Filed 7/12/02

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re EDWARD H., JR., et al., Persons Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. CYNTHIA E., Defendant and Appellant.	F039428 (Super. Ct. Nos. 500607, 500608, 500609, 500610, 500611) **O P I N I O N**

APPEAL from judgments of the Superior Court of Stanislaus County. Nancy Barnett Williamsen, Commissioner.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Michael H. Krausnick, County Counsel, and Carrie Stephens, Deputy County Counsel, Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II and III of the Discussion.

Cynthia E. appeals from orders terminating her parental rights (Welf. & Inst. Code, § 366.26) as to her children, Brittany, D'Andre, Kiah, Tailour and Edward Jr.[1] She contends the termination orders were erroneous due to alleged noncompliance with Indian Child Welfare Act (ICWA; 25 U.S. C., § 1900 et seq.) notice requirements. She additionally claims the juvenile court failed to find termination would be detrimental and improperly denied her request for a bonding study. In the published portion of this opinion, we hold proper notice to some but not all possible tribes in which a dependent child may be eligible for membership does not violate the ICWA provided the Bureau of Indian Affairs also receives notice pursuant to 25 United States Code section 1912. On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

The children in this case, who presently range in age from 5 and one-half to 17 years, have been dependent children of the juvenile court for more than 5 years. The court previously determined they came within its jurisdiction under section 300, subdivisions (b) and (g), in that: appellant was unable to care for them due to her substance abuse and arrest for child abuse; the father of the two youngest, Tailour and Edward, Jr., had disciplined one of the older children by choking him; and the older children had previously been adjudged dependents.

Despite lengthy efforts, reunification ultimately failed. By February 2000, the court selected a permanent plan of legal guardianship for the children. Their guardian was a maternal aunt with whom they lived out of state.

Although the authorities from the aunt's state initially recommended guardianship over adoption, that recommendation changed to adoption by the end of 2000. Consequently in January 2001, the Stanislaus County superior court granted a

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

modification petition (§ 388) setting a new hearing to select and implement a permanent plan for the children (§ 366.26). The court scheduled that hearing for an April 2001 date.

Meanwhile at a February 20th hearing, counsel for the father urged the court to order a bonding study. Appellant's counsel joined in that request. Counsel for the father argued "all of the witnesses, all of the children, all of the people involved in this matter are in another state." Counsel also cited a "very positive letter" regarding her client's visitation.[2] County counsel opposed the request. The court in turn denied the request.

The court eventually conducted the section 366.26 hearing between late August and early October 2001. At its conclusion, the court found all of the children adoptable and terminated parental rights. Appellant subsequently filed a notice of appeal from the October 2, 2001, orders terminating her parental rights.

DISCUSSION

I. *ICWA Notice*

In March 2001, while the section 366.26 hearing was pending, Edward H., Sr., father of Tailour and, Edward, Jr., informed a social worker that he had reason to believe he belonged to "a tribe out of Arkansas," the Choctaw Tribe. This led respondent Stanislaus County Community Services Agency (agency) to make an inquiry of and give notice of these dependency proceedings to the Bureau of Indian Affairs (Bureau), as agent for the Secretary of the Interior, the Choctaw Nation of Oklahoma and the Mississippi Band of Choctaw Indians. When neither the Bureau nor the two tribes declared the children to be Indian within the meaning of the ICWA, the court at the section 366.26 hearing ruled the ICWA did not apply.

Appellant complains the agency also should have given notice to the Jena Band of Choctaw Indians. Because the agency did not notice all three federally-recognized

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[2] The record contains neither the letter nor any other documentation in support of the bonding request.

Choctaw tribes, appellant contends the agency failed to fulfill ICWA notice requirements thereby requiring reversal of the termination orders in Tailour's and Edward, Jr.'s cases. We disagree.

Although appellant claims an ICWA violation, she in fact relies upon certain California Rules of Court which state:

> "**Notice shall be sent to all tribes** of which the child may be a member or eligible for membership" (Cal. Rules of Court, rule 1439(f)(3), emphasis added); and
>
> "Determination of tribal membership or eligibility for membership is made exclusively by the tribe" (Cal. Rules of Court, rule 1439(g)).

Left unsaid in appellant's argument are several points which, considered in toto, persuade us that the agency did not violate the ICWA in this case. Rather we hold proper notice to some but not all possible tribes in which a dependent child may be eligible for membership does not violate the ICWA provided the agency also gives notice pursuant to 25 United States Code section 1912 to the Bureau of Indian Affairs.

