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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re D.B. et al., Persons Coming Under the
Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN
AND FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

T.G.,

Defendant and Appellant.

A141447

(Contra Costa County
Super. Ct. Nos. J13-00956, J13-00957)

Appellant T.G. (hereinafter mother) appeals from the juvenile court's disposition orders. She asserts the court did not properly apply the protections of the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.) in removing two of her children, D.B. and R.C., from her custody without making required findings and placing them in a foster home despite ICWA's preference for placement with an extended family member. We conclude the juvenile court made the required ICWA findings, those findings are supported by record evidence, and foster home placement was appropriate under the circumstances. We therefore affirm.

BACKGROUND

As the parties are aware, mother recently petitioned this court to delay the permanency planning hearings for D.B. and R.C. Mother requested additional reunification services, claiming active efforts had not been made to help her keep custody of D.B. and R.C. We denied that writ petition on the merits (case No. A143118), summarizing the background of the proceedings as follows¹:

“[Mother] has had significant interactions with Children and Family Services Departments in several counties dating back to 1991. Her older children were removed from her care after she failed to reunify with them after several years of services.

“In August 2013, the Contra Costa department of Children and Family Services (hereinafter County) filed juvenile dependency petitions concerning two of mother’s eight children, two-year-old R.C. and 11-year-old D.B. The County alleged mother could not adequately supervise the youngsters because of an alcohol abuse problem and because she had remained in a relationship plagued by domestic violence. Specifically, mother reportedly kicked D.B. while drunk, was seen by D.B. being ‘terrible’ and getting into fights while drunk, struck her ‘boyfriend’ during a dispute (for which she was arrested), and exposed her children to her lifestyle of prostitution. The County further alleged mother had left R.C. and D.B. with a family friend for approximately three months without providing direct financial support after the first month—she told the friend she was ‘going back to ho’ing’ and ‘going back to the streets,’ and eventually denied access to public money (including SSI and CalWorks funds) that were meant for the children. Based on mother’s membership in the Standing Rock Sioux tribe, the County alleged R.C. and D.B. may be members of, or eligible for membership in, that tribe.

¹ We take judicial notice of our prior decision. (Evid. Code, §§ 451, subd. (a), 452, subd. (a), 459.)

“At the contested jurisdictional hearing on September 13, 2013, the juvenile court found the allegations of the dependency petitions, as amended, to be true. At the contested dispositional hearing, in January 2014, the juvenile court found R.C. and D.B. to be dependent children and ordered reunification services for mother.” (*T.G. v. Contra Costa County Superior Court* (Dec. 16, 2014, A143118) [nonpub. opn.])

When the children were first detained, the County placed them in a certified Indian foster family agency home in Sacramento County. The juvenile court ratified this placement at the detention and disposition hearings. Mother filed a timely notice of appeal from the January 27, 2014 disposition orders.

DISCUSSION

Application of ICWA Standards

The majority of mother’s contentions concern an asserted lack of compliance with ICWA at the disposition hearing. Specifically, Mother claims the juvenile court ordered D.B. and R.C. placed in foster care without making the required ICWA findings, by clear and convincing evidence, of likely serious emotional or physical damage and of active remedial efforts. (See 25 U.S.C. § 1912(e) [“No foster care placement may be ordered . . . in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”]; *id.* § 1912(d) [“Any party seeking to effect a foster care placement of . . . an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”].)²

² “ ‘[F]oster care placement’ . . . mean[s] any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.” (25 U.S.C. § 1903(1)(i).)

However, the juvenile court undeniably made these precise findings. The court’s disposition order “adopts the . . . findings [and] recommendations of the agency in the report” it prepared for the hearing. That December 6, 2013, report recommended a finding, by clear and convincing evidence, that continued parental custody would have been “likely to cause the Indian child serious emotional or physical damage.” It also recommended a finding, by clear and convincing evidence, “that active efforts [had] been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these efforts were unsuccessful.”

That County counsel may not have articulated the precise ICWA standards when presenting oral argument at the disposition hearing does not mean the juvenile court applied the wrong standards or viewed the evidence through the wrong lens—especially given the court’s written order indicating it applied the appropriate standard. (See *In re Merrick V.* (2004) 122 Cal.App.4th 235, 254 [agency’s argument for a particular standard does not mean juvenile court applied it; even when there is no record pertaining to the standard applied, court presumes court’s ruling is correct].) Nor do we see any portions of the juvenile court’s order (including those that reference similar, but different, non-ICWA state law standards requiring risk of harm and reasonable efforts at services before removal) that conflict with or are incompatible with—rather than additive or complimentary to—the court’s adopted ICWA findings. (See *People v. Smith* (1983) 33 Cal.3d 596, 599 [“In the case at bar it does not appear there is an irreconcilable conflict in the record . . .”]; cf. *In re Karla C.* (2010) 186 Cal.App.4th 1236, 1260, fn. 9, italics added [“Because the court’s written orders are *internally inconsistent*, in that they provide for both sole legal and physical custody to Father as well as ‘placement’ with Father and continuing jurisdiction, we conclude that the court’s oral pronouncement prevails.”].)

