Court of Appeal, Fourth Appellate District, Division One - Nos. D074207, D074675, D074844

S253971

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re A.K., a Person Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent,

v.

C.K., Defendant;

S.N. et al., Objectors and Appellants.

S.N. et al., Petitioners,

v.

SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;

SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Real Party in Interest.

The petition for review and application for stay are denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX B

Filed 1/8/19 In re A.K. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re A.K., a Person Coming Under the Juvenile Court Law.	D074207, D074675, D074844
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. S.N., et al., Objectors and Appellants.	(Super. Ct. No. J519469)

APPEALS from an order of the Superior Court of San Diego County, Ana L. Espana, Judge. Proceedings for extraordinary writ relief under Welfare and Institutions Code section 366.28, Edlene C. McKenzie, Judge. Appeals dismissed. Petitions denied and stay lifted.

Emily Uhre and Leslie A. Berry, under appointment by the Court of Appeal, for Defendant and Appellant S.N.

APPENDIX A

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant Sharon N.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Lisa Maldonado, Deputy County Counsel for Plaintiff and Respondent.

Jamie A. Moran, under appointment by the Court of Appeal, for minor.

These juvenile dependency appeals and related petitions for extraordinary writ review under Welfare and Institutions Code section 366.28, subdivision (b)(1)[1] involve the efforts by two-year-old A.K.'s paternal grandmother, Sharon N., and paternal aunt, S.N., to prevent her adoption by her long-term caregivers and de facto parents, and to gain placement of the child with them.

In her appeal, which S.N. joins, Sharon asserts that the San Diego County Health and Human Services Agency (Agency) and juvenile court did not adequately comply with the notice requirements of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901, et seq.). In her initial petition for writ review, S.N. asserts that reversal of the juvenile court's order denying her and Sharon placement is required because the Agency failed to adequately search for A.K.'s paternal relatives throughout the dependency. In her initial petition, Sharon argues the juvenile court improperly imposed restrictions on the paternal relatives' access to the juvenile court file on appeal, which, she contends, requires reversal of the denial of her section 388 petition seeking placement of the minor.

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1 Subsequent statutory references are to the Welfare and Institutions Code.

In the third petition, Sharon and S.N. challenge an order denying their subsequent section 388 petition seeking video visitation with A.K.

We reject these challenges, dismiss Sharon and S.N.'s appeals for lack of standing, lift the stay imposed by this court when the first petitions for extraordinary writ review were filed (D074675) and deny those petitions, and dismiss the subsequent petitions for extraordinary writ review (D074844).

PROCEDURAL AND FACTUAL BACKGROUND

A.K. tested positive for methadone at birth in November 2016 and shortly thereafter was taken into protective custody as a result of her parents' drug use and domestic violence. Her parents failed to reunify with her and their parental rights were terminated on February 20, 2018. That day, A.K. was freed for adoption and the court granted her foster and de facto parents prospective adoptive parent status under section 366.26, subdivision (n).[2] A.K. was placed with her prospective adoptive parents at three weeks old and is currently awaiting the finalization of her adoption by them.

After the termination of his parental rights, A.K.'s father, Casey K., appealed, asserting ICWA notice was not properly given based on A.K.'s mother's claims of Native

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2 The provision allows the juvenile court to "designate a current caretaker as a prospective adoptive parent if the child has lived with the caretaker for at least six months, the caretaker currently expresses a commitment to adopt the child, and the caretaker has taken at least one step to facilitate the adoption process." (§ 366.26, subd. (n).) The subdivision was added to section 366.26 in 2005 by Senate Bill No. 218 (Sen. Bill No. 218 (2005-2006 Reg. Session) § 1) to " 'confer on a caretaker who is a designated prospective adoptive parent standing to petition the court for a hearing on whether it is in the best interest of a child to remove that child from the caretaker's home after termination of parental rights and before a petition for adoption is granted.' " (*Wayne F. v. Superior Court* (2006) 145 Cal.App.4th 1331, 1336-1339.)

American ancestry. This court rejected the challenge and affirmed the termination of his parental rights in an unpublished opinion issued on August 16, 2018. (*In re A.K.* (Aug. 16, 2018, D073572).) Before that opinion was issued, in May 2018, Sharon and S.N. came forward for the first time and asked the Agency to place A.K. in their shared home. On May 22, 2018, they submitted petitions for modification under section 388, asserting they had just learned that A.K. was in foster care. In the petitions, Sharon and S.N. explained they had lost contact with Casey several years earlier and did not know that Casey had a young daughter or that he had been in prison for over a year. They stated they had only established communication with him a month before their petitions were filed, when they learned for the first time of A.K.'s existence and that Casey and the child's mother did not have custody.

The juvenile court set a hearing on the petitions for June 12, 2018. In the Agency's response, filed 10 days after Sharon's first contact, it notified the court that Sharon wanted placement of A.K. and it had already begun the process of evaluating her home. The Agency's filing also indicated that A.K.'s prospective adoptive parents were concerned about their confidentiality because Sharon and S.N. had submitted confidential information to the court from A.K.'s medical provider. On June 1, 2018, Sharon and S.N. submitted additional modification petitions asserting the Agency had acted improperly by failing to locate them and again requesting placement of A.K. The Agency's response to the new petitions stated that Casey had not provided any information concerning his relatives, but that "a relative search was completed in December 2016 through the database. The paternal grandmother's personal information was utilized and the address

returned was listed as 'older than 5 years.' The telephone number was no longer valid." The Agency recommended the court deny the petitions so A.K.'s permanent plan of adoption would not be further delayed.

