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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re E.Z., a Person Coming Under the Juvenile
Court Law.

MEDOCINO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

E.Z. et al.,

Defendants and Appellants.

A131512

(Mendocino County Super. Ct.
No. SCUJ-JVSQ-05-14625-01)

This case involves the minor E.Z., who was three years of age when first detained and is now nine years old. E.Z. is severely disabled, with diagnoses including Autism and Reactive Attachment Disorder. He is also a Native American child within the meaning of the Indian Child Welfare Act (ICWA),¹ eligible for membership in the Hopland Band of Pomo Indians (Tribe). The Tribe has intervened and participated in this proceeding.

On February 3, 2011, at the conclusion of a hearing to select a permanent plan for E.Z., pursuant to Welfare and Institutions Code section 366.26,² the Superior Court of

¹ 25 U.S.C. § 1901 et seq.

² If not otherwise indicated, further statutory references are to the Welfare and Institutions Code. Discussion of any particular “ICWA section” refers to that section as codified in Title 25 of the United States Code. References to rules are to the California Rules of Court.

Mendocino County, Juvenile Division, ordered E.Z.'s placement with his current foster parent, R.O., under a plan of guardianship. The minor's father (also E.Z.), and L.E. (Mother), have appealed. Father contends the juvenile court erred in denying a petition by the Tribe to transfer this proceeding to its tribal court. Mother challenges a finding by the court that good cause existed not to follow the Tribe's placement preference established pursuant to ICWA.

As discussed below, we conclude Father has forfeited his right to challenge the juvenile court's order denying transfer to the tribal court because he failed to take a timely appeal from that order. We also conclude substantial evidence supports the finding challenged by Mother. We affirm the orders of February 3, 2011.

BACKGROUND

The Mendocino County Health and Human Service Agency (Agency) detained E.Z. (born June 2002) and his younger brother, E.Z.-2 (born December 2003) on March 9, 2006, and initiated this proceeding four days later with a petition under section 300. Having received notice of the proceeding, the Tribe intervened a month later.

In early May 2006, the juvenile court sustained allegations under section 300, subdivision (b) in that the parents had failed to provide the minors with a safe and sanitary home environment, and Father had a substance abuse problem inhibiting his ability to care for the children. On the date the minors were initially detained, Father was arrested for possession of methamphetamine and drug paraphernalia. At that time, the minors appeared to be severely neglected; very dirty and smelling of feces and urine. E.Z.-2 had a severe, untreated skin infection. Both minors appeared to be severely traumatized, E.Z. markedly so, when intervention workers attempted to bathe them later in the day. These workers reported that neither child appeared able to understand their directions or attempts to interact, nor able to respond except by unintelligible noises and yells.

At this time, the Tribe's preferred placement, established pursuant to ICWA,³ was to place both minors with P.Z., their paternal grandmother. E.Z.-2 was accordingly placed with P.Z. in early April 2006. P.Z. said she felt presently unable to care for E.Z., however, although she felt "terrible" about it. E.Z. was thus placed in an intensive foster care home in Solano County in the middle of April, after exhibiting extreme behaviors that had resulted in a brief period of hospitalization—in which an assessment under section 5150 was not completed due to his young age—as well as his removal from his first foster care placement subsequent to initial detention. His foster parent in the new intensive foster care program, located in Fairfield, was Vicki A.

In a report dated mid-May 2006, an Agency evaluator reported significant speech delays that could have profound impact on E.Z.'s personal, social, academic, and future vocational life. Almost four years of age, E.Z. was functioning at the level of an infant of six to nine months. The evaluator recommended placement in a home that could provide consistent reinforcement of behavioral norms and could follow educational recommendations regarding his developmental and speech delays.

At the dispositional hearing at the end of May 2006, the juvenile court found ICWA applied. The court placed both minors in the Agency's custody and care, and ordered reunification services for Father and Mother. The court also ordered there be no sibling visitation, adopting the Agency's recommendation based on concerns about E.Z.'s history of assaulting his brother.⁴

The juvenile court continued reunification services for Father and Mother, and out-of-home placement for both minors, at the six-month status review hearing and the 12-month permanency hearing. During this period, E.Z. remained at his foster placement with Vicki A., and E.Z.-2 remained with his grandmother P.Z.

At the 12-month review hearing in April 2007, the Tribe expressed interest in having E.Z. moved from his current placement to P.Z.'s home, where E.Z.'s younger

³ See 25 U.S.C. § 1915.

⁴ Supervised sibling visitation was later initiated at the six-month status review hearing in October 2006.

brother also lived, and indicated the Tribe might have a member willing to provide foster care for E.Z. in the event a placement with P.Z. did not work out. Later that month, P.Z. reported she still felt unable to care for E.Z., as well as E.Z.-2.

