Filed 7/14/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re T. S., a Person Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. M. S., Defendant and Appellant.	C059718 (Super. Ct. No. JD223652)

APPEAL from a judgment of the Superior Court of Sacramento County, Scott P. Harman, Judge. Affirmed.

Nicole Williams, under appointment by the Court of Appeal for Defendant and Appellant.

Robert A. Ryan, Jr., County Counsel, and Scott M. Fera, Deputy County Counsel for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II and III of the DISCUSSION.

Appellant, the father of the minor, appeals from the juvenile court's order terminating parental rights. (Welf. & Inst. Code, §§ 366.26, 395.)[1]

Appellant claims that a statutory exception to adoption applied because the minor's Indian tribe had identified guardianship as the permanent plan for the minor. (§ 366.26, subd. (c)(1)(B)(vi)(II).) In the published portion of the opinion, we reject this contention.

Appellant also claims his trial attorney rendered ineffective assistance of counsel because she did not argue that another exception to adoption applied based on substantial interference with the minor's connection to his tribal community. (§ 366.26, subd. (c)(1)(B)(vi)(I).) In addition, appellant maintains he received ineffective assistance of counsel because his attorney failed to argue that the Department was required to seek a criminal conviction exemption for relatives selected by the minor's tribe to be guardians for the minor.

In the unpublished portion of the opinion, we reject appellant's claims of ineffective assistance of counsel. We therefore affirm the order terminating parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

A dependency petition was filed in Shasta County in August 2005 concerning the two-day-old minor, alleging the minor's

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

mother tested positive for methamphetamine when the minor was born and admitted intravenous drug use on one occasion during her pregnancy. It also was alleged that appellant admitted past drug use and had a conviction for public intoxication. The petition further alleged the parents' home was cluttered, they did not have the items necessary to care for the minor, and they did not consistently demonstrate proper care of the minor while he was still in the hospital.

The minor's mother had Indian heritage through the Pit River Tribe (the Tribe), and prior to the jurisdictional hearing, the Tribe filed a Notice of Intervention, informing the court that the minor is an Indian child and the Tribe was appearing in the proceedings.

The allegations in the petition were sustained. Prior to the dispositional hearing, the matter was transferred to Sacramento County. In January 2006, a representative of the Tribe appeared at the transfer-in hearing and, in accordance with her recommendation, the minor was placed with the parents.[2] At the dispositional hearing in April 2006, the parents were ordered to comply with the case plan recommended by the Sacramento County Department of Health and Human Services (the Department).

By the time of the review hearing in October 2006, appellant was no longer living with the minor and the minor's

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[2] Thereafter, the minor was removed briefly from the parents pursuant to a supplemental petition, which was subsequently dismissed.

mother, and he had decided he did not want to participate in further reunification services. At the review hearing, the juvenile court ordered that the minor remain in the mother's care and terminated appellant's services.

In July 2007, a supplemental petition was filed based on the mother's continued noncompliance with substance abuse treatment and her failure to take the minor to scheduled monthly check-ups, and because she allowed appellant to have unauthorized contact with the minor. The minor was placed in a foster home, and the social worker recommended the mother's services be terminated.

Meanwhile, the Tribe was in the process of passing a resolution for placement of the minor in the home of maternal cousins who were active members of the Tribe, although they did not have an established relationship with the minor. Although the social worker had concluded that the minor was adoptable and the maternal cousins were willing to adopt, the Tribe did not agree with a permanent plan of adoption, believing "[g]uardianship [wa]s the more appropriate permanent plan to avoid severing the parental rights of both parents." The Tribe wanted the minor placed in a guardianship with relatives.

An evaluation by an Indian Child Welfare Act (ICWA) expert concluded that active efforts had been made to provide remedial and rehabilitative services to the family and that the minor would suffer serious emotional or physical damage if returned to parental care. However, the expert felt it was in the family's best interest to reunify as an Indian family, and she

recommended guardianship as the permanent plan. She explained: "It is not unknown among Indian nations to allow their members who are struggling to achieve resolution to adverse circumstances every possible opportunity to succeed. In this case [the mother] has struggled to be successful in recovery, and is committed to continuing to pursue sobriety. In order to allow her future opportunities to reunify her family, the plan of long-term guardian[]ship is recommended. From a tribal perspective, it is in the family's best interest to reunify as an Indian family. Adoption would potentially remove the possibility that the child and his parent(s) could reunify as a family."

