court concluded the children were adoptable and terminated parental rights. This appeal followed.

II

DISCUSSION

A. ICWA

The record shows Father told the social worker on February 6, 2013, that he had Native American Indian heritage from the Cherokee tribe, but could not provide ancestry, reservation, or membership information. The social worker had asked Father for further information in regard to his Indian heritage on February 8 and 11, 2013, but had received none. Father knew his mother's name, but did not know her whereabouts since she had left him when he was four or five years old. The social worker's reports indicate that the social worker was aware that Father resided with the paternal grandfather; that the social worker was aware of the paternal grandmother's name; and that the social worker had made visits to the paternal grandfather's home. The record also contains information pertaining to the paternal grandfather's date of birth as well as address.

Based on the information provided by Father, on March 14, 2013, CFS sent ICWA notices to the BIA and the Cherokee tribes. The notices included Mother's and Father's names, former addresses, dates and places of birth, and the tribe names for Father. The notices also included the maternal grandparents' names and birthdates and the paternal grandfather's name. The notices stated "unknown" as to the paternal grandmother's name and "No information available" as to the paternal grandparents' birthdates, addresses, and tribal information. Information as to the maternal and paternal great-grandparents was listed as "unknown" or "No information available." The Cherokee

tribes responded that based on the information provided, J.K. and Z.K. were not considered Indian children.

There is no indication in the record to show that ICWA notices were sent to the tribes on behalf of K.K., presumably because Father stated at K.K.'s February 14, 2013 detention hearing that he had no Indian heritage and signed a declaration indicating the same. The court found that ICWA did not apply as to K.K. on February 14, 2013. Nonetheless, the social workers' reports indicated that ICWA eligibility as to K.K. was "pending." As to J.K. and Z.K., at a non-appearance review hearing on May 31, 2013, the court found that CFS had sent ICWA notices as required by the ICWA and that ICWA did not apply.

Father argues that the judgment must be reversed because CFS did not include adequate information in the notices that were sent to the BIA and Indian tribes and breached its continuing duty to inquire of Father and the paternal grandfather about the children's Indian status. Mother adopts Father's arguments. Based on the record in this case, we agree with Father's contentions.

Congress enacted ICWA 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 State of California recognizes that it has an interest in protecting Indian children and has declared its commitment to protecting the essential tribal relations and best interest of an Indian child by promoting practices in accordance with ICWA. (Welf. & Inst.Code, § 224.) Because ICWA presumes it is in the best interest of the child to retain tribal ties

and cultural heritage, the party seeking foster care placement of, or termination of parental rights to, an Indian child is required to notify the Indian tribe, by registered mail with return receipt requested, of the pending proceedings and the right to intervene. (25 U.S.C. § 1912, subd. (a).)

Under California law, the court, the county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all dependency proceedings. (§ 224.3, subd. (a); *In re A.B.* (2008) 164 Cal.App.4th 832, 838.) “If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer 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 to gather the information” (§ 224.3, subd. (c).)

Thus, the social worker has a duty to inquire about and obtain all information about a child’s family history in order to assist the tribe in determining if the child is an Indian child. (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1116.) The fact the identity of the tribe is unknown does not discharge CFS from the requirement of giving notice. The Indian tribe determines whether the child is an Indian child (*In re Robert A.* (2007) 147 Cal.App.4th 982, 988), so only a suggestion of Indian ancestry is needed to trigger the notice requirement (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406, 1408).

The ICWA notice must “contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child’s eligibility for membership.” (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576 [Fourth Dist., Div. Two]; see *In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) Where notices contain incomplete or incorrect information, a tribe cannot conduct a meaningful search to determine a child’s Indian heritage. (See *In re Louis S.* (2004) 117 Cal.App.4th 622, 631, citing *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705.)

Here, Father informed the social worker that he had Indian heritage from the Cherokee tribe. However, the notices sent to the BIA and the Cherokee tribes contained the paternal grandfather’s name but no information about the paternal grandfather’s date of birth and address and no name, date of birth, or address for the paternal grandmother because the information was unavailable or unknown.

Yet, the record indicates that the social worker was aware of the paternal grandmother’s name and information pertaining to the paternal grandfather’s date of birth and address were noted in CFS’s own records. Further, the social worker was aware Father lived with the paternal grandfather and had made visits to the paternal grandfather’s home to check on Father. There is no indication that the social worker ever inquired about Indian ancestry with the paternal grandfather.

