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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re N.H. et al., Persons Coming Under the Juvenile
Court Law.

SACRAMENTO COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

K.H. et al.,

Defendants and Appellants.

C070874

(Super. Ct. Nos. JD230666 &
JD231230)

K.H. and Y. T., parents of minors N.H. and David H. (David) (collectively “minors”), appeal from orders of the juvenile court terminating their parental rights. (Welf. & Inst. Code,¹ § 366.26, 395 [].) The parents contend the juvenile court erred under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) in deviating from

¹ Further undesignated statutory references are to the Welfare and Institutions Code.

the ICWA placement preference order without good cause and that insufficient “active efforts” were made to keep the Indian family together. Disagreeing, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Family History of Dependency Proceedings

N.H. was born in February 2010 and David in January 2011. They have an older half sister and two older brothers, who were ages nine, seven and four years, respectively, at the time of the ruling after the selection and implementation hearing in April 2012. The three older children were detained in July 2009, adjudicated dependents in September 2009 due to domestic violence between mother and father and removed from parental custody when mother was seven weeks pregnant with N.H. They were placed in a Native American foster home certified by Tribal Economic and Social Solutions Agency (TESSA). Mother’s case plan included general counseling, parenting and participation in a domestic violence program.

The older children’s six-month review report, filed just before N.H.’s birth, noted that mother had not obtained any significant prenatal care and was not participating in services at the Sacramento Native American Health Center (SNAHC). The juvenile court ordered additional services.

N.H.’s Birth and Early Proceedings

The Sacramento County Department of Health and Human Services (Department) filed a non-detaining petition as to N.H. in May 2010 based on domestic violence. Mother claimed Indian heritage as a registered tribal member of the Navajo Nation. N.H. was detained in June 2010 due to mother’s neglect.

The Department filed several reports prior to the contested jurisdiction/disposition hearing. The reports chronicled domestic violence incidents between mother and father from 2006 to the present as well as mother’s neglect of N.H. At that time, there were no relatives willing and able to accept placement of the minors.

Mother admitted methamphetamine use in August 2010 and was twice referred for an assessment but did not follow through. She tested positive for methamphetamine on August 30, 2010. Father admitted he and mother used methamphetamine together. The Department recommended denying services to both parents. A third addendum informed the court that mother was not participating in services and had left residential treatment several times. The attached report of the ICWA expert opined there was clear evidence that N.H. “was at great risk for severe ‘emotional and/or physical damage,’ were she to be returned to the care of either of her parents.” The ICWA expert agreed with the Department’s recommendations.

The Department filed a second amended petition, adding allegations of the parents’ drug use and mother’s neglect of N.H. to the allegations of domestic violence. The Navajo tribe intervened, and the court continued the jurisdiction/disposition hearing for an Interstate Compact on the Placement of Children (ICPC) investigation regarding a maternal great-aunt (aunt) in Arizona.

A fourth addendum, filed in January 2011, stated that the tribe was completing the evaluation for placement with the aunt and expected it to be favorable. The Department was concerned because the aunt had 10 citations for alcohol-related offenses in 10 years. The addendum reported mother had entered a drug treatment program, became ill and was hospitalized. A month later she went to an intake appointment at SNAHC intending to enroll in all services but did not. Mother denied using methamphetamine but did not submit to tests, did not attend meetings with the social worker, and denied an ongoing relationship with father. Father was also missing appointments and tested positive for methamphetamine.

David’s Birth and Early Proceedings

In January 2011, mother gave birth to David. Both mother and David tested positive for methamphetamine; David was detained. Mother admitted recent methamphetamine use and that she used the drug throughout her pregnancy. The parents

were involved in a physical altercation at the hospital following David's birth. The court found ICWA applied to David and ordered the Navajo tribe be notified.

The report for the jurisdiction/disposition hearing stated that mother had admitted recent methamphetamine use and that she was drinking to excess. SNAHC informed the social worker that mother had sporadically attended programs there since May 2010, and was aware of the services available to her but did not follow through to access them. Mother was resistant to treatment and continuing to use methamphetamine despite referrals to multiple treatment programs. The report recommended denial of services.