In the report for the 18-month permanency review hearing, the Agency said E.Z. had been diagnosed with Autism after an evaluation in March 2007. He had been prescribed psychotropic medications two months later. His foster parent reported a slight change in E.Z.'s behaviors as a result, but the minor was still having tantrums, and at times still became unmanageable, biting and hitting the foster parent. In August 2007, another mental health evaluator gave E.Z. an additional diagnosis of Intermittent Explosive Disorder and increased his medication.

In that same month, the Tribe established a foster placement with an identified tribal family as its preferred placement under ICWA. The Agency learned two months later that the family identified as the Tribe's preferred placement was no longer willing to assume E.Z.'s foster care.

At the conclusion of the 18-month review hearing in October 2007, the juvenile court terminated the parents' reunification services. It determined not to set a hearing under section 366.26, as neither minor was a proper subject for adoption and no one was willing to accept guardianship. Accordingly, the court ordered for E.Z. long-term foster care with his current foster parent, Vicki A., with the goal of a less restrictive foster placement. It further ordered long-term foster care for E.Z.-2 with his current relative caregiver, P.Z. There followed a series of postpermanency review hearings to review the status of the minors' long-term placements.

In February 2008, the Tribe indicated another revision of its preferred placement under ICWA—to place E.Z. in the foster care of Julie V., one of the Tribe's social workers.

On that same month, in response to an Agency request for information about special education services that might be available for E.Z. in Mendocino County, the Ukiah Unified School District submitted a letter stating that a review of E.Z.'s Individualized Education Plan (IEP) indicated he currently required a specialized school,

a nonmainstream or “non-public” school (NPS). The NPS E.Z. currently attended in Fairfield, for example, specialized in working with nonverbal students who display extreme behavior. If E.Z. were to relocate in Mendocino County, his IEP would require his transport to the closest comparable NPS in Santa Rosa, about one hour’s drive from Ukiah.

In an evaluation submitted in March 2008, Jacqueline Singer, Ph.D., rendered an opinion as to whether moving E.Z.—to the proposed new placement with tribal member Julie V.—was likely to result in serious emotional harm. Dr. Singer recommended that E.Z. remain in his current foster placement in Fairfield until his foster parent Vicki A. and others in his intensive foster care program felt he was ready to make the transition to a new placement. She also recommended that any move be preceded by a gradual transition period to allow E.Z. to familiarize himself with Julie V. and allow her some time to consult with E.Z.’s current placement and develop a comparably suitable behavioral and educational plan.

Despite E.Z.’s progress in his placement with Vicki A. and the intensive foster care program in Fairfield, the Agency received notice that Vicki A. would no longer be able to provide for E.Z., and the Agency would consequently need to find a new foster placement for him before the end of July 2008. The Agency immediately notified the Tribe of this development. In the meantime, however, Julie V. had decided, after spending a weekend visit with E.Z. in May, she could not commit to providing for his foster care.

It therefore became necessary to find a new foster placement for E.Z. At the end of July 2008, the Agency placed him with R.O., in Fort Bragg, a caregiver who had years of experience with special needs children. The Agency subsequently reported that E.Z.’s adjustment to the change had been difficult, but had been manageable. After several incidents of biting, he became more acclimated to his placement. R.O. and her family “stuck” with E.Z., despite his difficult behaviors, “trying to help him be a part” of their family.

E.Z. had had regular visitation with his grandmother, P.Z., and his younger brother, over the preceding year. As his behaviors indicated he was having difficulty making these transitions—between his placement home in Fort Bragg and P.Z.’s home in Ukiah—the Agency suggested to P.Z. that she visit E.Z. in Fort Bragg, but P.Z. was not receptive to the idea. Visits between E.Z. and his grandmother and younger brother appear to have faltered for some time afterward.

In June 2009, almost one year after E.Z.’s placement with R.O. in Fort Bragg, the Agency reported he still displayed behaviors including “spitting, biting, defecating, hitting, kicking, and bolting.” Nevertheless, R.O. expressed her desire to care for E.Z. permanently as his legal guardian. The Agency noted E.Z. had begun to adapt “wonderfully” to his placement, due to R.O.’s knowledge of E.Z.’s disabilities and her efforts to support him. E.Z. began to receive behavior modification services that would, if successful, enable him to attend a classroom designed specifically for autistic children.

The juvenile court, at the conclusion of the fourth postpermanency review hearing in July 2009, entered orders indicating the goals of permanent plans in which E.Z. would be placed with R.O. in a plan of legal guardianship, and E.Z.-2 would be similarly placed with his grandmother P.Z.

In preparation for the fifth postpermanency review hearing in December 2009, the Agency recommended setting a section 366.26 hearing for E.Z.-2, to select a permanent plan of placement with P.Z. as legal guardian. During this hearing, the Tribe’s ICWA case manager and social worker, Kathy Fisher, indicated that P.Z.’s housing and financial situation had recently improved, such that she now desired to assume the care of E.Z., as well as E.Z.-2. At the conclusion of the hearing, the juvenile court set a section 366.26 hearing for E.Z.-2. E.Z.-2’s section 366.26 hearing was held in April 2010, at which time the court ordered a permanent plan appointing P.Z. as his legal guardian.