We therefore reject mother’s assertion that the juvenile court failed to apply the correct standards under ICWA.

Substantial Evidence Supports Required Findings

We next consider mother's assertion that, even assuming the juvenile court applied the correct legal standards, the court's findings are not supported by substantial evidence. (See *In re M.B.* (2010) 182 Cal.App.4th 1496, 1506 (*M.B.*); *C.F. v. Superior Court* (2014) 230 Cal.App.4th 227, 239 (*C.F.*).)³ "Under this standard, we do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or reweigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is other evidence to the contrary. [Citation.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding." (*M.B.*, at p. 1506.)

Mother contends neither the finding of a likely prospect of serious harm to the children, nor the finding of active efforts at reunification, is supported by substantial evidence. The record, however, shows the contrary.

Substantial Evidence of Likely Serious Harm

The County, in its disposition report, noted mother has eight children, two of whom had become adults and the rest of whom were either in guardianship or placed with their fathers or paternal relatives. In the 1990's, mother lost her eldest children after several years of offered reunification services proved ineffective. Over the years, mother has been repeatedly offered substance abuse treatment but has chosen not to participate. She fails to acknowledge the alcoholism that compromises her ability to parent and her neglect of her children, choosing instead to believe the "friends" she leaves her children with are conspiring against her to take her children away unfairly. She has been hostile

³ Mother and County agree no higher level of scrutiny applies to a finding of active efforts at this point in the analysis. Accordingly, we do not further address the standard of review issue. (Compare *In re K.B.* (2009) 173 Cal.App.4th 1275, 1286 [citing authority from Alaska and suggesting when services rendered could be gleaned directly from record, "active efforts" would be a mixed question of law and fact reviewed independently]; and *C.F.*, *supra*, 230 Cal.App.4th at p. 239 [rejecting this approach as inconsistent with California's dependency law].)

to engaging in various therapeutic services offered in the past and declined the social worker's offer to help her get properly connected with a drug/alcohol testing facility. She even bizarrely quipped that she had already been convicted for domestic violence, so she could not be forced to engage in services related to that problem.

At the jurisdictional hearing, mother was found to have an alcohol problem that prevents her from providing adequate care for her children, to have been in a relationship involving domestic violence, and to have left her children in the hands of a family friend without financial support. In connection with the jurisdictional hearing, D.B., then 11 years old, said mother has "popped" her for no reason. She stated mother is " 'not a real mom' " and " 'takes all the money' " from the third-party caregiver who was " 'trying to put food on the table.' " D.B. described mother as "terrible" when drunk and she had witnessed mother fight when drunk. D.B. did not want to go home. R.C., who was then two years old, had been in the middle of the house doorway (in a stroller) during a May 2013 drunken altercation between mother and her boyfriend. Despite her young age, she had been able to point to where mother was when the police arrived. Mother's social worker reported mother had also likely been drunk during a call they had regarding services.

The problems identified at the jurisdictional hearing were not resolved by the time of disposition.

In its disposition report, the County could not "state that the children would be safe in [mother's] care. [Mother] has an approximately 25 year history of substance abuse, homelessness, instability, neglect, physical aggression, and of routinely leaving her children with various different 'friends' for months and sometimes years at a time with no financial assistance. [Mother's] oldest child is approximately 22 years old. The reasons for that child and his sister's removal from [mother] are essentially the same issues that resulted in the Probate Court granting petitions appointing guardians for them, as well as the case on [a third sibling] . . . opened earlier this year. [Mother's] inability and or unwillingness to acknowledge the impact of domestic violence, abandonment, and substance abuse on her ability to parent places the child[ren] at high risk if in her care."

Though D.B. felt somewhat conflicted about her emotions toward mother, she did not wish to visit mother or even have telephone contact. R.C.'s substitute care provider found R.C. physically aggressive, mean, and foul-mouthed. R.C. said she “ ‘wants to die or jump off a bridge.’ ”

Additionally, an ICWA expert opined by declaration that returning the children to mother would, “beyond a reasonable doubt, result in serious emotional/and or physical damage,” citing: mother’s history of failing to succeed at reunification services in prior cases, resulting in the loss of her three older children; mother’s history of neglect and endangerment of her children; mother’s criminal history; a recent altercation with police; a refusal to acknowledge her drinking problem; and D.B.’s fear of returning to mother’s care.

