Filed 8/26/08; part. pub. order 9/23/08 (see end of opn.)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re SHANE G., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. L.K. et al., Defendants and Appellants.	D052632 (Super. Ct. No. 515833E)

APPEALS from a judgment of the Superior Court of San Diego County, Cynthia Bashant and Gary M. Bubis, Judges. Affirmed.

L.K. and Shane G., Sr., (together the parents) appeal a juvenile court judgment terminating their parental rights to their minor son Shane G. under Welfare and Institutions Code section 366.26.[1] The parents challenge the sufficiency of the evidence

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

to support the court's finding the beneficial parent-child relationship and beneficial sibling relationship exceptions did not apply to preclude terminating their parental rights. They further contend reversal is required because the court failed to ensure proper notice under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2006 five-year-old Shane became a dependent of the juvenile court under section 300, subdivision (b) and was removed from parental custody based on findings his parents left him with the paternal grandmother who could not care for him because she had health problems and no home of her own. L.K. had four other children[2] and a history with child protective services dating to 1994. She used methamphetamine and was often homeless and transient. She voluntarily gave legal guardianship of her three daughters to the maternal grandmother. Both parents had extensive criminal histories. Just before the jurisdiction hearing, L.K. was arrested on drug charges and was serving a one-year sentence for a prior burglary conviction.

Shane and his siblings visited L.K. at the jail, and after her release, at a park. Shane and his brother Anthony had been living in separate foster homes, but were later placed together. The parents had not complied with reunification services and stopped visiting the minors. L.K. was arrested again. At a 12-month hearing, the court

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2 Shane, Sr., is not the father of the other minors. These children, 13-year-old Danica, 11-year-old Jasmine, 10-year-old Amber and nine-year-old Anthony, are not subjects of this appeal.

terminated services and set a section 366.26 selection and implementation hearing for Shane.

The social worker assessed Shane as adoptable and recommended adoption as his permanent plan. L.K. remained incarcerated. Neither parent had much contact with Shane for the past year. Shane and Anthony were moved to the foster home of Lisa U., who was interested in adopting them.

The San Diego County Health and Human Services Agency (Agency) filed a petition for modification under section 388 seeking to have the court terminate L.K.'s visits with Shane. The petition alleged L.K. had not visited Shane for many months due to her incarceration, Shane displayed severe anxiety and anger after a recent visit, and Shane's therapist believed visits were detrimental to him. The court granted the petition, finding there was a change in circumstances and it was in Shane's best interests to suspend visits. L.K. appealed, and in an unpublished opinion, this court affirmed the order granting the modification petition.

According to an addendum report, Anthony was moved to a new foster home because the social worker believed it was in Shane's best interests to live apart from him. Shane said he felt safer since Anthony moved because he no longer worried about Anthony hitting him, twisting his arm or pushing him down the stairs. Lisa arranged visits between Shane and Anthony, and was amenable to Shane having contact with his sisters. By this time, Shane had been living with Lisa for nine months and referred to her as "mom." His academic performance had improved dramatically and he no longer had

issues with enuresis, especially since Anthony moved out. Shane told Lisa he loved her and wanted to stay with her forever.

The social worker again recommended adoption for Shane as he had no current relationship with his parents and terminating parental rights would not greatly harm him. Also, Shane had never lived with Anthony other than the 18 months they were placed in the same foster home. The social worker noted Shane experienced anxiety from prolonged contact with Anthony, and Shane deserved the opportunity to be raised in an environment where he felt safe and protected. Lisa was willing to maintain sibling contact.

At a contested selection and implementation hearing, social worker Deena Larks testified the parents had not seen Shane for seven months. Shane and Anthony continued to visit each other and Lisa was committed to continuing their contact. In Larks' opinion, Shane's anxiety and fear of living with Anthony adversely affected their bond. Larks believed the permanence, stability and sense of safety that adoption offered Shane outweighed any detriment caused by losing contact with Anthony. In any event, Lisa had already arranged for regular visits and telephone contact between Shane and Anthony. Similarly, the benefit of adoption for Shane outweighed the benefits of maintaining contact with his sisters, with whom he had never lived. Lisa was willing to foster contact between Shane and his sisters.