The Agency reported in May 2010 that E.Z. was now in second grade in a recently created Special Day Class (SDC) for autistic students. That same month an SDC teacher and school psychologist completed a psychological educational assessment of E.Z. This assessment indicated that E.Z. continued to have developmental delays and many

challenging behaviors—both at home and at school—such as tantrums, destruction of property, hitting, kicking, biting, and bolting. A multi-disciplinary team of teachers, classroom helpers, and an array of behavioral, speech, and occupational therapists, were working together to address E.Z.’s special needs. The school psychologist noted that the consistent structure and predictability provided at E.Z.’s foster home and at school were important to support the therapeutic services he was receiving. Because E.Z.’s foster parent R.O. was knowledgeable of his needs, provided the structure and guidance he required, and continued to express interest in legal guardianship, the Agency recommended that the juvenile court set a section 366.26 hearing to select a permanent plan for him.

At the sixth postpermanency review hearing on July 1, 2010, the juvenile court set a section 366.26 hearing to select a permanent plan for E.Z. At this hearing, the Tribe indicated its intent to file a petition to transfer E.Z.’s proceeding to its tribal court, pursuant to ICWA, and it subsequently did so. (See 25 U.S.C. § 1911.) On July 29, the court held a hearing on this petition, and denied it after making a finding of good cause not to transfer the proceeding.

In November 2010, the Tribe filed a resolution establishing its new placement preference under ICWA—to place E.Z. with his grandmother P.Z. under a permanent plan of legal guardianship. Meanwhile, the Agency had filed its report for the section 366.26 hearing, recommending the appointment of R.O. as E.Z.’s legal guardian, notwithstanding the Tribe’s opposition to this plan.

At the conclusion of the section 366.26 hearing on February 3, 2011, the juvenile court found good cause not to follow the Tribe’s placement preference established under ICWA. It ordered instead a permanent plan for E.Z. placing him with his current foster parent, R.O., appointing her his legal guardian. The court additionally ordered continued visitation between E.Z. and his grandmother P.Z.

The appeals of Father and Mother followed. (See § 395.)

DISCUSSION

A. *The Finding of Good Cause Not to Transfer to the Tribal Court*

When an Indian child resides within the reservation of an Indian tribe, ICWA generally confers on the tribe exclusive jurisdiction in any child custody proceeding involving that child, “except where such jurisdiction is otherwise vested in the State by existing Federal law.” (25 U.S.C. § 1911, subd. (a).) California is vested with concurrent jurisdiction in dependency proceedings pursuant to the “existing Federal law” of section 1360, subdivision (a) of Title 28 of the United States Code.⁵ (*Doe v. Mann*, *supra*, 415 F.3d at pp. 1058–1068; see also *In re M.A.* (2006) 137 Cal.App.4th 567, 574.) When, as here, a state juvenile court has established dependency jurisdiction over an Indian child pursuant to concurrent jurisdiction, ICWA requires that court to transfer the proceeding to the jurisdiction of the child’s tribe—on a petition for transfer made by the tribe or the child’s parent or Indian custodian—“*in the absence of good cause to the contrary.*” (25 U.S.C. § 1911, subd. (b), italics added.)

Our dependency scheme sets out an almost identical transfer procedure, which provides that, “[i]n the case of an Indian child who . . . is domiciled within a reservation of an Indian tribe that does not have exclusive jurisdiction over child custody proceedings . . . the court shall transfer the proceeding to the jurisdiction of the child’s tribe upon petition of either parent, the Indian custodian, if any, or the child's tribe, *unless the court finds good cause not to transfer.*” (§ 305.5, subd. (b), italics added; see also rule 5.483(b).) The juvenile court is required to find good cause not to transfer in certain circumstances, such as when the child’s tribe has no tribal court or that court declines jurisdiction. (§ 305.5, subd. (c)(1).) On the other hand, the court “may” find good cause not to transfer in certain other circumstances. (§ 305.5, subd. (c)(2).) In particular, it may find good cause not to transfer when “[t]he proceeding was at an advanced stage

⁵ A tribe that has been divested of its *exclusive* jurisdiction in child custody matters, by the concurrent jurisdiction conferred on certain states under Title 28 United States Code section 1360, subdivision (a), may “reassume” such exclusive jurisdiction by completing procedural requirements set out in ICWA. (See 25 U.S.C. § 1918, subd. (a); *Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1061–1068.)

when the petition to transfer was received and the petitioner did not file the petition within a reasonable time after receiving notice of the proceeding” (§ 305.5, subd. (c)(2)(B); see also rule 5.483(d)(2)(B).) In this situation, a petitioner cannot be considered to have delayed unreasonably solely because he or she petitioned after reunification efforts have failed and reunification services are terminated. (§ 305.5, subd. (c)(2)(B).) The party opposing transfer has the burden of establishing good cause to the contrary. (§ 305.5, subd. (c)(4); see also rule 5.483(f)(1).)