Thus, sufficient evidence supports the juvenile court’s finding of likely serious emotional or physical damage if D.B. and R.C. were returned to mother’s care. Indeed, by the time of the hearing, D.B. already explicitly feared mother because of her aggressive behavior when drunk and C.B. had demonstrated alarmingly aggressive and fatalistic behavior after witnessing domestic violence incidents. (See *In re Barbara R.* (2006) 137 Cal.App.4th 941, 946, 951–952 [risk of serious damage when the mother’s substance abuse and domestic violence issues not adequately addressed through reunification services and the child was scared of the mother and did not wish to visit with her]; *In re Krystle D.* (1994) 30 Cal.App.4th 1778, 1798–1799 [serious damage likely due in part to ongoing, unaddressed alcohol problem]; *In re Riva M.* (1991) 235 Cal.App.3d 403, 411 [failure to overcome problems that led to detention, including alcoholism, meant children at risk of serious damage]; see also *In re Heather A.* (1996) 52 Cal.App.4th 183, 195–196 [exposure to domestic violence puts non-Indian children at unacceptable risk of harm]; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451–452 [exposure to substance abuse puts non-Indian children at unacceptable risk of harm].)

While mother claims the causal link between her behaviors and likely damage to the children is weak, we must “draw all reasonable inferences in support” of the juvenile court’s detriment finding. (*M.B., supra*, 182 Cal.App.4th at p. 1506.)

Additionally, while mother claims the ICWA's expert declaration was insufficient because the expert had little contact with the family, that did not strip it of significance, particularly given the remainder of the record. ICWA undoubtedly requires the juvenile court to obtain some expert testimony from an Indian expert on the subject of likely damage. (25 U.S.C. § 1912(e) ["No foster care placement" without "a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses" of likely serious damage.]) But this is for the purpose of educating the juvenile court "on the tribal culture and childrearing practices" relevant to the case. (*M.B.*, *supra*, 182 Cal.App.4th at p. 1503.) ICWA does not require the expert to make an independent evaluation or engage in independent fact finding, and expert testimony on the tribe cultural matters is "but one factor" for the juvenile court to consider in reaching a determination on the serious damage issue. (*M.B.*, at pp. 1503, 1505–1506.) Here, mother makes no claim the expert's declaration failed to address or misstated any relevant cultural matters the juvenile court should have considered. (*Id.* at p. 1505.)

Substantial Evidence of Active Efforts

Substantial evidence also supports the juvenile court's finding that the County made active efforts to keep mother together with D.B. and R.C. Under ICWA, there can be no foster care placement of an Indian child unless the court is satisfied "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." (25 U.S.C. § 1912(d); see also *C.F.*, *supra*, 230 Cal.App.4th at pp. 237–238 & fn. 6.; see also *Adoptive Couple v. Baby Girl* (2013) ___ U.S. ___ [133 S.Ct. 2552, 2562].) Active efforts are "timely and affirmative" efforts, taking into consideration the relevant aspects of the Indian child's tribe and available tribal resources. (*C.F.*, at pp. 239–240.)

California's own dependency law, at times, imposes a requirement of reasonable efforts or services, which must be tailored to the facts of a particular case. (*C.F. supra*, 230 Cal.App.4th at pp. 237–238 [discussing requirement in connection with terminating parental rights]; *In re Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 998 (*Hannah S.*)) In California, there is often no significant difference between "active efforts"

required by ICWA and “reasonable services” required by state law. (*C.F.*, at pp. 237–238; *Hannah S.*, at p. 998.) “[T]he standards in assessing whether ‘active efforts’ were made to prevent the breakup of the Indian family, and whether reasonable services under state law were provided, are essentially undifferentiable.” (*In re Michael G.* (1998) 63 Cal.App.4th 700, 714.) Indeed, California’s Welfare and Institutions Code has always required an “ ‘ ‘effort . . . be made to provide suitable services, in spite of the difficulties of doing so or the prospects of success.’ ’ ” (*C.F.*, at p. 238; *In re Michael G.*, at p. 714.)

The County’s disposition report outlines what it termed the “reasonable efforts” made to help mother resolve the problems that caused her to initially lose custody of D.B. and R.C. Without comprehensively listing these efforts, mother was referred to substance abuse treatment, drug/alcohol testing, and a domestic violence program. She was offered visitation with her children. She was also given a referral to the Richmond Native American Health Center for parenting classes, individual counseling, and family counseling. Further, mother was provided transportation support. The County also had conversations with mother regarding her progress and offered assistance in navigating and obtaining services (in particular, placements in various inpatient or outpatient substance abuse programs). The County also maintained written and telephonic contact with the tribe and reached out directly to some service providers.