CFS argues that given Father’s “scant information” about Indian ancestry and his later retraction of no known Indian heritage, there was no need for the social worker to inquire further. Nevertheless, the social worker had sent inadequate notices to the BIA

and Cherokee tribes on March 14, 2013, a month after Father had retracted his claim of Indian heritage, and had continued to list K.K.'s ICWA eligibility as "pending" in CFS's reports. Father's failure to provide the social worker with specific information and his later claim of no known Indian heritage does not render the error harmless, because the responsibility for compliance with ICWA "falls squarely and affirmatively" on the court and CFS. (*Justin L. v. Superior Court* (2008) 165 Cal.App.4th 1406, 1410.)

Relying on this court's opinion in *In re E.H.* (2006) 141 Cal.App.4th 1330 [Fourth Dist., Div. Two], CFS also asserts that "the juvenile court could reasonably infer that in the interim week between the time [F]ather initially claimed he had Cherokee heritage and the time he retracted that claim, [F]ather did the necessary inquiry to conclude that he in fact had no Cherokee heritage." CFS's reliance on *In re E.H.*, *supra*, 141 Cal.App.4th 1330 is misplaced. Moreover, CFS's claim that Father conducted the necessary inquiry is pure speculation. In *In re E.H.*, *supra*, 141 Cal.App.4th 1330, the mother challenged the sufficiency of the evidence to support the juvenile court's finding that ICWA did not apply, claiming the record did not show the juvenile court and social worker complied with their respective duties to inquire into whether the child was an Indian child. (*Id.* at p. 1334.) This court disagreed with the mother, finding that under the circumstances of that case, if the child is subject to ICWA "it was incumbent on [the] mother to respond to the trial court's exhortations and disclose the child's Indian ancestry or to object to the social worker's reports." (*Id.* at p. 1335.) Because the mother neither objected to the social worker's reports noting ICWA did not apply nor respond affirmatively to the

juvenile court's repeated inquiries regarding a child's possible Indian heritage, this court concluded the mother could not challenge the sufficiency of the evidence when the juvenile court finds ICWA inapplicable. (*Id.* at pp. 1334-1335.)

This case is distinguishable from *In re E.H.* First, unlike in *In re E.H.*, where the mother had ignored the court and social worker's inquiries regarding the child's possible Indian heritage, Father here had stated that he had Indian heritage through the Cherokee tribe. Second, CFS and the social worker believed ICWA applied and therefore had sent notices to the BIA and the Cherokee tribes. CFS's argument that Father's later claim that he had no known Indian ancestry does not relieve CFS of its duty of further inquiry and to send adequate notices, because Father had stated he had Indian heritage and CFS had filled out and sent notices to the BIA and the Cherokee tribes. Further, Father's determination of Indian ancestry is not controlling under ICWA. (*In re Damian C.* (2009) 178 Cal.App.4th 192, 199 ["the question of membership in the tribe rests with the tribe itself"]; *In re Robert A.*, *supra*, 147 Cal.App.4th at p. 988.)

The finding that ICWA did not apply under such circumstances was improper given the inadequate information in the notices. "Deficiencies in an ICWA notice are generally prejudicial, but may be deemed harmless under some circumstances." (*In re Cheyanne F.*, *supra*, 164 Cal.App.4th at p. 577.) Improper notice may be deemed harmless where the tribe actually participated in the proceedings (*In re Miracle M.* (2008) 160 Cal.App.4th 834, 847) or where a notice listed only one of two possibly Indian

children, who had the same parents (*In re E.W.* (2009) 170 Cal.App.4th 396, 400-402 [Fourth Dist., Div. Two]).

However, in this case we cannot find the error to be harmless because the omitted information prevented the tribes from having a meaningful opportunity to search the tribal registry. (*In re S.M.*, *supra*, 118 Cal.App.4th at p. 1116-1117 [omission of information about child's grandmother and great-grandmother prevent tribes from conducting meaningful search]; *In re Louis S.*, *supra*, 117 Cal.App.4th at p. 631 [notice is meaningless if insufficient information is presented to a tribe asked to determine if a child is an Indian child].) We therefore conditionally reverse the finding ICWA does not apply and remand with directions to reinstate the finding if it was based upon proper and adequate ICWA notices given with respect to all three boys.