As we have noted, the Tribe intervened in this proceeding not long after its inception, in April 2006.⁶ Over four years later, in July 2010, it filed a petition to transfer E.Z.’s case to its tribal court, pursuant to the provisions of ICWA section 1911 and Welfare and Institutions Code section 305.5 summarized above. It appears the Tribe had established its tribal court in 2001, and adopted rules for the operation of a tribal juvenile court the following year. However, in early 2006, the tribal court lost its judge, and hence was unable to accept a transfer of E.Z.’s proceeding during the period of time between the initiation of his case in March 2006 and when the Tribe actually petitioned for transfer in July 2010.

The juvenile court held a hearing on the Tribe’s petition to transfer on July 29, 2010. At its conclusion, the court found that E.Z.’s dependency proceeding had reached an advanced stage as early as October 2007, when the court first terminated reunification services and ordered long-term foster care for E.Z.⁷ In the court’s view, permanency planning had, in effect, been in progress since that time—for a period of over two years—and this progress had involved extensive efforts by the “team” that included the court, the Agency, the Tribe, and all parties and their counsel, not to mention E.Z.’s foster parent, teachers, and service providers. Although the Tribe could not have sought

⁶ A second motion to intervene filed June 1, 2010, was thus redundant.

⁷ The only reason the juvenile court did not immediately set a hearing under section 366.26 at the conclusion of the 18-month permanency review hearing in October 2007, was due to its findings that E.Z. was not suitable for adoption and no one was presently willing to accept legal guardianship. (See § 366.22, subd. (a); see also § 366.21, subd. (g)(3).)

transfer earlier due to its lack of an operating tribal court, it nevertheless did not request a transfer until July 2010, after the juvenile court had scheduled the section 366.26 hearing, and over four years after it had received notice of the proceeding and intervened. The court relied in part on the decision in *In re Robert T.* (1988) 200 Cal.App.3d 657, referring particularly to language linking timeliness considerations with a concern for the “best interests of the Indian child,” as well as to language that a timely request for transfer “should at least precede permanency planning in the dependency proceedings.” (*Id.* at p. 665.) The court concluded, accordingly, that there was good cause not to transfer the proceeding and denied the Tribe’s petition.

Father contends the juvenile court erred in denying the Tribe’s petition for transfer. He argues the proceeding was *not* at an “advanced” stage at the time of the petition because parental rights had not been terminated, and the court had not yet held its section 366.26 hearing and considered evidence on the selection of a permanent plan. He also reasons the court should not have relied on *In re Robert T.*, because the language in that decision concerning timeliness is inconsistent with subsequently enacted provisions of section 305.5,⁸ while its consideration of the best interests of the Indian child was not a proper factor articulated either by ICWA section 1911 or by Welfare and Institutions Code section 305.5.

There is, however, one significant problem with these objections. Father’s appeal is from the orders issued on February 3, 2011, at the conclusion of the section 366.26 hearing. By no stretch of liberal construction may his notice of appeal be deemed to embrace the order denying the Tribe’s petition for transfer, which was entered over six months earlier.

“A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment.” (§ 395, subd. (a)(1).) A “ ‘judgment’ ” in a dependency proceeding is

⁸ Father refers specifically to the provision that “[i]t shall not, in and of itself, be considered an unreasonable delay for a party to wait until reunification efforts have failed and reunification services have been terminated before filing a petition to transfer.” (§ 305.5, subd. (c)(2)(B).)

the dispositional order, and all subsequent orders are appealable.⁹ (*In re S.B.* (2009) 46 Cal.4th 529, 532.) Thus, an order denying a petition for transfer to a tribal court is immediately appealable, unless it is entered *before* the dispositional order. (See *In re Jack C.* (2011) 192 Cal.App.4th 967, 987.) Here, the order of July 29, 2010, denying the Tribe’s petition for transfer, was issued after the dispositional order and was at once appealable. Neither Father nor any other party took a timely appeal from that order, and it became final and binding. It may not be attacked now on appeal from the later order issued after the section 366.26 hearing. (See *In re S.B.*, *supra*, 46 Cal.4th at p. 532; see also rule 8.406(a) & (c).) We lack any jurisdiction to review Father’s claims of error. (See *In re Jonathon S.* (2005) 129 Cal.App.4th 334, 340–341.)

Even if we were to assume we had appellate jurisdiction in this instance, we would find no merit in Father’s objection. The relevant facts are essentially undisputed. Unreasonable delay is not established solely by the fact that the petitioner has waited until reunification services have been terminated. (§ 305.5, subd. (c)(2)(B).) But in this case, services were terminated well over *two years* before the Tribe petitioned for transfer. During the interim, the juvenile court, together with the Agency, the parties, and the Tribe, worked within the framework of the dependency law and ICWA to achieve permanency and stability for E.Z. in a manner that appropriately addressed his exceptional needs. At the time the Tribe filed its petition, the court had finally scheduled a hearing under section 366.26, and all concerned had begun to prepare for that hearing—in effect, to finalize their long, ongoing efforts to reach a permanent plan.