The juvenile court sustained the allegations in the supplemental petition. While the dispositional hearing was pending, an assessment for placement of the minor with the maternal cousins was commenced. The cousins had assumed guardianship of three other children and, reportedly, "there ha[d] been no concerns regarding their ability to care for the children in their home."

However, both cousins had criminal histories, which would require an exemption through "the Kinship Unit."

The husband's criminal record included misdemeanor convictions between 1991 and 1996 for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), possession of a dangerous weapon (§ 12020, subd. (a)), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), petty theft (§ 484, subd. (a)); carrying a

firearm in a vehicle (§ 12034, subd. (a)), receiving stolen property (§ 496, subd. (a)), two counts of corporal injury on a spouse or cohabitant (§ 273.5, subd. (a)), and battery (§ 242), as well as a 2000 violation for assault with a deadly weapon (§ 245, subd. (a)(1)) which, according to the social worker's report, was "[l]ikely" a felony conviction.

The wife's criminal record contained misdemeanor convictions in 2001 for tampering with a vehicle (Veh. Code, § 10852) and driving without a valid license. (Veh. Code, § 12500, subd. (a).) Nonetheless, the social worker recommended that the minor be placed in the cousins' home upon receipt of a resolution to this effect by the Tribe "and/or approval from the Kinship Unit."

At the dispositional hearing in November 2007, the juvenile court terminated the mother's services and set the matter for a hearing pursuant to section 366.26 to select and implement a permanent plan for the minor. The court noted that an assessment of the maternal cousins for placement was underway but had not been completed, nor was there a resolution from the Tribe concerning the placement.

According to the report for the section 366.26 hearing, which was prepared in February 2008, the minor's foster parents were not interested in adoption or guardianship. Meanwhile, the parents had not visited the minor since shortly after the last hearing, in November.

In March 2008, on the date set for the section 366.26 hearing, the juvenile court continued the hearing for 90 days

and ordered the Tribe to either submit a written resolution concerning placement or personally appear to explain its position.

Shortly thereafter, the Tribe passed a resolution establishing placement with the maternal cousins as "the first order of placement preference" for the minor and "approv[ing] the placement as a long term guardianship." However, the Kinship Unit ultimately declined to approve the placement of the minor with the maternal cousins due to their criminal histories. The social worker recommended that the minor not be placed with the maternal cousins, as they would not be able to pass a guardianship assessment, and that a permanent plan of adoption be ordered.

The Tribe continued to recommend placement of the minor with the maternal cousins. The ICWA expert also continued to recommend a plan of guardianship with the maternal cousins, based on the fact that they had demonstrated their ability to provide a safe, nurturing home and had been approved for placement in the past. The expert opined: "The [minor's] best potential for healthy development as an Indian person lie[s] with his ongoing connection with his family and his tribe. Such an arrangement would also preserve the [minor's] family bond, an element that is essential for the healthy development of his identity."

At the section 366.26 hearing, the ICWA expert testified consistently with these views. She noted that the Tribe felt safe having the minor placed with the maternal cousins despite

their criminal records, and that the Tribe "would know their tribal members better than anyone." The expert acknowledged she had never met the cousins or been to their home, and that her recommendation was based solely on the documented evidence she had received. She testified that she would defer to the tribal council's resolution in every case.

An adoption social worker testified that the minor was generally adoptable and an Indian foster family agency had identified a placement for him in which one of the foster parents was a member of the Tribe. The family was "open to considering" adoption of the minor. The social worker testified she would be able to find another Indian family to adopt the minor if this particular family was not willing to do so, although it might take longer to find a family affiliated with the Tribe.

The mother argued that an exception to adoption applied because the Tribe had identified guardianship as the permanent plan that would meet their prevailing social and cultural standards and protect the minor's best interests as an Indian child. Appellant joined in this argument.

The juvenile court concluded it had discretion to find adoption was in a child's best interests even though a tribe has identified guardianship or long term foster care with a relative as the preferred permanent plan. The court ruled "that is the situation that we have in this case," noting that the Department had located a placement with a member of the minor's Tribe and would place the minor with an Indian family if this placement

did not work out. The court ordered a permanent plan of adoption and terminated parental rights.[3]

DISCUSSION

I

Appellant's first claim is that the juvenile court should have applied an exception to adoption because the minor's tribe identified guardianship as the permanent plan for the minor. (§ 366.26, subd. (c)(1)(B)(vi)(II).) We disagree.

