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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re TAYLOR B., a Person Coming Under the
Juvenile Court Law.

TUOLUMNE COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

L.M.,

Defendant and Appellant.

F067597

(Super. Ct. No. JV7214)

OPINION

APPEAL from an order of the Superior Court of Tuolumne County. Eric L.
DuTemple, Judge.

Vasquez, Estrada & Conway and Thomas Weathers for Defendant and Appellant.

Sarah Carrillo, County Counsel, for Plaintiff and Respondent.

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This appeal arises from a Welfare and Institutions Code section 366.26¹ order terminating L.M.'s (mother) paternal rights to 10-month-old Taylor B. Steven B. (father) is Taylor's presumed father, but does not join in the appeal.

Mother's only contention on appeal is that substantial evidence did not support the finding of good cause to deviate from the placement preferences under the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.).

We disagree and affirm the juvenile court's order.

SUMMARY OF FACTS AND PROCEDURES

Mother and father are the biological parents of four children. Their two oldest children, twins L. and M., were the subject of a 2009 juvenile court action when infant L. was found to have multiple fractures and a brain hemorrhage after only a few weeks in her parents' care. L. was subsequently diagnosed with a metabolic bone disorder, which made her more susceptible to injury. Nevertheless, doctors concluded that, despite the disorder, her injuries were not caused by normal handling. A section 300 petition alleging neglect, abuse and severe physical abuse was sustained. Mother and father were not offered services and parental rights to the twins were terminated in May of 2010.

Mother and father's third child, Steven, age two, was born in Idaho and placed informally under "temporary guardianship" with his maternal grandmother, Donna. He continues to reside with her.

The current case began when the Tuolumne County Department of Social Services (the Department) received a referral indicating that mother and father had a new baby, Taylor, and were again living in Tuolumne County. Because of the severe injuries to L. in the previous case, a social worker conducted an investigation on July 24, 2012. At this point, both mother and father were still on probation for misdemeanor child abuse

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

convictions related to L.'s injuries. When the social worker made the unannounced visit, she learned that Taylor had been taken to a local hospital the day before because she was coughing and spitting up milk. The hospital believed Taylor, now two weeks old, had pneumonia and transferred her to the medical center in Modesto. A child welfare hold was placed on Taylor pending further investigation.

The hospital in Modesto reported that, on admission, Taylor had a visible laceration on her lower lip, which her parents claimed was caused by a pacifier. She also had lacerations on the back of her throat, which mother and father attributed to trying to remove fluids from her throat with a bulb syringe. Taylor was admitted to the hospital based on three possible diagnoses: infection; pyloric stenosis; and/or failure to thrive. She was being assessed and would not be released for several days.

Neither mother nor father understood why the Department would be concerned with Taylor, stating that their earlier case regarding the twins was over and should not be held against them. Mother had begun her prenatal care with Taylor in Tuolumne County, but she and father had then moved to Idaho to be near her mother Donna. Taylor was born in early July of 2012 in Montana. When Taylor was a few weeks old, mother and father had driven with her from Idaho to California so that the two of them could complete their criminal sanctions, which included approximately 25 days of work release and 400 hours of community service prior to September of 2012. According to mother and father, Donna was coming from Idaho in a week to take Taylor back with her so that mother and father could complete their service.

A section 300 petition was filed, alleging sibling abuse under subdivision (j), but pending additional information on Taylor's medical condition. Taylor was detained by the juvenile court on July 27, 2012. Mother is a member of the Chicken Ranch Rancheria of Me-Wuk Indians (the Tribe), a federally recognized Indian tribe under ICWA, and the ICWA therefore applies to this action. Jan Costa, a representative of the Tribe, appeared at the hearing, but provided no input to the court.

On August 9, 2012, an amended section 300 petition was filed with allegations under subdivisions (a), (b), and (j). In addition to the allegations of sibling abuse, the amended petition alleged that Taylor had suffered physical injury in the form of multiple lesions on the back of her throat caused when mother and father repeatedly used a bulb syringe in an attempt to remove phlegm from Taylor's throat. The lesion on Taylor's lip was alleged to be caused by her sucking on a pacifier for a long period of time. The petition also alleged that Taylor was diagnosed with failure to thrive, based on a significant loss of birth weight.