B. *Beneficial Parent-Child Exception*

Mother contends the juvenile court erred in finding the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1), did not apply to preclude the termination of parental rights. Father adopts Mother's argument that the beneficial relationship exception to adoption precludes termination of parental rights.

After reunification services are denied or terminated, “ ‘the focus shifts to the needs of the child for permanency and stability.’ ” (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) A hearing under section 366.26 is held to design and implement a permanent plan for the child. At a section 366.26 hearing, the court must terminate parental rights and

order the child placed for adoption if it determines, under the clear and convincing standard, that it is likely the child will be adopted. (§ 366.26, subd. (c)(1).)

“ ‘Adoption is the Legislature’s first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.’ ” (*In re Celine R.*, *supra*, 31 Cal.4th at p. 53; see § 366.26, subd. (c)(1).) “ ‘Guardianship, while a more stable placement than foster care, is not irrevocable and thus falls short of the secure and permanent future the Legislature had in mind for the dependent child.’ ” (*In re Celine R.*, *supra*, at p. 53.) A statutory exception to the general rule requiring the court to choose adoption exists where “[t]he court finds a *compelling reason* for determining that termination would be detrimental to the child” (§ 366.26, subd. (c)(1)(B), italics added) 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); see *In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) There is no dispute here that the parents had maintained regular visitation with the children.

In deciding whether the parent-child beneficial relationship exception applies, “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.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) “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.*) The parent-child

relationship must “promote[] 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.”

(Ibid.)

The parent-child relationship “exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) “[A] child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child’s need for a parent.” (*Id.* at p. 1350.) Even a “loving and happy relationship” with a parent does not necessarily establish the statutory exception. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.)

“The *Autumn H.* standard reflects the legislative intent that adoption should be ordered unless exceptional circumstances exist, one of those exceptional circumstances being the existence of such a strong and beneficial parent-child relationship that terminating parental rights would be detrimental to the child and outweighs the child’s need for a stable and permanent home that would come with adoption.” (*In re Casey D.*, *supra*, 70 Cal.App.4th 38, 51.) “[T]he *Autumn H.* language, while setting the hurdle high, does not set an impossible standard nor mandate day-to-day contact.” (*Ibid.*) “Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship. A strong and beneficial parent-child relationship might exist such that

termination of parental rights would be detrimental to the child, particularly in the case of an older child, despite a lack of day-to-day contact and interaction.” (*Ibid.*) “[I]t is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D, supra*, 78 Cal.App.4th at p. 1350; see *In re Celine R., supra*, 31 Cal.4th at p. 53.)

A parent claiming the applicability of the parent-child relationship exception has the burden of proof. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315; *In re C.B.* (2010) 190 Cal.App.4th 102, 133-134; *In re Autumn H., supra*, 27 Cal.App.4th at p. 574.) The parent must show both that a beneficial parental relationship exists *and* that severing that relationship would result in great harm to the child. (*In re Bailey J., supra*, 189 Cal.App.4th at pp. 1314-1315.) A juvenile court’s finding that the beneficial parental relationship exception does not apply is reviewed in part under the substantial evidence standard and in part for abuse of discretion: The factual finding, i.e., whether a beneficial parental relationship exists, is reviewed for substantial evidence, while the court’s determination that the relationship does or does not constitute a “compelling reason” (*In re Celine R., supra*, 31 Cal.4th at p. 53) for finding that termination of parental rights would be detrimental is reviewed for abuse of discretion. (*In re Bailey J., supra*, 189 Cal.App.4th at pp. 1314-1315; accord, *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622.) A juvenile court’s ruling on whether there is a “compelling reason” is reviewed for abuse of discretion because the court must “determine the importance of the relationship in terms of the detrimental impact that its severance can be expected to have

on the child and . . . weigh that against the benefit to the child of adoption.” (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315, italics omitted.)

Mother argues that substantial evidence supports the conclusion that a beneficial parental relationship existed. However, since it is the parent who bears the burden of producing evidence of the existence of a beneficial parental relationship, it is not enough that the evidence supported such a finding; the question on appeal is whether the evidence compels such a finding as a matter of law. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) As the court in *In re I.W.* discussed, the substantial evidence rule is “typically implicated when a defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence.” (*Ibid.*) When, however, the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, “it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact’s unassailable conclusion that the party with the burden did not prove one or more elements of the case [citations]. [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the [Mother’s and Father’s] evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to

support a finding [in the parents' favor].’ [Citation.]” (*Ibid.*) Accordingly, unless the undisputed facts established the existence of a beneficial relationship as a matter of law, a substantial evidence challenge to this component of the juvenile court’s determination cannot succeed. (*In re Bailey J., supra*, 189 Cal.App.4th at p. 1314.)