We review the juvenile court's ruling declining to find an exception to termination of parental rights for abuse of discretion. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1342.) "'"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."'" (*Id.* at p. 1351.)

"'At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption.* [Citation.]' [Citations.] If the court finds the child is adoptable, it *must* terminate parental rights absent

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[3] Appellant filed an application for rehearing, asserting the juvenile court erred by terminating parental rights despite the Tribe's resolution for placement of the minor with the maternal cousins in guardianship. The application for rehearing was denied.

circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.)

Before the juvenile court may find an exception to adoption for an otherwise adoptable child, a parent must establish a "compelling reason for determining that termination would be detrimental to the child" due to one of several specified circumstances. (§ 366.26, subd. (c)(1)(B).) One such exception is when "[t]he child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to: [¶] . . . [¶] [t]he child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child." (§ 366.26, subd. (c)(1)(B)(vi)(II).)

The parent has the burden of establishing the existence of any circumstance that constitutes an exception to termination of parental rights. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373.) "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it 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*, (2000) 78 Cal.App.4th 1339, 1350.)

Here, it is not disputed that the minor was adoptable. Thus, for the juvenile court to order a permanent plan other than adoption based on the proffered exception, it was required

to find a compelling reason for determining that adoption would be detrimental to the minor because the Tribe had identified guardianship as the permanent plan and, thus, it would not be in the minor's best interest to terminate parental rights.

Appellant maintains that, regardless of the viability of the maternal cousins as a placement for the minor, the juvenile court was required to order a permanent plan of guardianship because this was the Tribe's recommendation.

However, a contrary conclusion was reached by the Court of Appeal for the Fifth District in *In re A.A.* (2008) 167 Cal.App.4th 1292. In that case, at the section 366.26 hearing, the children's tribe sought a permanent plan of guardianship with relatives from whom the children previously had been removed at the relatives' request. The children had experienced several placement changes during the dependency proceedings and had "attachment-disorder issues and developmental delays." (*Id.* at p. 1302.) The children had been placed in a prospective adoptive home in which one of the prospective adoptive parents was a member of another tribe. (*Id.* at p. 1303.) The children had made gradual progress with their mental health issues in this placement and had begun to attach to their caretakers. (*Id.* at p. 1308.) The juvenile court ordered a permanent plan of adoption despite the tribe's identification of guardianship as the desired permanent plan.

The appellate court concurred, concluding that, "although guardianship may have served the [t]ribe's interests, the court, in assessing the children's best interests, was not compelled to

agree with the [t]ribe." (*In re A.A.*, *supra*, 167 Cal.App.4th at p. 1324.) The court noted: "The [t]ribe's earlier role in bringing the children's relative placement to a premature close and current request to change their placement yet again, notwithstanding the undisputed evidence of the children's attachment problems, may similarly have persuaded the court that the [t]ribe's identification of guardianship did not coincide with the children's interest in stability and permanence. Under these circumstances, the court could conclude that the [t]ribe's identification of guardianship as a permanent plan for the children was not a compelling reason for finding that termination would be detrimental." (*Id.* at p. 1325.)

We agree that a juvenile court is not obligated to adopt the permanent plan designated by a child's tribe without conducting an independent assessment of detriment.[4] The

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[4] The portions of section 366.26 addressed by appellant's argument are as follows:

"(c)(1) . . . the court shall terminate parental rights unless either of the following applies:

"[¶] . . . [¶]

"(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:

"[¶] . . . [¶]

"(vi) The child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to:

exceptions to adoption relating to Indian children, like the other enumerated exceptions to adoption, are contained in section 366.26, subdivision (c)(1)(B), and, therefore, apply only if the described circumstances are present *and* there is a compelling reason for determining that termination of parental rights would be detrimental to the child as a result of such circumstances. (See fn. 4, *ante*.) Had the Legislature intended to preclude the court from ordering a permanent plan of adoption when a tribe has identified another permanent plan, it could have placed this provision in the next subdivision of section 366.26, subdivision (c)(2), which enumerates circumstances under

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"(I) Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights.

"(II) The child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.