S.N. filed another modification petition on June 8, 2018, asserting that the Agency's report was inaccurate in several respects, and referencing an earlier Agency report, dated September 26, 2017, in which Casey told the social worker that he wanted A.K. to reside with Sharon, but did not know her whereabouts or have her contact information.[3] The petition also attached a letter from Casey contradicting statements he made to the Agency when A.K. was first taken into protective custody and stating that he never alleged Sharon abused him.

Before the June 12, 2018 hearing, the Agency submitted a supplemental report explaining its search efforts for paternal relatives in more detail. The Agency's social worker who conducted the search explained that Casey told her his mother was "extremely abusive, listed specific instances of his mother's abuse and stated he did not want [A.K.] placed with her or the Agency to contact her." Casey told the social worker

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3 The referenced report, dated September 26, 2017, was prepared for the six-month review hearing. It stated that Casey told the agency's social worker he wanted A.K. to reside with his family, but that Casey had never provided any family contact information to the Agency. The report also stated Casey "wanted [A.K.] to reside with his mother, Sharon [N.], but stated he did not know her whereabouts and did not have any contact information." Casey "confirmed that his mother had abused him growing up, but [said he] did not have any concerns with [A.K.] residing in his mother's care" and also wanted A.K. "to reside with his sister, Sharon [sic] [N.], who resides with his mother." Casey did not have any contact information for either Sharon or S.N. The report stated that Casey also "mentioned his brother, [C.K.], and was only able to inform [the social worker] that he was a manager at a Sprouts Grocery Store in San Diego, but he did not have any contact information."

his mother's name and his brother's name, and the social worker tried various phone numbers she located for the relatives but was unable to find a working number. The social worker also reported that during her investigation of the paternal relatives she found multiple aliases for each relative, which impeded her search. The Agency's report noted that Sharon and S.N. had moved to a remote part of the state and received mail only at a post office box, and not their physical address.

The supplemental report again raised concern about confidentiality in the case based on Sharon's and S.N.'s apparent access to information received from Casey. The report also noted that Casey's older daughter N.K., A.K.'s half-sister, had established a GoFundMe account on the internet to raise money for an attorney to help her seek placement of A.K.

At the June 12, 2018 hearing, Sharon and S.N. appeared telephonically and argued that their home had been approved for placement and that the Agency was delinquent in not locating them sooner. A paternal uncle who lived in another state appeared in person and argued the Agency should have easily been able to locate him because he was a veteran, a pediatric nurse for 13 years, and a former foster parent. The relatives also complained that once they made contact with the Agency and the minor's attorney, they were unable to get sufficient information about the process and how to intervene.

The Agency's counsel and the minor's counsel objected to these arguments. The Agency's counsel stated that the Agency had notified the court within days of being contacted by the paternal relatives and had begun the process of clearing the relatives' homes for placement expeditiously. Counsel clarified that neither Sharon and S.N.'s

home in Northern California nor the paternal uncle's out-of-state home had yet been approved for placement. The Agency also reiterated the efforts it made to locate the paternal relatives and noted that it was not disputed that Sharon and S.N. had not been in contact with Casey for three years, and that they had moved out of San Diego County and changed their telephone numbers. The minor's counsel noted that she had attempted to assist Sharon and S.N. the same day that they contacted her, and that Sharon and S.N. filed their initial documents with the court prior to contacting the minor's counsel.

Both the Agency's and minor's counsel argued that because the relatives' homes had not yet been approved for placement, the court could not make a prima facie finding of changed circumstances under section 388 and also asserted the relatives had not shown that a change in placement would be in A.K.'s best interest. The juvenile court agreed and found there were no changed circumstances or evidence to show a change in placement was in the minor's best interest. The court made its finding without prejudice and invited the paternal relatives to file a section 388 petition as soon as they were notified that their homes were approved for placement.

Both the Agency's counsel and minor's counsel then raised their concern that Casey had provided the paternal relatives with confidential documents concerning the proceedings. The court stressed the seriousness of the confidentiality protections in place in dependency proceedings and admonished the relatives not to disseminate any confidential information or documents in their possession. The court also ordered the paternal relatives to return any reports to the Agency's social worker and ordered A.K.'s

half-sister to take down the GoFundMe webpage. Sharon and S.N. filed notices of appeal from the order denying their petitions.[4]

On July 9, 2018, the Agency submitted an ex parte report informing the juvenile court that Sharon had returned documents she received from Casey to the Agency and that the approval process in Sharon and S.N.'s home county, Plumas, was still ongoing. The report also noted that one of the confidential documents referenced in the relatives' various section 388 petitions had not been included in the documents Sharon returned to the Agency.

A scheduled postpermanency planning hearing took place on August 16, 2018 and Sharon and S.N. appeared telephonically. At the hearing, the Agency's counsel reported that Sharon and S.N.'s home had been approved by the Agency for placement. Sharon and S.N. renewed their section 388 petitions requesting placement and the juvenile court set a hearing on their request for August 29, 2018.

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4 After Sharon and S.N. filed their opening briefs in this court, the Agency brought a motion seeking to (1) limit their access to confidential juvenile court records that had been provided to them in the course of their appeal, (2) strike their briefing, and (3) require them to file new briefs based on a limited record. Sharon and S.N. opposed the motion, asserting that their appellate counsel was authorized to review the entire appellate record under section 827 and California Rules of Court, rule 5.552, but conceding Sharon and S.N. should not personally have access to the record under those provisions. This court denied the Agency's motion, but issued an order directing "Appellants to give any and all juvenile court records that they may have in their possession, other than any transcripts and exhibits from the hearings in which they participated, to their respective appellate counsel." The order also directed counsel for the appellants "to retain the appellate record or return it to ADI [(Appellate Defenders Inc., the non-profit law firm that administers the appointed counsel system for this court)] after the close of these proceedings" under California Rules of Court, rule 8.401(b).