The first addendum to David's jurisdiction/disposition report revealed that mother admitted methamphetamine use in February 2011 and said she would enter residential treatment. Mother failed to drug test and did not enter the program. A second addendum stated the ICPC report was not complete and that the aunt was sending mixed messages about taking all the children and was not aware that there was now a fifth child.

Termination and Denial of Services

In February 2011, the court terminated mother's services for the three older children, denied services for the parents in minors' cases and set a selection and implementation hearing.

Reports Prior to the Selection and Implementation Hearing

The July 2011 assessment report prepared for the selection and implementation hearing stated N.H. and David were likely to be adopted by the *current* caretakers, one of whom was Native American. The tribe was no longer recommending placement with the aunt; the Department had contacted the tribe about the status of the ICPC in July 2011 and was advised that mother told the Navajo social worker she had been molested by relatives as a girl. The Navajo social worker investigated and found the relatives were still living in the area and would have access to minors if they were placed with the aunt. Although a homestudy completed by the tribe in June 2011 recommended placement with the aunt, the tribe made this recommendation before mother's allegations of molest, and

tribe representatives told the Department the tribe no longer recommended placement with the aunt for that reason.

An addendum to the selection and implementation assessment stated that the ICWA expert had expressed the opinion that there was currently no evidence minors would suffer serious emotional or physical damage if they were returned to mother because mother had made significant progress in achieving sobriety, and was taking advantage and making active use of the resources offered by a sober living facility. The expert felt that the Department had provided active efforts to support the family and had maintained contact with the tribe but suggested that tribal customary adoption (TCA) should be considered because termination of parental rights was contrary to the interests of the tribe.² The Department had forwarded information to the tribe on TCA but had received no response.

A second addendum in October 2011 reported that the tribe now recommended placement with the aunt if minors did not reunify with mother, but the home where the aunt intended to live with minors was not finished. The Department did not support placement with the aunt because she had no relationship with minors and had not contacted the Department to inquire about them.

In the most recent telephone conversation the tribe's social worker stated the tribe did not support the placement because mother did not want minors placed there. However, if parental rights were terminated, *then* the tribe wanted minors placed with the aunt. The addendum further stated the Navajo tribe did not support TCA but wanted the court to follow the requirements of ICWA if it terminated parental rights. A letter from the tribe's social worker was attached to the addendum and explained that minors would not be at risk if placed with the aunt because the alleged molester was no longer in the

² TCA permits placement and tribal adoption of an Indian child without terminating parental rights. (§ 366.26, subd. (c)(2)(B).)

area and recommended that the court extend services and support further efforts to reunify the family.

Testimony and Other Evidence at the Selection and Implementation Hearings

The ICWA expert testified at a selection and implementation hearing in November 2011 and again at a subsequent hearing (after the first resulted in a mistrial) in February 2012. In November, the expert opined that the Department had made active efforts to provide services to mother and had complied with the spirit of ICWA in placing minors. The expert testified that mother needed a longer period of sobriety than she currently had to demonstrate she was ready to have minors in her care. The tribe's social worker agreed with the expert's conclusions. Mother planned to enter Friendship House, a Native American residential treatment facility.

After mother's testimony at the hearing in November, the social worker called mother's housing at Mather and found that mother only stayed at the facility about two months, failed to appear for drug testing and was discharged from the program in October 2011. The SNAHC drug abuse counselor reported that mother was seen at their facility in November 2011. Mother also saw a domestic violence counselor for an incident in late November 2011 when father went to mother's home and attacked her. Mother was encouraged to make a report but did not do so. Mother admitted recent methamphetamine use to the domestic violence counselor when the counselor took her to a clean and sober living facility. Mother left the facility after two days and did not contact Friendship House.

The three older children were moved to separate placements in December 2011 and January 2012. N.H. and David remained in the original placement and continued to do well. Mother was pregnant and admitted to methamphetamine and alcohol use in the past months. She had not gone to residential treatment.

At the February 2012 selection and implementation hearing, the ICWA expert testified that she no longer believed the Department had made active efforts. The expert

opined that active efforts included not only providing services, but also making efforts to engage the tribe and there was no evidence of input from the tribe since the last hearing. The expert agreed that the Department had provided a number of services including culturally appropriate Indian services. The expert now opined that minors would be at significant risk for emotional or physical damage in their parents' care because there was no evidence either parent had the capacity to properly provide for them. The expert was still of the opinion that parental rights should not be terminated.