The parties stipulated to Shane's testimony as follows: Shane would be sad if he could no longer see Anthony. He wanted to see Anthony but not live with him. He would be sad if he could no longer see his sisters. The last time he remembered seeing

them was when he was six years old. Shane wanted to see L.K. but "only a little bit until she goes to college." He had not seen Shane, Sr., in a long time. Shane wanted to see him, but only sometimes, until Shane, Sr., went to college.

The court addressed the applicability of ICWA. L.K. initially indicated she had no Native American heritage, but she later claimed she may have some Comanche heritage. However, L.K. stated neither she nor the minors had ever been tribal members. The court acknowledged there had been a finding from 2005 that ICWA did not apply in this case. Although there was a letter in the file from the Comanche tribe stating it did not intend to intervene because the child (Shane's sibling Danica) did not have at least one-eighth Comanche heritage, the ICWA notices were not in the file. There was another finding in January 2006 that ICWA did not apply to any of the minors.

Agency argued ICWA notice was not required because there was no reason to believe, based on L.K.'s information, that Shane was a member of a tribe or eligible for membership in a tribe. The court continued the matter for Agency to provide copies of ICWA notices.

Several days later, Agency filed an addendum report with additional ICWA inquiry information. The social worker interviewed the maternal grandmother, who stated Shane's great-great-great-grandmother was a Comanche princess. The maternal grandmother said she never saw any ceremonial costumes and no one in the family ever participated in Indian ceremonies, lived on a reservation, attended an Indian school or received services from an Indian health clinic. Agency told the court the ICWA notices

in the file concerned one of L.K.'s older children, but Agency had no ICWA notices that were sent as to Shane.

The parties stipulated to the testimony of Amber Robinson from the Comanche enrollment office, who would say the Comanche tribe requires any member to be at least one-eighth Comanche. The parties also stipulated the maternal grandmother would testify Shane has 1/64th Comanche heritage.

The court found Agency performed a reasonable ICWA inquiry and there was no reason to believe Shane was an Indian child as defined by federal law. Based on the addendum report, stipulated testimony and letter from the Comanche tribe, ICWA did not apply. The court further found Shane was adoptable and none of the exceptions to adoption applied to preclude terminating parental rights.

DISCUSSION

I

L.K. challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(B)(i) did not apply to preclude terminating parental rights. L.K. asserts she maintained contact with Shane to the best of her ability and Shane would benefit from continuing their relationship. Shane, Sr., joins in this argument.

A

We review the judgment for substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. We do not consider the

credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination of parental rights would be detrimental to the child under one of several specified exceptions. (§ 366.26, subd. (c)(1)(A) & (B)(i) - (vi);[3] *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if termination of parental rights 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." We have interpreted the phrase "benefit from continuing the relationship" 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

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[3] Before 2008 these exceptions were found in section 366.26, subdivision (c)(1)(A) through (F).

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 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." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575; accord *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment from child to parent. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

B

The evidence showed L.K. sometimes participated in supervised visits with Shane, but other times, she did not visit, she could not visit because she was incarcerated or her whereabouts were unknown. L.K.'s inconsistent contact, for whatever reason, did not qualify as "regular visitation and contact" within the meaning of the statute.

In any event, L.K. did not meet her burden of showing there was a beneficial parent-child relationship sufficient to apply the exception of section 366.26, subdivision (c)(1)(B)(i). Shane did not have a significant, positive emotional attachment to L.K.

Visits with her caused Shane to become confused, severely anxious and angry. He regressed after spending time with L.K. and his intermittent contact with her interfered with his ability to grieve, heal and attain stability. Consequently, the court suspended visits because they were detrimental to Shane.