The section 366.26 hearing is undoubtedly “a critical late stage in a dependency proceeding.” (*In re S.B.*, *supra*, 46 Cal.4th at p. 532.) This is especially true when the hearing occurs over two years after the termination of reunification services. Moreover, the case of *In re Robert T.* remains good law. The juvenile court’s reliance on that decision, and its consideration whether it was in E.Z.’s best interests to halt the ongoing

⁹ The few postdispositional orders that are *not* immediately appealable are expressly identified by statute, such as an order setting a hearing under section 366.26 or a posttermination placement order. (See §§ 366.26, subd. (l)(1), 366.28, subd. (b)(1).) A petition to transfer a proceeding to a tribal court is not so identified.

efforts to reach permanency in order to transfer the matter to another forum, is not, in our view, contrary either to ICWA section 1911 or Welfare and Institutions Code section 305.5.

Review of a finding of good cause to deny a petition for transfer to a tribal court is limited to a determination whether it is supported by substantial evidence. (*In re Robert T.*, *supra*, 200 Cal.App.3d at p. 663.) We have examined carefully the entire record in this case. If we had proper jurisdiction to decide the issue, we would without hesitation affirm the challenged finding under this standard.

B. *The Finding of Good Cause Not to Follow the Tribe’s Placement Preference*

ICWA section 1915 provides that “[i]n any foster care or preadoptive placement, a preference shall be given, *in the absence of good cause to the contrary*” to specified placements. (25 U.S.C. § 1915, subd. (b), italics added.) These are: (i) a member of the Indian child’s extended family; (ii) a foster home licensed, approved, or specified by the Indian child’s tribe; (iii) an Indian foster home licensed or approved by an authorized nonIndian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs. (25 U.S.C. § 1915, subd. (b).) If the Indian child’s tribe establishes a different order of preference by resolution—as it did in this case—the court or agency effecting placement must follow that preference “so long as the placement is the least restrictive setting appropriate to the particular needs of the child” (25 U.S.C. § 1915, subd. (c).)

ICWA does not define the “good cause” necessary to make a placement other than those preferred under the Act. Courts have deduced from its legislative history, that Congress clearly intended by this term to provide state courts with flexibility in determining the placement of an Indian child. (*Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 641 (*Fresno*).)

California dependency law tracks the preferences set out in ICWA section 1915. Thus, in “[a]ny foster care or guardianship placement of an Indian child . . . [p]reference shall be given to the child’s placement with one of the following, in descending priority

order: ¶ (1) A member of the child’s extended family; ¶ (2) A foster home licensed, approved, or specified by the child’s tribe; ¶ (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; ¶ (4) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs.” (§ 361.31, subd. (b).) As under ICWA section 1915, the court or agency effecting placement must follow a different order of preference established by the Indian child’s tribe “so long as the placement is the least restrictive setting appropriate to the particular needs of the child” (§ 361.31, subd. (d).)

Again, similar to ICWA section 1915, the juvenile court “may determine that good cause exists not to follow placement preferences” (§ 361.31, subd. (h).) The burden of establishing the existence of good cause is on the party requesting that the preferences not be followed. (§ 361.31, subd. (j); see rule 5.484(b)(3).) Good cause to deviate from the preferences may include “[t]he extraordinary physical or emotional needs of the Indian child as established by a qualified expert witness” (Rule 5.484(b)(2)(C), italics added.)¹⁰

As noted above, the Tribe established by resolution several placement preferences for E.Z. pursuant to ICWA. Its last established preference—filed November 17, 2010, not long before the section 366.26 hearing commenced on December 9—was that E.Z. be placed with his paternal grandmother P.Z. under a plan of guardianship. The juvenile

¹⁰ Rule 5.484(b)(2)(C) is similar to guidelines promulgated by the Department of the Interior, which state in pertinent part: “For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference . . . shall be based on one or more of the following considerations: [including] ¶ (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness. . . .” (Section F.3 of Department of the Interior, Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings 44 Fed.Reg. 67584 (Nov. 26, 1979); hereafter Guidelines.) One reviewing court, noting that ICWA “neither expressly nor impliedly restricts the superior court . . . to the three considerations” specified in the federal Guidelines, endorsed instead the identical, but nonexclusive, considerations now set out in rule 5.484(b)(2). (*Fresno, supra*, 122 Cal.App.4th at p. 643.)

court, however, deviated from this preferred placement after finding good cause to do so, and ordered E.Z.'s placement with his foster parent, R.O., under a plan of guardianship.