In advance of the hearing, A.K.'s prospective adoptive parents submitted a brief in opposition to Sharon and S.N.'s request for placement. In the brief, they asserted that the paternal relatives had not shown any evidence that removing A.K. from their care would be in the child's best interests. The prospective adoptive parents also argued removal would be detrimental to A.K. because she had been in their care since she was just three weeks old and they were uniquely suited to address A.K.'s specialized medical needs. A.K. was under the care of several medical specialists to address pulmonary and respiratory issues, and her prospective adoptive mother is a nurse practitioner.

The Agency's report for the hearing recommended that the court summarily deny the paternal relatives' section 388 petitions and echoed the prospective adoptive parents' concerns that removing A.K. and placing her with paternal relatives she had never met would not serve her best interests. The Agency also pointed out that Sharon and S.N. lived in a remote location and had health concerns of their own, which could hinder their ability to provide adequate care for A.K. The Agency noted that A.K.'s prospective adoptive parents wanted A.K. to establish a relationship with Sharon, S.N., and her other paternal relatives and to maintain contact with them once the adoption was finalized.

The report also repeated some of the information about the Agency's failed efforts to locate paternal relatives before parental rights were terminated. The Agency explained that the social worker assigned to the family at the beginning of the dependency stated she "submitted a relative search for the father's relatives in December 2016 after interviewing the father and receiving very limited information from him. The father reported his mother was extremely abusive, listed specific instances of his mother's abuse

and stated he did not want his child placed with her or the Agency to contact her. He reported her name was Sharon [N.] The father also stated he had a brother, he stated his name was Desmond [K.]. Upon receiving the results of the relative search, I attempted to contact the numbers listed on the search for the first and second degree relatives. I discovered the paternal grandmother had multiple names that she went by and her address was more than five years old at the time of the search. I attempted to contact the phone numbers listed for the paternal grandmother, but none were working. I discovered the father's brother, whom he told me was named Desmond [K.], was actually [C.K.]. I received phone numbers for [C.K.] and attempted to contact him on those numbers with no success."

The report added that the social worker also discovered the date of birth and social security number for Sharon, and ran another search using that information but still did not uncover any accurate contact information. The report explained that Casey had provided the Agency with conflicting information about his relatives and that the relatives had "numerous AKA's," which "made search efforts difficult." The report noted that Sharon had acknowledged Casey had no way to reach her, that Sharon and S.N. did not use social media or have public contact information, and that officials in their home county of Plumas had been unable to locate addresses or telephone numbers for the relatives in their research for the placement approval process.

On August 28, 2018, Sharon and S.N. filed additional section 388 petitions seeking an investigation into "findings that a proper search was made for paternal relatives" and requesting that they be "provided with proof of any notification attempts

made by [s]ocial [s]ervices." S.N.'s petition also stated that the requested action would benefit A.K. by preventing later emotional trauma that A.K. would face if she learned "she was adopted under false pretenses." At the August 29, 2018 hearing, the juvenile court continued the matter two weeks so that it could have additional time to review the recent filings.[5] At that hearing, Sharon and S.N. also asked the court to appoint an attorney for them. The court denied their request.

At the start of the continued hearing, the court stated that Sharon and S.N.'s section 827 petition was being addressed by another court and would not be heard that day. The court then heard argument from Sharon and S.N. They asserted the Agency had not conducted an adequate search for A.K.'s family members even though the record showed the Agency had their names and Sharon's birthday and social security number early in the proceedings, at the time that ICWA notice was sent. They argued that this failure on the Agency's part voided all subsequent orders in the proceeding.

When the court asked if they had any documents establishing the Agency had their identifying information, Sharon stated that the Blackfeet Tribe provided her with a copy of the Agency's December 21, 2016 ICWA notice to the tribe that listed her name, which she contended showed the Agency had the information it needed to locate her. Sharon and S.N. also asserted that depriving A.K. of the opportunity to live with her biological

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5 On August 29, 2018, Sharon and S.N. filed a section 827 petition to obtain the juvenile court file. The filing was initially rejected, and then successfully refiled on September 10, 2018.

relatives would be detrimental to her, and medical research showed that adopted children had an increased risk of suicide.

The Agency's counsel responded that its efforts to locate the paternal relatives were diligent and that the relatives had not provided any basis to support a prima facie finding on their modification petitions with respect to A.K.'s best interest. Counsel further asserted that all of the statements provided to the court concerning the benefits of a relationship with the biological family were merely opinion, and not fact. Counsel for the minor and her prospective adoptive parents similarly asserted the relatives had not met their burden to establish that removal of A.K. from her home was in the child's best interest and asked the court to deny the section 388 petitions. The prospective adoptive parents' counsel also argued that Sharon and S.N. had not shown the Agency conducted an inadequate search for relatives based on the information the Agency had before parental rights were terminated.

After argument by counsel and the petitioners, the juvenile court issued its rulings. The court first found the Agency had conducted an adequate search for paternal relatives. The court then concluded that the preference for relative placement under section 361.3 was not applicable, rather the preference for continued placement with the minor's caregiver under section 366.26, subdivision (k) governed the court's decision. The court next found that the approval of Sharon and S.N.'s home by the Agency for placement did not constitute a changed circumstance because "we are out of the 361.3 area" and that Sharon and S.N. had not established a prima facie case that changing A.K.'s placement was in her best interest.

After noticing Sharon and S.N. of their right to appeal, the court also expressed continued concern over the confidentiality of the documents in the proceeding and made a "specific order that only those excerpts [that] have been referred to by this [c]ourt be released on the record for appeal."[6] On September 17, 2018, Sharon and S.N. filed notices of appeal. Thereafter, this court issued orders that Sharon's and S.N.'s appeals proceed by petition for writ review under California Rules of Court, rule 8.454 and that the appellate record be prepared in accordance with rule 8.450.[7]

On October 4, 2018, Sharon and S.N. brought another section 388 petition seeking an order from the juvenile court requiring the prospective adoptive parents to provide regular video visitation with them. The court denied the petition on October 10. Sharon and S.N. filed notices of appeal of that order and this court issued orders that these appeals proceed by petition for writ review under California Rules of Court, rule 8.454.