In the social worker's opinion, L.K.'s relationship with Shane was not parental, but more like that of an older sibling. Shane did not spontaneously ask for L.K. and he wanted to see her "only a little bit." He was thriving in his placement with Lisa, whom he identified as his mother and with whom he wanted to live until he grew up. There was no showing Shane would be "greatly harmed" if he no longer had contact with L.K. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

Further, L.K. did not show maintaining her relationship with Shane outweighed the benefits of adoption for him. Shane's life had been chaotic until he was placed in a stable, nurturing environment with a caregiver who is committed to adopting him. Neither L.K. nor Shane, Sr., could safely parent him. Where, as here, the biological parent does not fulfill a parental role, "the child should be given every opportunity to bond with an individual who will assume the role of a parent." (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 854.) Shane, whose needs could not be met by L.K., deserves to have his custody status promptly resolved and his placement made permanent and secure. Substantial evidence supports the court's finding the exception of section 366.26, subdivision (c)(1)(B)(i) did not apply to preclude terminating parental rights.

II

L.K. challenges the sufficiency of the evidence to support the court's finding the sibling relationship exception of section 366.26, subdivision (c)(1)(B)(v) did not apply to preclude terminating parental rights. She asserts the minors are a close sibling set, especially Shane and Anthony, and they are at risk of losing contact if Shane is adopted. Shane, Sr., joins in this argument.

A

The sibling relationship exception to terminating parental rights applies when the juvenile court finds there is a compelling reason for determining termination would be detrimental to the child because it would substantially interfere with that child's sibling relationship. (§ 366.26, subds. (c)(1)(B)(v).) Factors to be considered include the nature and extent of the relationship, whether the child was raised with a sibling in the same home and whether the child has strong bonds with a sibling. The court must also consider whether ongoing contact is in the child's best interests, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption. (*Ibid.*) The purpose of this exception is to preserve long-standing sibling relationships that "serve as anchors for dependent children whose lives are in turmoil." (*In re Erik P., supra*, 104 Cal.App.4th at p. 404.)

"The sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption." (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 813.) Similar to the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(B)(i), application of the sibling relationship exception requires a

balancing of interests. (*In re L.Y.L., supra*, 101 Cal.App.4th at p. 951.) The parent must first show: (1) the existence of a significant sibling relationship; (2) termination of parental rights would substantially interfere with that relationship; and (3) it would be detrimental to the child if the relationship ended. (*Id*. at p. 952.) Once the parent shows a sibling relationship is so strong that its severance would be detrimental to the adoptive child, the court then decides whether the benefit to the child of continuing the sibling relationship outweighs the benefits of adoption. (*Id*. at pp. 952-953.)

B

Here, there was no evidence of a significant sibling relationship. Shane was not raised in the same home as his siblings and there was no indication Shane had significant common experiences with them, especially his older sisters. After the minors were taken into protective custody, Shane continued to live apart from his siblings. Shane and Anthony were later placed in the same foster home for 18 months, but this living arrangement was not in Shane's best interests. Shane experienced fear and anxiety from living with Anthony, which adversely affected their bond. There was no "compelling reason" for the court to find it would be detrimental to Shane if the sibling relationships ended. (§ 366.26, subd. (c)(1)(B)(v).)

Further, the evidence showed Lisa, Shane's prospective adoptive parent, was committed to maintaining the sibling relationships. Lisa had maintained contact, and would continue to do so, between Shane and Anthony, noting she also cared deeply for Anthony. She was also willing to foster continued contact between Shane and his sisters. Although, as L.K. argues, there are no guarantees sibling contact will continue after

Shane is adopted, this factor is not determinative. Under the proper legal analysis of section 366.26, subdivision (c)(1)(B)(v), there was no showing termination of parental rights would substantially interfere with the sibling relationship. (*In re L.Y.L., supra*, 101 Cal.App.4th at p. 952.)

The evidence amply supports a finding the benefit to Shane of continuing the sibling relationships was outweighed by the benefits he would realize through adoption. Although Shane said he would be sad if he could no longer see Anthony or his sisters, he wants to be adopted by Lisa, who is committed to providing him a safe, stable and permanent home. Substantial evidence supports the court's finding the exception of section 366.26, subdivision (c)(1)(B)(v) did not apply to preclude terminating parental rights. (See *In re Celine R.* (2003) 31 Cal.4th 45, 61-62; *In re L.Y.L., supra*, 101 Cal.App.4th at p. 952.)