In doing so, the juvenile court commented it was "convinced that the need for consistency and stability is what is leading to [E.Z.'s] progress, and I don't think it's in his best interest to interrupt that." The court found that "good cause exists . . . not to follow [the tribal preference] because of [E.Z.'s] compelling need for consistency and stability in his life. [¶] He has made substantial improvements in [RO's] home[,] has a bond with [her,] he's on a more serious end of the spectrum of autism[, and] has extraordinary . . . needs"

Mother argues the evidence does not support the juvenile court's finding of good cause not to follow the preference established by the Tribe. In the first place, she urges evidence was lacking to establish that E.Z.'s behavior would be affected by regression if he were moved from R.O.'s home to the preferred placement with P.Z. According to Mother, the juvenile court relied, at least in part, on the bonding study and subsequent testimony of the Agency's qualified expert witness, Jacqueline Singer, Ph.D. Mother summarizes Dr. Singer's opinion as one concluding there was a risk E.Z. would regress if he were removed from R.O.'s care, with a recommendation that E.Z. continue in his placement with R.O.

Mother concedes that Dr. Singer's opinion would "arguably" support the challenged finding of good cause, *but for* her earlier evaluation in 2008.

In 2008, Dr. Singer was asked to evaluate E.Z. to determine whether it would be detrimental to remove him from his then current intensive foster care placement with Vicki A., in order to place him with the Tribe's newly established preferred foster placement with Julie V., a tribal social worker. In that evaluation, Dr. Singer recommended that E.Z. not be moved until Vicki A. and others in E.Z.'s intensive foster care program deemed him ready to make the transition, stating the risk of disruption to his progress at that time outweighed any benefit he would receive in the proposed new placement. Not long afterwards, however, Julie V. indicated she needed more time before committing to E.Z.'s care, whereas Vicki A. gave notice she could no longer care

for E.Z. Consequently, it became necessary to find a new foster placement for E.Z. and move him there without the period of gradual transition Dr. Singer had recommended. This was accomplished in late July 2008, when E.Z. was moved to his current placement with R.O.

In Mother's view, E.Z. adjusted well to this new placement, despite expectations to the contrary. Mother reasons that the success of this move demonstrated that the concerns expressed by Dr. Singer in her 2008 evaluation were "unfounded." In her view, Dr. Singer's opinions expressed in 2011 are "nearly . . . identical" to the opinions she expressed in 2008 under "similar circumstances." She suggests, in effect, that Dr. Singer's subsequent opinion—that it would be detrimental to move E.Z. from his placement with R.O. to the preferred placement with P.Z.—was as "unfounded" as the opinion she expressed in 2008.

Secondly, Mother contends that, even if there were substantial evidence that E.Z. would regress if he was moved to the preferred placement with P.Z., there was not substantial evidence that this "regression" would be "so significant as to outweigh the placement preference" established by the Tribe. Mother views the evidence of E.Z.'s past behavior to "indicate[] that [his] periods of regression were temporary." Moreover, she asserts federal law and state law recognize the importance of preserving the family's ties and cultural inheritance of Indian children. (See 25 U.S.C. § 1901; Welf. & Inst. Code, § 224.) Mother insists that the juvenile court's duty to maintain E.Z.'s cultural and familial ties was thus "paramount," despite any evidence of his impaired ability to appreciate them fully. She suggests it was error for the court not to maintain these ties, given P.Z.'s willingness to care for E.Z. and her history of providing "excellent care" for his younger brother E.Z.-2, who had also been diagnosed with autism, as well as mild mental retardation.

Whereas custody decisions under the dependency law are usually reviewed for abuse of discretion, reviewing courts have determined a different standard applies in cases involving a determination of good cause not to follow the placement preferences set out in ICWA section 1915, or established by resolution of a tribe in accordance with that

same section. Instead, a court's determination to make a placement in exception to an ICWA established placement preference is reviewed under the substantial evidence standard to ensure that the court's finding of good cause to deviate from the preferred placement is "rigorously tested against the record." (*Fresno, supra*, 122 Cal.App.4th at p. 645.) Under this standard, we examine the record to determine whether there is substantial evidence, whether or not contradicted, to support the finding, viewing the record in the light most favorable to the challenged ruling and hence resolving all conflicts, and drawing all legitimate inferences, in its favor. We do not reweigh the evidence or address credibility issues that are left to the juvenile court as trier of fact. (*Id.* at p. 646; *In re G.L.* (2009) 177 Cal.App.4th 683, 697–698.)

Thus, we examine the record under this standard to determine whether substantial evidence supports the juvenile court's finding of good cause, which was based on a determination that deviation from the established preference of the Tribe was justified by E.Z.'s "*extraordinary physical or emotional needs . . . as established by a qualified expert witness.*" (Rule 5.484(b)(2)(C), italics added; see also Guidelines, *supra*, 44 Fed.Reg. 67584.)

The Agency's report for the section 366.26 hearing, filed in October 2010, reported E.Z. had developed relationships with his foster parent R.O. and with the other children in R.O.'s home. E.Z. had by then been placed with R.O. for over two years, and during this period R.O. had provided E.Z. with a stable, loving environment. The report cited and incorporated a bonding study by Dr. Singer, dated September 2010, which recommended a permanent plan for E.Z. to remain with R.O.