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6 The Agency filed a memorandum of points and authorities in opposition to Sharon and S.N.'s August 29, 2018 petition for the juvenile court file under section 827, but the appellate and writ of extraordinary review records contain no ruling on that petition.

7 Once appointed, appellate counsel for A.K. brought a motion for a protective order seeking an order like the one issued in the appeals challenging the juvenile court's June 12, 2018 orders. We denied minor's counsel's motion and issued an order substantively identical to the one we issued in the appeals: "Minor [A.]K.'s opposed motion for a protective order is DENIED. Instead, on the court's own motion and consistent with the order issued in related appeal number D074207, we direct petitioners to give any and all juvenile court records that they may have in their possession, other than any transcripts and exhibits from the hearings in which they participated, to their respective appellate counsel. Counsel for the petitioners are directed to retain the writ record or return it to ADI after the close of these proceedings. (Cal. Rules of Court, rule[] 8.401(b).)"

DISCUSSION

I

Appeal of ICWA Findings

Despite this court's decision affirming the trial court's findings that the tribes identified by A.K.'s parents received proper notice and that ICWA does not apply, Sharon and S.N. assert reversal of the order terminating parental rights is required because the ICWA notice provided by the Agency was deficient in ways not previously considered by this court. Specifically, they contend the ICWA notice was deficient because the Agency "made no effort to locate any of the paternal relatives to obtain information, even when names of the paternal grandmother and aunt and the employment place and location of the paternal uncle was known to the Agency." The Agency responds that (1) Sharon and S.N. lack standing to challenge the juvenile court's ICWA findings, (2) the challenge is barred by principles of res judicata or collateral estoppel, and (3) the argument was forfeited by Sharon and S.N.'s failure to raise it in the court below.[8]

"Congress enacted ICWA in 1978 in response to 'rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.' [Citation]. ICWA declared that 'it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian

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tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .' (25 U.S.C. § 1902.)" (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8 (*Isaiah*).)

"The minimum standards established by ICWA include the requirement of notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.' (25 U.S.C. § 1912(a).)"[9] (*Isaiah, supra*, 1 Cal.5th at p. 8.) The notice requirement's purpose is twofold: To "facilitate a determination of whether the child is an Indian child under ICWA" and to "ensure[] that an Indian tribe is aware of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving an Indian child." (*Ibid.*)

In 2006, California's legislature "enacted provisions that affirm ICWA's purposes (§ 224, subd. (a)) and mandate compliance with ICWA '[i]n all Indian child custody

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9 " 'If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe.' [Citation.] The 'Secretary' refers to the United States Secretary of the Interior (25 U.S.C. § 1903(11)), whose department includes the [Bureau of Indian Affairs]." (*Isaiah, supra*, 1 Cal.5th at p. 8.)

proceedings' (§ 224, subd. (b))."[10] (*Isaiah*, *supra*, 1 Cal.5th at p. 9.) "Section 224.2 codifies and elaborates on ICWA's requirements of notice to a child's parents or legal guardian, Indian custodian, and Indian tribe, and to the BIA" and "section 224.3, subdivision (a) . . . provides that courts and county welfare departments 'have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care.' " (*Ibid.*)

If a social services agency or the juvenile court does not comply with ICWA's requirements, "[a]ny Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act [25 U.S.C. § 1911, 1912, and 1913]." (25 U.S.C. § 1914.) ICWA defines "parent" as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child." (25 U.S.C. § 1903(9).) " 'Indian custodian' means any Indian

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10 Assembly Bill No. 3176, which was signed into law on September 27, 2018 and takes effect on January 1, 2019, revised some state law provisions concerning the "specific steps a social worker, probation officer, or court is required to take in making an inquiry of a child's possible status as an Indian child" and "the various notice requirements that are mandated during an Indian child custody proceeding, including a proceeding for an emergency removal of an Indian child from the custody of his or her parents or Indian custodian." (Legis. Counsel's Dig., Assem. Bill No. 3176 (2017-2018 Reg. Sess.).)

person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." (25 U.S.C. § 1903(6).) The law defines "grandparent" as an "extended family member," not a parent. (25 U.S.C. § 1903(2).)

"California's legislation implementing the ICWA adopts these provisions without change. Section 224, subdivision (e) restates the federal standing provision (25 U.S.C. § 1914) in substantively identical terms. Section 224.1, subdivisions (a) and (c) state that the terms 'parent,' 'Indian custodian,' and 'extended family member' shall be defined as in the federal law. (See 25 U.S.C. § 1903.)" (*In re Michael A.* (2012) 209 Cal.App.4th 661, 665.) "Thus, under the plain terms of federal and state law, a grandparent . . . lacks standing to bring an ICWA challenge unless he or she qualifies as an 'Indian custodian.' " (*Ibid.*) In her reply brief, Sharon asserts that because she is bringing her challenge under 25 U.S.C. section 1915, subdivision (a), the standing requirement set forth in 25 U.S.C. section 1914 does not apply. We disagree.