III

L.K. contends the court erred by failing to ensure sufficient ICWA notice was sent to the Comanche tribe. Shane, Sr., joins in this argument.

A

ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes and families by establishing certain minimum federal standards in juvenile dependency cases. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421; *In re Jullian B.* (2000) 82 Cal.App.4th 1337, 1344.) ICWA defines an Indian child as any unmarried person who is under age 18 and is either: (1) a member of an Indian tribe, or

(2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4).)

When a court "knows or has reason to know that an Indian child is involved" in a juvenile dependency proceeding, a duty arises under ICWA to give the Indian child's tribe notice of the pending proceedings and its right to intervene. (25 U.S.C. § 1912(a); §§ 224.3, subd. (d), 290.1, subd. (f), 290.2, subd. (e), 291, subd. (g), 292, subd. (f), 293, subd. (g), 294, subd. (i), 295, subd. (g), 297, subd. (d); *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 941.) Alternatively, if there is insufficient reason to believe a child is an Indian child, notice need not be given. (*In re O.K.* (2003) 106 Cal.App.4th 152, 157; *In re Aaron R.* (2005) 130 Cal.App.4th 697, 707.)

"The circumstances that may provide probable cause for the court to believe the child is an Indian child include, but are not limited to, the following: [¶] (A) A person having an interest in the child . . . informs the court or the county welfare agency . . . or provides information suggesting that the child is an Indian child; [¶] (B) The residence of the child, the child's parents, or an Indian custodian is in a predominantly Indian community; or [¶] (C) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service." (Cal. Rules of Court, rule 5.664(d)(4); § 224.3, subd. (b)(2) & (3).) If these or other circumstances indicate a child may be an Indian child, the social worker must further inquire regarding the child's possible Indian status. Further inquiry includes interviewing the parents, Indian custodian, extended family members or any other person who can reasonably be expected to have information

concerning the child's membership status or eligibility. (§ 224.3, subd. (c).) If the inquiry leads the social worker or the court to know or have reason to know an Indian child is involved, the social worker must provide notice. (§§ 224.3, subd. (d), 224.2, subd. (a)(5)(A)-(G).)

B

Here, Agency's inquiry produced no information Shane was an Indian child. The social worker interviewed the maternal grandmother who indicated Shane's great-great-great-grandmother was a Comanche princess. However, no one in the family ever lived on a reservation, attended an Indian school, participated in Indian ceremonies or received services from an Indian health clinic. Most significantly, the evidence before the court showed the Comanche tribe requires a minimum blood quantum for membership that excludes Shane.[4] Thus, notice to the Comanche tribe was not required. (§ 224.3, subd. (d).)

Although there was some confusion regarding ICWA notices sent to the Comanche tribe as to Shane, and no notices or return receipts could be found, Agency performed a reasonable ICWA inquiry and determined there was no reason to believe Shane was an Indian child. Where, as here, the record is devoid of any evidence a child is an Indian child, reversing the judgment terminating parental rights for the sole purpose

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4 Agency received a letter from the Comanche tribe concerning Shane's half-sibling Danica. The letter confirmed the required blood quantum for membership in the tribe and stated Danica was not eligible for membership. Because Comanche heritage was asserted through L.K., who is the mother of both Danica and Shane, the letter supports a finding Shane would be ineligible for membership in the Comanche tribe.

of sending notice to the tribe would serve only to delay permanency for a child such as Shane rather than further the important goals and ensure the procedural safeguards intended by ICWA. Reversal is not required. *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431 [parents of non-Indian children should not be permitted to cause additional unwarranted delay and hardship without any showing the interests of ICWA are implicated].)

DISPOSITION

The judgment is affirmed.

MCCONNELL, P. J.

WE CONCUR:

MCDONALD, J.

IRION, J.

Filed 9/23/08

CERTIFIED FOR PARTIAL PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re SHANE G. Jr., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. L.K. et al., Defendants and Appellants.	D052632 (Super. Ct. No. 515833E) ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION

THE COURT:

The opinion filed August 25, 2008, is ordered certified for publication with the exception of parts I and II.

The attorneys of record are:

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McCONNELL, P. J.

Copies to: All parties