"[¶] . . . [¶]

"(2) The court shall not terminate parental rights if:

"[¶] . . .[¶]

"(B) In the case of an Indian child:

"(i) At the hearing terminating parental rights, the court has found that active efforts were not made as required in Section 361.7.

"(ii) The court does not make a determination at the hearing terminating parental rights, supported by evidence beyond a reasonable doubt, including testimony of one or more 'qualified expert witnesses' as defined in Section 224.6, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child."

which the juvenile court "shall not terminate parental rights," and includes other provisions involving Indian children. (See fn. 4, *ante*.) Instead, the provision was added to a subdivision that contains plain, unambiguous language conferring discretion upon the juvenile court to reject the exceptions in the absence of compelling evidence of detriment.

Contrary to appellant's claim, the legislative history regarding this statutory exception does not cause us to abandon the reasoning of *In re A.A., supra,* 167 Cal.App.4th 1292. Appellant relies on a statement in the Senate Judiciary Committee's analysis of Senate Bill No. 678, which added the exception to adoption at issue here, that the provision "would essentially empower a tribe to veto the termination of parental rights by identifying a permanent living arrangement for the child." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 678, comment (2005-2006 Reg. Sess.) Aug. 23, 2005, p. 22.) However, this statement is lodged in a paragraph with other language that suggests the juvenile court's determination is discretionary. Thus, the analysis states that, under the provision, the court "*may* . . . find a compelling reason for not terminating parental rights" when the child's tribe identifies a different permanent plan and the court would be required "to *consider* the alternatives to termination of parental rights provided by a tribe." (*Ibid.*, italics added.) When evaluated in this context, the single, fleeting reference in the legislative history to a tribe's "veto power" is insufficient to negate the

meaning of the statute derived from its plain language and its overall design.

Having concluded that a juvenile court retains discretion to reject the permanent plan identified by a child's tribe, we conclude that the court, here, exercised its discretion properly. The only prospective guardians that had been identified by the Tribe were the maternal cousins, whose criminal records had resulted in their rejection as a viable placement option. No other relatives had been identified as an appropriate placement for the minor, and the Tribe did not have any licensed foster families that could care for the minor. In sum, there were no appropriate families that were willing to assume guardianship of the minor.

Moreover, the ICWA expert had explained that the Tribe's identification of guardianship as the preferred permanent plan stemmed from its interest in preserving the minor's connection to his family and the Tribe. But, according to the report for the section 366.26 hearing, the minor's parents had stopped visiting him. And, as there were no family or tribal members that had been found appropriate for placement, there was no basis for believing that guardianship would be more likely to achieve these goals than would adoption by an Indian family. Under such circumstances, it was well within the juvenile court's discretion to decline to find an exception to adoption based on the Tribe's identification of guardianship as the permanent plan.

II

Appellant next claims his trial counsel rendered ineffective assistance by failing to argue that an exception to adoption applied because termination of parental rights would substantially interfere with the minor's connection to his tribal community. (§ 366.26, subd. (c)(1)(B)(vi)(I); fn. 4 *ante*.) We reject this claim.

The juvenile court does not have a sua sponte duty to consider the statutory exceptions to adoption. (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 292, and cases cited therein.) Because the exception now argued by appellant was not claimed in the juvenile court, it ordinarily would not be subject to review. (*Ibid*.)

However, appellant maintains he received ineffective assistance of counsel based on his trial attorney's failure to argue for the application of this exception to adoption. We address his claim in this context.

In an ineffective assistance of counsel claim, "the burden is on appellant to establish both that counsel's representation fell below prevailing professional norms and that, in the absence of counsel's failings, a more favorable result was reasonably probable. [Citations.] Unless the record affirmatively establishes ineffective assistance of counsel, we must affirm the judgment." (*In re Daisy D.*, *supra*, 144 Cal.App.4th at pp. 292-293.)

"It is also particularly difficult to establish ineffective assistance of counsel on direct appeal, where we are limited to

evaluating the appellate record. If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212, italics added.)

The exception to adoption at issue applies in cases involving Indian children when there is a compelling reason for determining that adoption would be detrimental to the child because "[t]ermination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights," and, thus, would not be in the minor's best interest. (§ 366.26, subd. (c)(1)(B)(vi)(I).)