Section 1915, subdivision (a) of title 25 of the United States Code states: "In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with [¶] (1) a member of the child's extended family; [¶] (2) other members of the Indian child's tribe; or [¶] (3) other Indian families." On its face, this section applies once a state court has determined a dependent minor is an Indian child as defined by ICWA. Despite Sharon's assertion to the contrary in her reply brief, this statute is not at issue here. Rather, Sharon and S.N. argue that the Agency and juvenile court failed to comply with their continuing

duty to provide notice to the Blackfeet Tribe once they learned the names of additional paternal relatives.[11] This assertion falls squarely under 25 U.S.C. section 1912 and the corresponding California provision, Welfare and Institutions Code section 224.2, which set forth ICWA's notice requirements. Standing to assert a violation of these requirements is determined by 25 U.S.C. section 1914, and neither grandmother nor aunt have standing under that provision. (*In re Michael A.*, *supra*, 209 Cal.App.4th at pp. 664-665 [grandmother lacked standing to bring ICWA challenge]; *In re E.R.* (2017) 18 Cal.App.5th 891, 894 [uncle lacked standing to bring ICWA challenge].) Accordingly, the appeals are dismissed.

II

Petitions for Extraordinary Writ Review

A

S.N.'s initial writ petition challenges the juvenile court's September 11, 2018 order denying her and Sharon's request for placement of A.K. S.N. asserts that the Agency failed to conduct an adequate search for paternal relatives, and the juvenile court's "erroneous finding that the Agency did conduct a proper search for relatives" requires reversal of the order denying S.N.'s section 388 petition "with directions to the juvenile court to conduct a full evidentiary hearing on placement" under section 361.3. The Agency responds that S.N. has mischaracterized the law governing the petitions and that

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11 We note that despite Sharon's recent contact with the Blackfeet Tribe to establish when the Agency knew her name, there is no indication that inclusion of additional paternal relatives' names in the notice would have shown that A.K. is an "Indian Child" as defined by ICWA.

the juvenile court properly concluded no evidentiary hearing was required under section 388.

1. *General Legal Principles Governing Notice to Relatives and Consideration of Relatives for Placement*

When a social services agency first removes a child from parental custody, section 309, subdivision (e) requires the agency to conduct an investigation to identify and locate "all grandparents, parents of a sibling of the child, if the parent has legal custody of the sibling, adult siblings, other adult relatives of the child, as defined in paragraph (2) of subdivision (f) of Section 319, including any other adult relatives suggested by the parents."[12] The statute further requires the social worker to "provide to all adult relatives who are located, except when that relative's history of family or domestic violence makes notification inappropriate, within 30 days of removal of the child, written notification and shall also, whenever appropriate, provide oral notification, in person or by telephone" that the "child has been removed from the custody of his or her parent or parents" and "[a]n explanation of the various options to participate in the care and placement of the child and support for the child's family, including any options that may be lost by failing to respond." (§ 309, subd. (e)(1).) The statute specifically requires a social worker to use due diligence in this investigation. (*Id.*, subd. (e)(3).)

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12 The definition of "relative" was previously set forth in former section 319, subdivision (f)(2), which defined "relative" as "an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand,' or the spouse of any of these persons, even if the marriage was terminated by death or dissolution." The same definition is now contained in section 319, subdivision (h)(2).

If the juvenile court removes the child from the parents' custody at the disposition hearing, it must "make a finding as to whether the social worker has exercised due diligence in conducting the investigation . . . to identify, locate, and notify the child's relatives, including both maternal and paternal relatives." (§ 358, subd. (b)(2); accord, Cal. Rules of Court, rule 5.695(e)(1).) The court may consider, "among other examples of due diligence," whether the social worker has: "(A) Asked the child, in an age-appropriate manner and consistent with the child's best interest, about his or her relatives. [¶] (B) Obtained information regarding the location of the child's relatives. [¶] (C) Reviewed the child's case file for any information regarding the child's relatives. [¶] (D) Telephoned, emailed, or visited all identified relatives. [¶] (E) Asked located relatives for the names and locations of other relatives. [¶] (F) Used Internet search tools to locate relatives identified as supports." (§ 358, subd. (b)(3); Cal. Rules of Court, rule 5.695(f).)

If a relative steps forward for placement, that relative must be "assessed and *considered* favorably, subject to the juvenile court's consideration of the suitability of the relative's home and the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320 (*Stephanie M.*).) This court recently noted that "[t]his directive applies throughout a child's dependency proceedings but is governed by different standards depending on whether the issue arises during the reunification period, in the interim between termination of reunification services and a section 366.26 hearing, or after a permanency plan has been selected for a child." (*In re Maria Q.* (2018) 28 Cal.App.5th 577, 591 (*Maria Q.*).)

"At the outset of the case and during the reunification period, the agency and juvenile court are required to give 'preferential consideration' to a relative's request for placement, which means 'the relative seeking placement shall be the first placement to be considered and investigated.' " (*Maria Q., supra,* 28 Cal.App.5th at p. 591, quoting § 361.3, subd. (c)(1).) "In assessing any relatives who would like the child to be placed in their care, the Agency and the juvenile court are required to consider the factors described in section 361.3, subdivision (a), and any other factors the juvenile court may deem relevant to the child's particular circumstances. The first and foremost of these factors is '[t]he best interest of the child, including special physical, psychological, educational, medical, or emotional needs.' "[13] (*Maria Q.*, at p. 592.)