In August 2013, at the time her children were detained, mother declined services. Although she said she would enroll at a substance abuse program at Ujima West, she later admitted to her social worker she had not enrolled. In November 2013, mother expressed some interest in services to a social worker, but it appears she declined to avail herself of any before the disposition hearing. Mother would, instead, respond to inquiries about her progress with referrals by asking when would she get time for herself and by asking why she had to do anything when she was fine. As to making progress before the next court hearing, mother had stated “ ‘[i]nternal affairs should investigate this thing’ ” because she had not done anything wrong.

The record shows ample reunification efforts. This is not a case where mother was merely referred to services and then left to herself. Rather, the County repeatedly attempted to assist mother in connecting with services.

While mother complains remedial services and rehabilitative programs were insufficient because D.B. and R.C. were placed in a foster home outside of mother's county of residence, the children's placement is irrelevant to the adequacy of the County's efforts to remedy *mother's* substance abuse and domestic violence issues. While placement is an important issue, and one we address below, it is not part of the active efforts inquiry. "ICWA and . . . California's statutory law address the issue of an Indian child's placement separately from the issue of active efforts" and so "we distinguish the issue of placement from that of active efforts." (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1318–1319.)

Placement of Children

Mother also contends the juvenile court ignored ICWA's express placement preferences when, at the disposition hearing, it permitted D.B. and R.C. to remain placed in an Indian foster home outside of mother's county of residence.⁴

Under ICWA: "Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—[¶] (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 non-Indian 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

⁴ The parties appear to assume, and therefore we do as well, that the order allowing placement to persist was an ICWA foster care placement.

Indian child's needs." (25 U.S.C. § 1915(b); see Cal. Rules of Court, rule 5.484(b) [implementing the good cause requirement].)

According to mother, D.B. and R.C. should have been placed with an extended family member and good cause did not support placement in the Indian foster home. Although the juvenile court, at disposition, ordered that the children's foster home placement was "appropriate," it made no explicit good cause finding regarding placement. In addition, the court does not appear to have addressed mother's request, at the disposition hearing, to have her children moved to "a family home," as suggested (if possible) by the Indian expert. Mother, however, never mentioned the ICWA's placement requirements and never offered a concrete alternate placement proposal.

Even if the juvenile court should have made an explicit good cause finding (cf. *People, Dept. of Social Services in Interest of A.E.V.* (Colo. App. 1989) 782 P.2d 858, 860 [implicit finding adequate]), and even if mother did not waive the placement issue by failing to alert the court to the ICWA requirements, there is no prejudicial error here requiring reversal.

The only possible alternate placement mother identifies on appeal is a great aunt. The great aunt, however, had not sufficiently expressed her desire for placement at the time of disposition. As discussed in the disposition report, the County mailed the aunt a placement application by certified mail. No response was received by the time of the report. No evidence suggests the aunt ever came forward with a completed application by the time of the disposition hearing. Moreover, the aunt, though present at the disposition hearing, made no request for placement, and mother's counsel did not mention the aunt as a desired placement.

As mother has not shown that a more preferential placement under ICWA was warranted at the time, she was not prejudiced by the court's placement order. (*In re K.B., supra*, 173 Cal.App.4th at p. 1290 ["Since there is no evidence that there was any suitable member of the children's extended family available for placement or any evidence that any other member of the Choctaw Nation was available to take the children, the placement with the prospective adoptive parents satisfies the requirements of ICWA."].)

Even in ICWA cases, there is generally no reversal unless the appellant suffers and demonstrates prejudicial error. (*In re E.W.* (2009) 170 Cal.App.4th 396, 402 [applying harmless error in ICWA case]; *In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1414–1415 [same]; *In re S.B.* (2005) 130 Cal.App.4th 1148, 1165 [same].)

For the same reasons, mother’s claim that the juvenile court failed to follow ICWA placement preferences at the detention hearing are unavailing. To begin with, it is not at all clear that ICWA placement preferences routinely apply at detention hearings, which are often conducted quickly in response to an emergency situation. (*In re S.B.*, *supra*, 130 Cal.App.4th at pp. 1154, 1162–1164.) She has also failed to submit a reporter’s transcript of the detention hearing, so we have no way of knowing the extent to which the juvenile court did or did not consider its placement options, and we cannot meaningfully review the placement order. (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1002 [“because we do not have an adequate record of the June 22, 2006 proceeding, we cannot knowledgeably rule on the merits of this issue, and we consider the claim abandoned. [Citation.] It is the appellant’s responsibility to include in the appellate record the portions of the reporter’s transcript relevant to appellant’s issues on appeal.”].) In any case, mother has not suggested any alternative placement that could have been made at the time of detention and therefore has failed to show any prejudicial error.

DISPOSITION

The juvenile court dispositional orders are affirmed.

Banke, J.

We concur:

Humes, P. J.

Margulies, J.