The adoptions social worker testified she contacted the tribe six or seven times, sent them all reports and discussed TCA two or three times. The tribe was clear that it did not want TCA with the current caretaker but, if parental rights were terminated, the tribe was interested in a TCA with the aunt. The social worker had contact with the tribe the day she testified and confirmed the tribe was still opposed to termination of parental rights but had no other suggestions for a permanent plan. The social worker testified minors were likely to be adopted and the current caretakers were the prospective adoptive parents. The aunt's home was not completed and could not be assessed and there was not room for minors in her current home. Further, mother did not want minors placed with the aunt because the individual who had molested her and possibly her older daughter had access to the aunt's home.

The Navajo tribal representative, appearing by telephone at the hearing, asked that, if the aunt was not an acceptable placement, the court consider another Navajo home, but did not provide any specific alternative recommendations.

Juvenile Court's Ruling

The juvenile court issued a thorough and detailed written ruling. After summarizing the family's dependency history, the court first addressed active efforts, and found that since 2009 the Department had made culturally appropriate efforts to help mother and to stay connected with the Navajo tribe. Despite the efforts to help her,

mother continued to use methamphetamine, including while she was pregnant, and engage in domestic violence.

The court then addressed placement preferences, noting that the majority of the tribe's efforts as to placement were directed to placement with the aunt in Arizona, which was preferred over an Indian foster home. Mother had expressed interest in returning to Arizona, but then disclosed a history of molest by a relative who had resided in the aunt's home and indicated her opposition to minors' placement with the aunt. The court found no other placement options were made available by the tribe "despite numerous conversations and court appearances" and found good cause to deviate from the ICWA placement preference order due to mother's request. It found proof "beyond a reasonable doubt that continued custody of the children David and [N.] [] with their mother or father is likely to result in serious emotional or physical damage to the children." The court also found "the evidence to be clear and convincing that active efforts have been made by [the Department] and that their current placement is in compliance with [ICWA]." The court encouraged the Department to work with the tribe regarding placement in implementing the permanent plan.

DISCUSSION

I

Placement with Maternal Great Aunt

Both mother and father argue there was no evidence of good cause to deviate from the ICWA placement preference because the aunt was a member of the tribe and had been approved by the tribe for placement.³ The Department disagrees, and contends that

³ Mother's briefing on appeal completely fails to acknowledge her continued *objection* in the juvenile court to minors' placement with the aunt--the very same aunt with whom she now claims the juvenile court *was legally obliged to place* minors absent good cause to do otherwise, a finding she claims is not supported by substantial evidence. Although the Department argues in its briefing that the parents' lack of objection to the court's

we should not review the juvenile court's placement decision because the placement was not subject to reevaluation for ICWA compliance at the time of the selection and implementation hearing. We have reviewed the decision and we agree that substantial evidence supports it.

A. *The Law*

ICWA provides criteria and a placement preference order for foster care and preadoptive placement of Indian children. "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 Indian child's needs." (25 U.S.C. 1915 (b); § 361.31, subs. (b)(c)(h).)

When assessing good cause, the court may consider the preference of the parent and the unavailability of suitable families after a diligent search. (25 U.S.C. 1915 (c); § 361.31, subd. (e); Cal. Rules of Court, rule 5.484(b).)

failure to place the children with the aunt results in forfeiture of that argument on appeal, a point with which we disagree (see *In re M.B.* (2010) 182 Cal.App.4th 1496, 1506 ["Of course, while a parent may waive an objection to specific evidence, a claim that there is insufficient evidence to support the judgment is not waived by a failure to object"]), it does not argue mother invited any error displayed by the court's specific decision to decline to place minors with the aunt.

B. Analysis

When minors were placed in foster care, no relatives had come forward for placement and the tribe did not initially suggest any relative or specify a foster home approved by the tribe. In these circumstances, placement with the current caretakers was within the ICWA preferences.