"Appellate court decisions have consistently held that the relative placement preference applies at least through the family reunification period. [Citations.] During the reunification period, the preference applies regardless of whether a new placement is

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13 The other factors set forth in section 361.3 include, in pertinent part: "(2) The wishes of the parent, the relative, and child, if appropriate. [¶] . . . [¶] (5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect. [¶] (6) The nature and duration of the relationship between the child and the relative, and the relative's desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful. [¶] (7) The ability of the relative to do the following: [¶] (A) Provide a safe, secure, and stable environment for the child. [¶] (B) Exercise proper and effective care and control of the child. [¶] (C) Provide a home and the necessities of life for the child. [¶] (D) Protect the child from his or her parents. [¶] (E) Facilitate court-ordered reunification efforts with the parents. [¶] (F) Facilitate visitation with the child's other relatives. [¶] (G) Facilitate implementation of all elements of the case plan. [¶] (H) [¶] (i) Provide legal permanence for the child if reunification fails. [¶] . . . [¶] (I) Arrange for appropriate and safe child care, as necessary. [¶] (8) [¶] (A) The safety of the relative's home." (§361.3, subd. (a).)

required or is otherwise being considered by the dependency court." (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 795.) At that stage a relative may assert they are entitled to be considered for placement without filing a section 388 petition. Instead, the juvenile court looks solely to the factors set forth in section 361.3 to determine whether to place the minor with the relative seeking placement. (*Joseph T.*, at p. 795.) Likewise, this court has held that once reunification services are terminated *but before a permanent plan is selected*, the juvenile court must apply the relative placement preference under section 361.3 and not a general best interest standard under section 388. (*In re Isabella G.* (2016) 246 Cal.App.4th 708, 723 (*Isabella G.*).)

However, once parental rights are terminated and the juvenile court *selects adoption* as the minor's permanent plan, the section 361.3 relative placement preference no longer applies. (*In re K.L.* (2016) 248 Cal.App.4th 52, 65-66; see *In re Sarah S.* (1996) 43 Cal.App.4th 274, 284 ["By its own terms . . . section 361.3 applies when 'a child is removed from the physical custody of his or her parents' and thus must be 'placed' in a temporary home, not when reunification efforts have failed and a permanent plan for adoption has been approved (or when a child has otherwise been freed for adoption)."].) "Instead, at the section 366.26 hearing, the court must apply the caretaker preference

under section 366.26, subdivision (k)."[14] (*In re A.K.* (2017) 12 Cal.App.5th 492, 498.) Put another way, subdivision (k) of section 366.26, "[b]y its plain language . . . overrides section 361.3 when it comes to placements for *adoption*." (*Sarah S.*, at p. 285.)

2. *Requesting Placement After Adoption is Selected as the Permanent Plan*

"After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability . . . .' A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interest of the child." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Because the focus of the proceedings has shifted, a relative who comes forward seeking placement of the minor after adoption is selected as the child's permanent plan proceeds by filing a petition under section 388, allowing the court to assess whether the requested change is in the minor's best interest. (See *In re Marcos G.* (2010) 182 Cal.App.4th 369, 382 ["The essence of a section 388 petition is the petitioner's assertion that she or he can demonstrate, by a

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14 Section 366.26, subdivision (k) provides: "(1) Notwithstanding any other law, the application of any person who, as a relative caretaker or foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster parent and removal from the relative caretaker or foster parent would be seriously detrimental to the child's emotional well-being. [¶] (2) As used in this subdivision, 'preference' means that the application shall be processed and, if satisfactory, the family study shall be completed before the processing of the application of any other person for the adoptive placement of the child."

preponderance of the evidence, that new evidence or a change of circumstances exists warranting a finding that the best interests of the minor child will be served if a previous order of the court is changed, modified or set aside."].)

"Section 388 provides in pertinent part that: 'Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.' [¶] In any custody determination, a primary consideration in determining the child's best interest is the goal of assuring stability and continuity. [Citation.] 'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.' " (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

"At a hearing on a motion for change of placement, the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interest of the child." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) We review a juvenile court's decision to deny a section 388 petition without an evidentiary hearing for abuse of discretion. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

3. *Analysis*

S.N. asserts that "[w]hen the agency fails to comply with its statutory duties to search for relatives and/or assess the relatives who come forward to seek placement and the relative petitions the juvenile court for placement, the relative need not make the showings required by section 388." She argues "the relative need only establish the agency failed to comply with its statutory duty to search for and notify relative[s] in order to be automatically entitled to a hearing to assess the relative's placement request." In support, S.N. cites *Maria Q., supra*, 28 Cal.App.5th 577 and *Isabella G., supra*, 246 Cal.App.4th 708. In essence, S.N. contends the Agency's search efforts did not comply with section 309, therefore all subsequent orders, including the orders terminating parental rights and freeing A.K. for adoption, must be reversed and she and Sharon afforded a placement hearing solely under section 361.3. In response, the Agency states that its search efforts were diligent. It also argues that, even if its search efforts were deficient, the court's denial of Sharon and S.N.'s request for placement under section 388 was not error because Sharon and S.N. failed to show any evidence that a change of placement was in A.K.'s best interest.

As an initial matter, we reject S.N.'s argument that the record does not support the juvenile court's finding that the Agency's relative search efforts were diligent. "The due diligence question is primarily a factual matter that considers [the Agency's] reported efforts," which we review "for substantial evidence. . . . Accordingly, we examine the whole record and ask whether any substantial evidence, contradicted or uncontradicted,

supports the court's finding, indulging all reasonable inferences in support of it." (*In re S.K.* (2018) 22 Cal.App.5th 29, 36-37.)

As discussed, the record shows that when A.K. was first taken into protective custody, Casey was not forthcoming with any information about his family. He provided very limited information that included only Sharon's name and an incorrect first name for his brother. He also told the Agency Sharon was "extremely abusive," detailed specific instances of abuse, and said he did not want his daughter placed with Sharon or for the Agency to contact her at all. With this limited information, the Agency attempted to locate his relatives by conducting searches through the Agency's resources and found some inoperable phone numbers, but never an accurate address. The search was complicated by the fact that paternal relatives had multiple aliases. Once Sharon and S.N. finally came forward, the Agency learned they previously had taken active steps to remain anonymous and unreachable, and their home county social services agency also had trouble locating identifying information about the family. Further, Sharon and S.N. acknowledged that Casey had no way to contact them.