Here, when the juvenile court ordered a permanent plan of adoption, it noted that the Department had located a placement with a member of the minor's tribe and that the minor would be placed with an Indian family even if this placement did not work out. Thus, appellant's trial counsel reasonably may have concluded that adoption would not substantially interfere with the minor's connection to the Tribe and that, strategically, tendering this argument would undercut the strength of her other arguments. Under such circumstances, and in the absence of an explanation from appellant's trial counsel regarding her reasons for not pursuing this issue, we will not presume ineffectiveness.

Appellant also requests that we exercise our discretion to excuse forfeiture of this issue. It is true an appellate court has discretion to review claims not raised in the trial court that address important legal issues, but "the discretion must be exercised with special care," particularly in dependency matters where "considerations such as permanency and stability are of paramount importance." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) Furthermore, a determination of whether the exception applies raises factual questions not squarely addressed in the juvenile court and "unsuitable for resolution on appeal." (*In re Daisy D.*, *supra*, 144 Cal.App.4th at p. 292.) Accordingly, we decline to exercise our discretion to excuse appellant's forfeiture of the issue.

III

Appellant also contends he received ineffective assistance of counsel because his trial attorney failed "to alert the juvenile court that the duty to seek an exemption [regarding the maternal cousins' criminal record] was the Department's." Again, in making this claim, appellant must establish "that counsel's representation fell below prevailing professional norms and that, in the absence of counsel's failings, a more favorable result was reasonably probable." (*In re Daisy D.*, *supra*, 144 Cal.App.4th at pp. 292-293.) Appellant fails to meet this burden.

Section 361.4 contains prerequisites for placing a child with a relative or other non-licensed placement. Among other things, the statute requires a criminal records check to be

conducted before making such placement (§ 361.4, subd. (b)), and if this reveals criminal convictions that are subject to exemption, the placement cannot occur unless an exemption is granted. (§ 361.4, subd. (d)(2).) Exemptions are to be evaluated at the county level, except that an Indian tribe may ask either the county or the State Department of Social Services to evaluate an exemption request to allow placement in a home designated by the tribe for placement under the ICWA. (§ 361.4, subds. (d)(5) & (f).)

In *In re Jullian B.* (2000) 82 Cal.App.4th 1337 at page 1350, this court held that, to establish good cause to avoid the placement preferences of ICWA based on a prospective caretaker's criminal convictions, the social services agency must seek a waiver of those convictions or adequately explain why it did not do so. If a waiver is denied, the record must establish that sound discretion was exercised and must set forth the reasons for the denial. (*Ibid.*)

The Department unsuccessfully attempts to distinguish *In re Jullian B.* because it involved two prospective adoptive placements, only one of which satisfied ICWA placement preferences whereas, here, the placement at issue was with prospective guardians. But the provisions of section 361.4, which were the focus of *Jullian B.*, pertain to placement "in the home of a relative, or the home of any prospective guardian or other person who is not a licensed or certified foster parent." (§ 361.4, subd. (a).) And under the ICWA, the first preference

for placement of an Indian child is with a member of the child's extended family. (25 U.S.C. § 1915(a) & (b).)

There is no indication in the record that the Tribe sought an exemption from the State Department of Social Services concerning the maternal cousins' criminal convictions. Thus, under *In re Jullian B.*, the Department was required to seek an exemption at the county level or provide sufficient justification for not pursuing one.

Nonetheless, on the record before us, ineffective assistance of counsel has not been established. According to the social worker's addendum report for the dispositional hearing, "[c]riminal background exemptions would be required through the Kinship Unit" before the minor could be placed with the maternal cousins, and the criminal record information was in the process of being reviewed by that unit. The Kinship Unit later "denied approval" of the cousins based on their criminal histories. Based on this record, it is possible that the Department *did* request an exemption and that the Kinship Unit was the entity charged with evaluating such requests.

And, although the reasons for denying the maternal cousins an exemption were not stated on the record, the criminal record of the husband reflecting multiple convictions for drugs, weapons, theft and violence, including two convictions involving domestic violence, speaks for itself. As with appellant's previous argument, we will not presume ineffectiveness of counsel under such circumstances in the absence of an explanation from appellant's trial counsel regarding her reasons

for not pursuing this issue. Nor will we exercise our discretion to excuse appellant's forfeiture of the issue.

DISPOSITION

The juvenile court's orders are affirmed.

SIMS, Acting P. J.

We concur:

RAYE, J.

CANTIL-SAKAUYE, J.