Over time, the aunt was identified as a potential placement and the tribe eventually provided an approved homestudy for her. However, mother objected to the placement due to her own molestation experiences with a person who would have access to minors if they were placed in that home and the tribe withdrew approval. After further investigation, the tribe again concluded the aunt was an acceptable placement if parental rights were terminated despite the fact that her current home did not have room for minors and her own home was still under construction with no known date of completion. The tribe's ultimate position was that if parental rights were terminated and the court did not consider the aunt an acceptable placement, another Navajo home should be found. However, the tribe had not identified any other Navajo placement although the juvenile court terminated services *more than a year* before concluding the selection and implementation hearing.

The aunt had never contacted the Department or made any effort to find out if minors had any special needs. At the time of the hearing, she was living in a home which had no room for minors and there was no clear indication when her own residence would be completed. Mother continued to oppose the placement, insisting that the relative who had molested her did have access to the aunt's home and, if placed there, minors would be at risk. Minors would remain together in the current placement. Substantial evidence supported the court's finding of good cause to deviate from the placement preference

order for the foster and preadoptive placement⁴ because the preferred placement with the aunt was not near minors' home, the mother opposed the placement and the proposed placement with the aunt was unsuitable. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.)⁵

II

Active Efforts

Father argues that the evidence does not support the juvenile court's finding that active efforts were made because the Department did not actively engage the tribe to find a home within the placement preference and the tribe wanted a Navajo home. He contends that active efforts are not limited to provision of services and the Department should have consulted with the tribe on options for placement. The Department disagrees.

We need not resolve the conflict to decide the issues in this case, because, as we have described *ante* and continue to describe *post*, here the record shows the juvenile court neither erred in its finding of good cause to support its placement decision nor in its finding that the Department made active efforts to provide remedial and rehabilitative services to the family.

⁴ The preference order for adoptive placements is "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." (25 U.S.C. 1915(a); § 361.31, subd. (c).) The decision on *adoptive* placement has not yet been made. Accordingly, the issue is not before us.

⁵ Father argues, and mother joins by incorporation, that, had the court ordered placement with the aunt, TCA would have been possible. To the extent that this point is relevant, it is not correct. The tribe did not perform a TCA homestudy, did not complete the process for the TCA, and did not file a TCA order showing that the TCA was complete. (§ 366.24, subd. (c)(6).) Nor did the tribe request a continuance to do so. (*Ibid.*) Thus the tribe did not follow through with the appropriate procedure *prior to* termination of parental rights to allow that permanency alternative to be considered and avoid termination.

A. The Law

“Any party seeking to effect [] termination of parental rights to 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.” (25 U.S.C. § 1912(d); § 361.7, subd. (a).) “What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions and way of life of the Indian child’s tribe. Active efforts shall utilize the available resources of the Indian child’s extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.” (§ 361.7, subd. (b); see also Cal. Rules of Court, rule 5.484(c).)

B. Analysis

From July 2009 to February 2011, the Department provided culturally appropriate services utilizing referrals through SNAHC and Indian foster care agencies. The ICWA expert and the tribe agreed the Department had made active efforts to reunify. Through and including the hearing on selection and implementation, where the Department’s social worker testified she had been in contact with the tribal representative the day before she testified, the Department was in regular contact with the tribe’s representatives regarding the issues of placement and permanency planning. To the extent that the tribal resources were available, they were utilized.

The record shows that the Department provided specific information on alternatives to termination of parental rights to the Navajo tribe. Although the ICWA expert did not have evidence of ongoing active efforts when she testified at the second selection and implementation hearing, the Department social worker’s subsequent testimony provided that evidence. While the Department may not have specifically asked the tribe for alternative Navajo placements, here the Department had, for a year before the hearing, consistently recommended the permanent plan of termination of parental

rights and adoption with a non-Navajo Indian caretaker. The tribe did not provide the Department with names of approved tribal members as alternative placements. When the tribe declines to participate in the proceedings in a meaningful way, it does not follow that the Department did not make active efforts to enable the tribe to participate.

Substantial evidence supports the juvenile court's finding that the Department made active efforts to prevent the breakup of the Indian family. Mother's repeated relapses and lack of participation in programs as well as the tribe's failure to provide any viable alternatives to termination of parental rights made it clear that the efforts were unsuccessful. (See *In re Angelia P.*, *supra*, 28 Cal.3d at p. 924; *In re Jason L.*, *supra*, 222 Cal.App.3d at p. 1214.)

DISPOSITION

The orders of the juvenile court are affirmed.

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

MAURO, J.