While more extensive search efforts might arguably have been made, we do not agree with Sharon that insufficient evidence supported the juvenile court's finding that the Agency was diligent. (See, e.g., *In re Misako R.* (1991) 2 Cal.App.4th 538, 545 ["In reviewing the reasonableness of the services provided, this court must view the evidence in a light most favorable to the respondent. We must indulge in all legitimate and reasonable inferences to uphold the verdict. If there is substantial evidence supporting the judgment, our duty ends and the judgment must not be disturbed."].) Section 358,

subdivision (b)(3) guides the juvenile court's determination as to whether the Agency has been sufficiently thorough in its efforts to locate relatives. The statute and the corresponding rule of court provides a list of nonexclusive examples of diligence for the court to consider: "(A) Ask[ing] the child, in an age-appropriate manner and consistent with the child's best interest, about his or her relatives. [¶] (B) Obtain[ing] information regarding the location of the child's relatives. [¶] (C) Review[ing] the child's case file for any information regarding the child's relatives. [¶] (D) Telephon[ing], email[ing], or visit[ing] all identified relatives. [¶] (E) Ask[ing] located relatives for the names and locations of other relatives. [¶] (F) Us[ing] Internet search tools to locate relatives identified as supports." (§ 358, subd. (b)(3), accord, Cal. Rules of Court, rule 5.695(f).)

Most of these examples require some identifying information and presume cooperating parents. In this case, Casey provided no information about A.K.'s paternal relatives and Sharon and S.N. had taken measures to lead anonymous lives. The record shows the Agency searched for the paternal family members but was constrained by the limited available information. While it is unfortunate that family members who wanted

to care for A.K. were not located in time to participate in the proceeding, the juvenile court's finding is supported by the record before this court.[15]

Because we are upholding the court's orders concerning the diligence of the Agency's relative search efforts, we need not reach the Agency's argument that regardless of the adequacy of its search, the relative placement preference of section 361.3 did not apply. The law is clear that so long as the Agency was diligent in its search for relatives, once parental rights are terminated and the minor is freed for adoption, the minor's best interest is paramount and any request for placement is governed by section 388. (See *In re K.L.*, *supra*, 248 Cal.App.4th at p. 66 ["The section 361.3 relative placement preference does not apply where, as here, the social services agency is seeking an adoptive placement for a dependent child for whom the court has selected adoption as the permanent placement goal."].) Thus, the juvenile court correctly assessed the paternal relatives' request under the changed circumstance and best interest analysis of section 388. Further, the juvenile court appropriately looked to the caretaker preference of section 366.26, subdivision (k) as a guidepost in that determination. (See *In re A.K.*, *supra*, 12 Cal.App.5th at p. 498.)

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15 S.N. states that "the Agency did not report on what efforts it had actually made to search for relatives; i.e. whether it searched DMV records, military records, CWS and criminal records, social security records" but the documentation submitted to the juvenile court shows that the social worker had undertaken search efforts that resulted in locating both phone numbers and aliases for Sharon and Casey's brother. We can infer this information, which was not provided directly to the Agency by the parents, was obtained through the Agency's search efforts, which likely included investigation into one or more of the types of records S.N. has identified.

Contrary to S.N.'s assertion that *Maria Q.* requires reversal, the case provides additional support for the juvenile court's approach here. In *Maria Q.*, this court addressed "whether the relative placement preference applies after the court has held a permanency plan hearing under section 366.26" but where something other than adoption is selected as the permanent plan. (*Maria Q.*, *supra*, 28 Cal.App.5th at p. 593.) In *Maria Q.*, the mother's reunification services to her four children were terminated but the section 366.26 permanency planning hearing was delayed for various reasons for a year and a half. (*Maria Q.*, at p. 581.) At the time of the hearing, two of the minors, Maria and J.M., were in long-term foster care with caregivers who wanted to adopt them, but whose foster license was in question, hampering their ability to adopt. (*Ibid.*) At the permanency planning hearing, the court ordered permanent plans of long-term foster care for the minors. (*Id.* at pp. 585-586.)

Several months later, the minors' maternal aunt brought a section 388 petition seeking visitation and custody of the children. (*Maria Q.*, *supra*, 28 Cal.App.5th at p. 586.) Because of its concern that the foster parents would not be approved for adoption, the agency recommended placement with the aunt. (*Id.* at p. 587.) At the hearing on the aunt's petition, the court questioned whether it should be decided under *Isabella G.*, i.e. solely by considering the factors in section 361.3, or under the changed circumstance and best interest rubric of section 388. (*Maria Q.*, at p. 586.) After a three-day hearing, the court denied the petition, concluding it would not be in Maria and J.M.'s best interest to change their placement. (*Id.* at pp. 587-589.)

On appeal, aunt asserted "the relative placement preference under section 361.3 applies to a dependent child who remains in foster care following a section 366.26 hearing." (*Maria Q., supra*, 28 Cal.App.5th at p. 595.) Minors' counsel agreed that section 361.3 was applicable but argued that "relative placement is subject to the mandatory preference for adoption by the child's caregivers" under section 366.26, subdivision (k). (*Maria Q.*, at p. 595.) The Agency took the position that the placement determination was governed exclusively by sections 366.26 and 366.3.[16] (*Maria Q.*, at p. 595.) This court agreed, holding that "[i]n view of the statutory preferences established by the Legislature to select a child's permanency plan (§ 366.26, subd. (b)), the directive in section 361.3, subdivision (a) to give 'preferential consideration . . . to a request by a relative of the child for placement of the child with the relative' does not apply." (*Id.* at p. 596.) We noted this holding was "supported by the Legislature's express directive that preferential consideration under section 361.3 be given to relatives in the event the adoption of previously dependent child was disrupted, set aside, or voluntarily relinquished," and that if the Legislature wanted to "give preferential consideration under section 361.3 to a relative seeking a less favored permanency plan, it