First, California Rules of Court, rule 1439(f)(3) which requires notice to "all tribes of which the child may be a member or eligible for membership" does not track the federal statutory language on this issue. Instead, 25 United States Code section 1912(a) requires, in relevant part, notice to "the Indian child's tribe." Specifically, the federal law provides in relevant part:

> "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, **the party** seeking the foster care placement of, or termination of parental rights to, an Indian child **shall notify** the parent or Indian custodian and **the Indian child's tribe**, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (Emphasis added.)

Second, the federal statute (25 U.S.C., § 1912(a)), as well as the rule of court (Cal. Rules of Court, rule 1439(f)(4)), authorize service of notice upon the Secretary of the

Interior "**[i]f the identity or location of the . . .** the **tribe cannot be determined . . . .**" The Secretary in turn:

> "shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe." (25 U.S.C., § 1912(a).)
>
> "Under the statutory scheme, the burden of identifying and providing notice to the proper tribe in these circumstances *shifts* from the state court to the Secretary, who presumably has resources and skill with which to ferret out the necessary information." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.)

Here, the identity of the actual Choctaw tribe in which Tailour and Edward, Jr., might be eligible for membership was unknown. At most, the father thought it was a tribe out of Arkansas. Notably, none of the three federally-recognized Choctaw tribes is located in Arkansas.[3] To the extent the agency gave notice to the two Choctaw tribes who had designated an agent for service of process, we note in passing that such designation is discretionary and not mandatory. (25 C.F.R., § 23.12 ["Any Indian tribe . . . **may** designate . . . an agent for service of notice[.]"])

Third, the rule of court which discusses the determination of Indian child status also provides:

> "Absent a contrary determination by the tribe, a determination by the BIA [Bureau of Indian Affairs, as agent for the Secretary of the Interior] that a child is or is not an Indian is conclusive." (Cal. Rules of Court, rule 1439(g)(4).)

In other words, even according to this state's Rules of Court, the Bureau, as well as an Indian tribe, can conclusively determine whether a child is an Indian.

Fourth, the decisions to which appellant cites as compelling reversal in Tailour's and Edward, Jr.'s cases are factually and legally distinguishable. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739-740; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 475-

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3 Appellant's request for judicial notice of the Jena Band's published address is granted. (Evid. Code, § 452.)

476; *In re Junious M.* (1983) 144 Cal.App.3d 786, 796.) To put a point on these cases, none of them held it was prejudical error for an agency to serve notice on the Bureau and some, but not all, of the tribes in which a child may at least be eligible for membership. In *In re Marinna J., supra,* 90 Cal.App.4th at pages 739-740, despite information that a dependent child could be Cherokee, there was no indication in the record that notice was sent to any Cherokee tribe or to the Bureau. In *In re Desiree F., supra,* 83 Cal.App.4th at pages 475-476, although there was evidence a dependent child could be eligible for membership in more than one tribe, no notice was sent to either tribe or to the Bureau. In *In re Junious M., supra,* 144 Cal.App.3d at pages 795-796, the court decided a dependent child was not Indian even though no notice was given to anyone.

Fifth and finally, appellant overlooks a decision from this court which implicitly endorses notice to the Bureau when the correct band of a tribe cannot be identified. In *In re Kahlen W., supra,* 233 Cal.App.3d at page 1420, a mother's report that she was a Miwok Tribe member led a social services department to telephone the Bureau and obtain the name of the three bands of the Miwok Tribe in the area.[4] A social worker in turn spoke with two of the three bands. Both bands contacted needed a roll number which the mother did not provide in order to determine to what band the family belonged. The department never gave formal notice of the proceedings and of the right to intervene, pursuant to the ICWA, to any of the Miwok bands or to the Bureau. In relevant part to the present appeal, this court stated:

> "DSS's inability to identify the correct band of the Miwok Tribe did not relieve its obligation to comply with the Act. DSS remained obligated to send notice to the Secretary in lieu of the tribe. It failed to do so. The telephone call made to the Bureau by [the social worker] was insufficent under the statute to provide the requisite notice." (*In re Kahlen W., supra,* 233 Cal.App.3d at p. 1423.)

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[4] The agency was incidentally Stanislaus County Department of Social Services (DSS), the predecessor of respondent in this case.

Under these circumstances, we reiterate the agency did not violate the ICWA by giving notice to the Bureau and two of the three federally-recognized Choctaw tribes.

II. ***No Detriment****

Appellant also contends the court should have continued the permanent plan of legal guardianship rather than freed her children for adoption. In particular, she argues she presented substantial evidence to support her claim that termination of parental rights would be detrimental to the children. We disagree both as to the standard of review and appellant's claim of error.