Dr. Singer's attached report stated E.Z.'s latest assessments placed him in a "very elevated" range in the spectrum of Autism. She noted E.Z. had long been diagnosed with Autism, first by the U.C. Davis Mind Institute and later by Dr. Richard Goldwasser, who had also diagnosed E.Z. to have Reactive Attachment Disorder and anxiety.¹¹ After

¹¹ The Agency report also included a letter from a teacher in E.Z.'s class for autistic students, dated August 2010, noting that E.Z.'s "level of disability [was] severe,"

conducting her bonding study, Dr. Singer concluded E.Z. perceived R.O. to be his parental figure and looked to her for support, care, and direction. R.O., for her part, was attuned to his needs. There was a significant positive emotional attachment between them. Dr. Singer expressed the opinion that it would be detrimental to terminate E.Z.'s relationship with R.O. He had substantially changed over the two-year period of his placement with her, after receiving from her consistent guidance, structure, and affection, and this had allowed him to feel the safety and security necessary to decrease his problematic behaviors. As such, Dr. Singer thought it detrimental to return E.Z. to his parents or to place him with his grandmother P.Z., as he would experience "significant regression." Such regression, in her opinion, would include a loss of E.Z.'s current level of functioning, and she could not predict the degree to which he might recover this loss of functioning over time. Dr. Singer expressly disagreed with an opinion expressed by the Tribe's expert, Kathy Fisher, that E.Z. himself did not want to remain with R.O., but wanted to live with his grandmother, P.Z.

The Agency report also cited to the results of a consultation by Dr. Goldwasser in September 2010, conducted about one year after his initial consultation and diagnosis in September 2009. Dr. Goldwasser found, among other things, that E.Z.'s level of anxiety continued to be an issue, and he, too, supported a continuation of E.Z.'s current foster placement and the multi-disciplinary services he was receiving at his current school.

Dr. Singer testified at the section 366.26 hearing, stating E.Z. had, in fact, experienced a significant period of regression after his move in July 2008 from his previous placement with Vicki A. and the intensive foster care program in Fairfield, to his current placement with R.O. Since then, as E.Z. had grown older, he had shown a greater capacity for developing an attached connection as his more severe behaviors diminished. Consequently, it was Dr. Singer's opinion that for E.Z. to lose a relationship

and he was performing academically at the level of preschool or kindergarten in reading and math skills, with significant delays in communication development and cognition.

now, such as that he had developed with R.O., made the likelihood of his regression more substantial.

Dr. Singer testified she did not agree with the Tribe's expert witness, Kathy Fisher, to the extent she had reported E.Z. currently had "good" executive functioning. In her opinion his executive functioning remained "pretty poor," as he still did not demonstrate "any ability to plan [and continued to show] poor emotional control." She found E.Z. to be "on the lower end of functioning . . . in terms of autistic behavior," with "limited language . . . limited social reciprocity, and . . . a limited ability to be able to learn in . . . a standard classroom setting." E.Z.'s functional ability in his new school was at a "pretty low level in terms of . . . cognitive and academic skills for a child that [was] almost nine."

Dr. Singer's study led her to conclude that E.Z.'s current "environment [in which] he fe[lt] a sense of safety has been therapeutic for him." E.Z., in her opinion, still had "very little ability to be able to conceptualize what it is that's going on for him," and he still had a notable level of anxiety about "anything that is outside what is the normal routine for him," particularly since no one was presently able to tell him "what is going to happen in terms of where he is going to be on a permanent basis." She said it was critical for E.Z. to continue the consistency and routine structure in his current environment, in that he currently had no internalized sense of order. A continuation of his current structure and routine might help him achieve a greater, internalized sense of safety.

When questioned about her previous evaluation in 2008, Dr. Singer stated she had not done a bonding study as to E.Z. with his then foster parent Vicky A., and so had not expressed an opinion about his level of attachment to her. She thought it was unlikely at that time E.Z. "could have internalized any sense of the relationship" with Vicki A. Dr. Singer further thought her conclusions in 2008 were that the proposed move would not necessarily be so traumatic as she now believed it would be, if E.Z. were removed from R.O.'s care and placed with P.Z.

In addition to Dr. Singer's testimony, Frank Menhams of the Redwood Coast Regional Center (RCRC) also gave evidence as an expert on the psychology of Autism.

He said R.O. had not needed the behavioral services offered by RCRC on behalf of E.Z. because they were unnecessary in light of R.O.'s own special education background and experience. He thought E.Z. was benefitting from his current placement with R.O., which he described as an "incredibly enriching situation."

In making its finding, there was good cause not to follow the Tribe's established placement preference, the juvenile court acknowledged it had heard "widely differing" views about what was best for E.Z.¹² Under the standard of review stated above, however, we focus on the evidence summarized above most favorable to the court's ruling.