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16 Section 366.3 mandates the juvenile court "hold periodic review hearings at least every six months . . . (postpermanency review). (§ 366.3, subd. (d).) At a postpermanency review for a child in continued foster care, the juvenile court is required to consider all permanency planning options for the child including, . . . whether the child should be placed for adoption, appointed a legal guardian, or placed with a fit and willing relative. (§ 366.3, subd. (h)(1).) The Legislature directs the juvenile court to order that a hearing be held pursuant to section 366.26 unless the court determines by clear and convincing evidence there is a compelling reason that holding a section 366.26 hearing is not in the child's best interest. (§ 366.3, subd. (h)(1).)" (*Maria Q., supra*, 28 Cal.App.5th at p. 594.)

would have said so." (*Ibid.*) The reasoning of *Maria Q.* applies with even greater force here, where the court has selected adoption as A.K.'s permanent plan and designated A.K.'s foster parents as her prospective adoptive parents under section 366.26, subdivision (n).

In sum, after concluding the Agency had been diligent in its search for paternal relatives, the juvenile court used the proper analytical framework under section 388 to determine Sharon and S.N.'s petitions seeking placement of A.K. As this court has noted before, unfortunately "[i]t is not always possible to litigate a dependency case with all parties present. The law recognizes this and requires only reasonable efforts to search for and notice missing parents." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 191.) It is axiomatic that this statement of law also applies when, as here, a nonparent seeks placement. "Where reasonable efforts have been made, a dependency case properly proceeds. If a missing [relative] later surfaces, it does not automatically follow that the best interests of the child will be promoted by going back to square one and relitigating the case. Children need stability and permanence in their lives, not protracted legal proceedings that prolong uncertainty for them. Further, the very nature of determining a child's best interests calls for a case-by-case analysis, not a mechanical rule." (*Ibid.*; see *In re Lauren R.* (2007) 148 Cal.App.4th 841, 855 [" '[T]he fundamental duty of the court is to assure the best interest of the child, whose bond with a foster parent may require that placement with a relative be rejected.' "].)

Sharon and S.N. demonstrated a strong desire to care for A.K., and the outcome of this proceeding might have been different if they had learned of A.K.'s dependency

earlier. However, under California's dependency laws we conclude there was no legal error in the juvenile court's orders denying their requests for placement.

B

As set forth in the background section of this opinion, after Sharon and S.N. filed their opening briefs in their appeal (D074207) and their counsel had been provided the entire juvenile court file as a matter of course, the Agency brought a motion in this court seeking to limit their appellate counsels' access to the juvenile court file to only those portions of the record in which Sharon and S.N. were directly involved. Citing California Rules of Court, rule 8.401, subdivision (b), we denied the motion, and on our own motion issued an order directing appellants to turn over any juvenile court files in their possession, except transcripts for the hearings they participated in, to their appellate counsel, and directing appellate counsel to retain the records or return them to ADI after the close of these proceedings.

In her petition (D074675), Sharon challenges the juvenile court's order denying her petition on the grounds that the juvenile court improperly directed that her counsel not be provided access to the entire juvenile court record on appeal. She argues that "the juvenile court does not have unfettered discretion to make specific orders as to what records the superior court clerk will or will not provide on appeal to an appealing party." Rather, she contends, this determination is governed solely by section 827 and California Rules of Court, rule 5.552 and the juvenile court's limitation constituted a violation of the separation of powers doctrine. She also asserts that because section 388, subdivision (a)(1) gives any " 'person having an interest' " in a dependent child standing

to file a petition under that provision, she is party to the action below and her attorney is entitled to review the entire juvenile file under section 827, subdivision (a)(1)(E) and California Rules of Court, rule 5.552(b)(1)(5). She asks this court to hold "that the appellate counsel representing a party, such as the paternal grandmother . . . , is among those authorized to inspect juvenile court case files (§ 827, subd. (a)(1)(E), [Cal. Rules of Court, r]ule 5.552(b)(1)(F)) and any attempt by the juvenile court to limit access to this record is in violation of the separation of powers doctrine, appellant's right to fair access to the courts, and is a mistake of law."

Sharon has obtained the relief she seeks in her petition for extraordinary writ review—her counsel was provided the entire confidential juvenile court file. This fact was confirmed by our denials of the Agency's and minor's motions for a protective order. Thus, any error by the juvenile court in the issuance of its order limiting her appellate counsel's access to the record has been rendered harmless. (See *In re J.P.* (2017) 15 Cal.App.5th 789, 798 [" 'The California Constitution prohibits a court from setting aside a judgment unless the error has resulted in a "miscarriage of justice." (Cal. Const., art. VI, § 13.)' "].) Accordingly, Sharon's petition is denied.

C

Finally, Sharon and S.N. both filed notices of appeal from the juvenile court's October 10, 2018 denial of their section 388 petitions seeking a court order that A.K.'s prospective adoptive parents provide them with regular video visitation. After the appeals were converted to petitions for extraordinary writ review, appellate counsel for Sharon and S.N. submitted letter briefs indicating they could not find any arguably

meritorious issues to support a petition for extraordinary writ review. Each letter brief also attached a writ petition prepared in propria persona by Sharon and S.N., which reasserts various arguments contained in earlier briefs and asks this court to order A.K.'s prospective adoptive parents to provide them with visitation. These arguments are not meritorious. Sharon and S.N. have not provided any legal basis for this court to revisit the juvenile court's order denying their visitation request. The petitions are dismissed.

DISPOSITION

The appeals (D074207) are dismissed. The stay of juvenile court proceedings imposed by this court on November 14, 2018 is lifted, Sharon's and S.N.'s petitions for extraordinary writs of review filed on September 21, 2018 (D074675) are denied, and the petitions filed on October 25, 2018 (D074844) are dismissed.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.