If there is clear and convincing proof of adoptability, a point which is uncontested here, the juvenile court must terminate parental rights unless, relevant to this appeal, the parent produces evidence sufficient to persuade the court that regular visitation and contact was maintained and the child would benefit from continuing the parent-child relationship. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343.) When a juvenile court rejects the parent's detriment claim and terminates his or her rights, the appellate issue is whether the juvenile court abused its discretion (*In re Jesse B.* (1992) 8 Cal.App.4th 845, 851). The statutory presumption is that termination is in the child's best interests and therefore not detrimental unless the parent proves otherwise. (§ 366.26, subd. (b); *In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1343-1344.) The social service agency has no burden to acquire and introduce at the permanency planning hearing evidence specifically directed to the issue of whether the minor would benefit from continued contact with a parent. (*In re Lorenzo C., supra*, 54 Cal.App.4th at p. 1334, citing § 366.26, subd. (c)(1)(A).) Therefore, we do not review the record, as appellant argues, for sufficient evidence that termination of the parents rights would not be detrimental.

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* See footnote *ante*, page 1.

Our review of the record supports the juvenile court's exercise of discretion in rejecting appellant's detriment claim. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Although the court found appellant and her children loved one another, it could properly conclude nevertheless that the mother had not maintained regular visitation and contact with her children, the first prong of the detriment test she sought to satisfy. Although the children had lived outside of California during the two years preceding the section 366.26 hearing, both parents followed in time, moving to the area in which the children lived. However, the mother by her own admission was inconsistent in her visits. The mother contributed to conflicts that arose during supervised visits. This in turn led to a further interruption of visits. Later, the mother began to consume alcohol which impacted visitation. Finally, in January 2001, the mother was arrested and returned to California where she was incarcerated on receiving stolen property charges. Although she was released in mid 2001, she was not free to leave the state and thus had had no visits with her children in approximately one year.

The mother now tries to distance herself from responsibility for her own conduct, by claiming she should not be penalized because of her inavailability. We are not persuaded by her argument. The cases she cites, *In re Brandon C.* (1999) 71 Cal.App.4th 1530 and *In re Dylan T.* (1998) 65 Cal.App.4th 765, do not excuse her or support her cause. Both cases are factually distinct and have no bearing on the pending matter. In *In re Brandon C., supra*, 71 Cal.App.4th 765, the trial court chose a permanent plan short of adoption based on a detriment finding and the agency involved appealed, attacking the benefit of continued contact. Notably, the parent in *Brandon C.* visited consistently for the entire length of the dependency, visiting once a week for two hours as authorized by the court. (*In re Brandon C., supra,* 71 Cal.App.4th at pp. 1536-1537.) In *In re Dylan T., supra,* a trial court adjudged a child a dependent after the mother was sentenced to a one-year jail term and denied the mother visitation during her incarceration. This court

reversed the denial of visitation in *Dylan T., supra,* as a denial of reasonable services. The juvenile court here never denied the mother visitation.

III. ***Bonding Study***[*]

Last, appellant argues the court improperly denied the request for a bonding study. We disagree.

Briefly put, this court lacks jurisdiction to review appellant's claim of error because she appealed from the October order terminating parental rights, not the February order denying her joinder in the bonding study request. The bonding study denial was appealable as a post-dispositional order. (§ 395, § 366.26, subd. *(l)*; *In re Edward H.* (1996) 43 Cal.App.4th 584, 590-591.) Because appellant did not appeal from the denial, it is now final and binding and may not be attacked on an appeal from a later appealable order. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.)

Even in the absence of appellant's waiver, we find her claim of error unpersuasive. A bonding study request is a matter for the trial court's discretion. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1339.) The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) Given the virtually silent record in this regard, we cannot say the court abused its discretion by denying appellant's request. The appellant must affirmatively show error by an adequate record. (*Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 72.) The father's briefing in which appellant joins all but concedes this point by citing evidence not before the court at the time of the request, but rather introduced at the subsequent section 366.26 hearing. It is this court's role, however, to review an order based on the record before the trial court when it rendered its decision, not based on subsequent evidence. (*People's Home Savings Bank v. Sadler* (1905) 1 Cal.App. 189, 193.)

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[*] See footnote *ante*, page 1.

DISPOSITION

The orders terminating parental rights are affirmed.

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Vartabedian, Acting P.J.

WE CONCUR:

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Buckley, J.

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Cornell, J.