Here, although we agree with Mother that the existence of a beneficial parental relationship does not depend on the child having a primary attachment to the parent or on the parent maintaining day-to-day contact with the child, there is insufficient evidence to show the children had a “substantial, positive emotional attachment” to Mother and Father. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575; see *In re S.B.* (2008) 164 Cal.App.4th 289, 299.) K.K. was removed from the parental care at birth. Z.K. was four years old and J.K. was two years old when they were removed from Father’s and Mother’s care in January 2013 and placed in foster care. By the time of the section 366.26 hearing in August 2014, K.K. had resided with the prospective adoptive parents his entire young life; J.K. half of his young life; and Z.K. for a quarter of his life. Although the parents had consistently visited the children and there was apparently a strong, healthy bond between the parents and the children, the evidence regarding the parents’ visitation in no way showed that they occupied a parental role in the boys’ lives. The boys were attached to their prospective adoptive parents and looked to them for comfort and attention. Moreover, based on the record, it appears the boys also had a strong bond with their prospective adoptive parents, who had seen to their developmental, educational, and emotional needs and who were committed to providing the boys with a

good future. Furthermore, despite their love for their children, the parents never combated their substance abuse issues and failed to take responsibility for their actions. For these reasons, the parents had never progressed beyond weekly two-hour supervised visits.

Even if the parents had established the existence of a beneficial parental relationship, they cannot show the juvenile court abused its discretion in regard to the second component of the beneficial parental relationship exception. The ultimate question we must decide is whether the juvenile court abused its discretion by failing to find that termination of parental rights would be so detrimental to the boys as to overcome the strong legislative preference for adoption. That decision is entrusted to the sound discretion of the juvenile court. (*In re Bailey J.*, *supra*, 189 Cal.App.4th at pp. 1314-1315.) We cannot find an abuse of discretion unless the juvenile court exceeded the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) “ “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.” ’ ’ (Id. at p. 319.)

Here, the parents did not introduce any evidence showing the boys would be greatly harmed by the termination of their parental rights. The boys were strongly bonded to the prospective adoptive parents. They had initially referred to the prospective adoptive mother as “mom,” but at the prospective adoptive mother’s suggestion began calling her “grandma.” The prospective adoptive parents had hoped for reunification;

however, as that prospect diminished, the prospective adoptive parents became the children's parents. They loved the three boys as their own and were committed to giving them a good future and education. They were attentive to the boys' developmental, educational, and emotional needs, and the boys looked to them for comfort, attention, and security. There was no evidence to show that the boys were deeply upset or always cried following their visits with the parents. Rather, the record indicates that the boys, while looking forward to and enjoying their visits with Mother, Father, and their half sisters, were attached, happy, and well bonded to their prospective adoptive parents and were thriving in the prospective adoptive parents' home. There was no evidence whatsoever that the boys would suffer great detriment if parental rights were terminated. Consequently, the juvenile court could reasonably conclude that termination of parental rights would have no detrimental impact on the boys.

For the foregoing reasons, we conclude that the juvenile court did not err in refusing to apply the beneficial parental relationship exception.

III

DISPOSITION

The order terminating parental rights is conditionally reversed, and a limited remand is hereby ordered, as follows:

The juvenile court is directed to order CFS to obtain complete information about paternal relatives and to provide corrected ICWA notices to the relevant tribes. Once the juvenile court finds that there has been substantial compliance with the notice

requirements of ICWA, it shall make a finding with respect to whether the children are Indian children. If at any time within 60 days after notice has been given there is a determinative response that the children are not Indian children, the juvenile court shall find in accordance with the response. If there is no such response, the juvenile court shall find that the children are not Indian children. If the juvenile court finds that the children are not Indian children, it shall reinstate the original order terminating parental rights. If the juvenile court finds that the children are Indian children, it shall set a new section 366.26 hearing and conduct all further proceedings in compliance with ICWA and all related federal and state law.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.