This evidence, in our view, provides substantial support for the juvenile court's finding of good cause not to follow the Tribe's established placement preference. The evidence adduced throughout this proceeding has consistently shown that E.Z. suffers from severe autism and from extreme, often aggressive, behaviors associated with anxiety that arises whenever E.Z. is presented with demands or with situations not strictly within the routine he finds safe and manageable. At the section 366.26 hearing, Dr. Singer presented a bonding study and testimony that together stated unequivocally her professional opinion that there was risk of significant detriment to E.Z.'s well-being if he were removed from his foster parent R.O. She based this conclusion primarily on the bond she perceived E.Z. had built with R.O.—one evidently remarkable given his severe level of autism and all the more devastating if lost. It was also based on R.O.'s experience—and indeed special talent—in caring for severely disabled children, by which she had become effectively attuned to E.Z.'s special needs, combined with R.O.'s dedication to E.Z. as his caregiver, despite the difficulties his behaviors had presented. Dr. Singer, in short, provided evidence, as a qualified expert, that established E.Z. as a

¹² Kathy Fisher, who worked for the Tribe as its ICWA case manager and social worker, submitted a report and testified at the section 366.26 hearing in support of following the Tribe's preferred placement with E.Z.'s grandmother, P.Z. P.Z. herself also testified regarding her present ability to assume E.Z.'s care. Her testimony concerning her own past family and tribal history, including her mother's placement in a BIA boarding school, present a poignant portrayal of the former policies sought to be remedied by ICWA.

child with extraordinary emotional and physical needs, justifying a departure from the Tribe's current preferred placement with P.Z. (Rule 5.484(b)(2)(C).)

We are not persuaded by Mother's argument that Dr. Singer's evidence was necessarily undermined by her prior evaluation in 2008. We find Dr. Singer's testimony consistent with her earlier opinion. As we have noted, her previous evaluation did not oppose the proposed move to the preferred placement with Julie V. so much as it called for a gradual transition. Dr. Singer gave evidence that E.Z.'s transition to his new placement in 2008 involved significant difficulties and was not, as Mother puts it, a success rendering Dr. Singer's concerns "unfounded." Dr. Singer further testified that E.Z.'s current progress and development made it far more likely he would experience significant trauma and loss of function if he were removed from R.O.'s care, than when he was removed from the care of Vicki A. in 2008 under circumstances contrary to her recommendation for a more gradual transition. We note, additionally, that Dr. Singer's earlier evaluation was based on a comparison of E.Z.'s caregiver at that time, Vicki A., with Julie V., his proposed preferred placement. The extent to which E.Z.'s abrupt transition in 2008 was more successful than Dr. Singer then predicted may reasonably be attributed, at least in part, to his placement with R.O.—and not Julie V.—which was a development beyond the information available to Dr. Singer when she made her recommendation in 2008 for a gradual transition. Finally, and perhaps most importantly, we observe that, if Dr. Singer's evaluation in 2008 was to any degree unfounded in light of later events, it was entirely within the province of juvenile court, as trier of fact, to determine the effect of that previous evaluation on the weight and credibility to be given to the evidence Dr. Singer presented subsequently at the section 366.26 hearing.

Nor are we persuaded that Dr. Singer's evidence, concerning the risk of detriment in moving E.Z. to another placement, failed to show detriment substantial enough to outweigh the legislative purposes underlying the placement preferences established under ICWA. Dr. Singer's evidence was that a change in E.Z.'s current placement with R.O., to the placement preferred by the Tribe, would result in substantial regression on E.Z.'s part and a loss of functioning at the level he had so far achieved. The purposes

underlying the placement preferences are subject to the flexibility given to state courts under ICWA to determine “good cause” not to follow those preferences. (*Fresno, supra*, 122 Cal.App.4th at p. 641.) The juvenile court found such good cause on the ground of “extraordinary physical or emotional needs of the Indian child as established by a qualified expert witness.” (Rule 5.484(b)(2)(C).) We conclude substantial evidence supports that finding, and decline to engage in any further inquiry that would require us to reweigh the evidence against the “paramount” duty to maintain E.Z.’s family and cultural ties.

Finally, we note that Mother, in her reply brief, urges us to distinguish factually several decisions cited by the Agency in support of its argument that substantial evidence supports the challenged finding of good cause. While these decisions—*In re N.M.* (2009) 174 Cal.App.4th 328, *In re A.A.* (2008) 167 Cal.App.4th 1292, and *Fresno, supra*, 122 Cal.App.4th 626—all present different factual circumstances to some degree, we are nevertheless satisfied that in this case substantial evidence supports the juvenile court’s finding of good cause not to follow the Tribe’s established placement preference.

In sum, E.Z., is a Native American child subject to the placement preferences established by ICWA. Nevertheless, substantial evidence supports the court’s finding of good cause not to follow those preferences, because E.Z. is also an autistic child with special, extraordinary needs that are best served by continuing his exceptional, if not preferred, placement.

DISPOSITION

The orders entered February 3, 2011, are affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Banke, J.