The report prepared in anticipation of jurisdiction stated that Taylor had been released from the hospital and placed in the adoptive home of her siblings in Sacramento. Various relatives had been or were being assessed for possible placement.

Father reported that, on the night of July 22, 2012, they thought Taylor had a cold and she had been crying and coughing. They had used a bulb syringe 60 to 80 times in one night to remove fluids from her mouth. They decided to take Taylor to the emergency room the following morning. Father did not appear concerned that the suction had caused injury Taylor. Father explained that he and mother had left Idaho because he and Donna had gotten into a fight, police were called, and he and mother decided to leave the state. Mother reported that they traveled with Taylor, boxes of their belongings, a small dog and her four puppies. One of the puppies suffocated during the trip, but neither father nor mother expressed concern about the incident. Father and mother claimed that they stopped often to feed Taylor, but did not provide a schedule.

The social worker discussed with mother the importance of not using marijuana while breastfeeding. According to mother, she had not used marijuana since she was one month pregnant with Taylor. Neither mother nor father showed emotion about Taylor's diagnosis or hospitalization. Father thought the hospital stay was a good thing as Taylor could overcome her failure to thrive diagnosis and then the issue would be resolved.

The report stated that, during the pendency of the juvenile and criminal cases regarding the twins, mother had again become pregnant and she fled the state. It was later learned that she had given birth to Steven in September of 2010, while living with her mother in Idaho. Idaho Child Welfare Services had been notified and it was determined that the child would be left in the care of his maternal grandmother, but no formal guardianship was obtained.

Both mother and father were convicted of misdemeanor child cruelty in 2010 and sentenced to 400 hours of community service, the completion of a parent education course, and a fine.

Regarding ICWA compliance, the social worker noted that she had contacted the Tribe's tribal representative on July 24 and July 31, 2012. The representative stated that the Tribe does not have any services beyond a trust fund to offer to the parents. The Tribe wished to receive information about the dependency, but had no plans to intervene, provide any support services, or provide any possible placement option, and would not make a statement regarding placement preference. Mother's sister Renee in Idaho requested placement and an evaluation of her home was initiated in August of 2012. Several other family members in California requested placement and were either being evaluated or had been disqualified.

The social worker expressed concern that mother and father still lacked insight and failed to accept responsibility for the injuries to L., despite Department intervention and criminal convictions. The social worker was also concerned with mother and father's abrupt decision to leave Idaho with a two-week-old infant. Taylor's failure to thrive appeared to be the result of mother and father's failure to adequately feed Taylor on their journey from Idaho. Once hospitalized, Taylor began to make significant progress in weight gain and alertness, physical appearance and facial expressions.

An addendum report filed for the scheduled jurisdiction hearing noted that the foster mother reported Taylor was not being fed enough of her bottle during visitations.

Also, on August 19, 2012, Taylor was taken to the emergency room with labored breathing. She was diagnosed with acute asthma and prescribed treatments. She was not to be exposed to cigarette smoke.

The social worker met with mother and father on August 21, 2012, and advised them they were not to smoke during visits with Taylor and they were to use a blanket between them and Taylor when they visited to prevent exposure to smoke on their clothing. When the social worker, supervising a visit on September 6, 2012, asked mother and father how old Taylor was, mother replied, ““Hmm, 3 months.”” Taylor was eight weeks old at the time. Mother stated that Taylor violently vomits during visitations, although neither father, the visit supervisor, nor social worker ever witnessed this.

Mother testified at the contested jurisdiction hearing that she was convicted of injuries to L., but denied being responsible for them. According to mother, the injuries to L. did not occur when she was in her care because she was “in jail for assault” at the time. Mother did not think the case regarding the twins was currently relevant as she saw no pattern in her care of the children.

According to mother, her child Steven was with her mother in Idaho because she did not want him taken away because of what had happened with the twins. Mother gave custody of Steven to her mother when Steven was less than a month old. Mother acknowledged that she had never had a child in her care for more than a month. Mother stated that she considered leaving Taylor with her mother as well, but because father and her mother had a fight, she did not.

Father testified that he planned to have the case involving the twins “completely sealed” so there would be no allegations for the Department to prevent them from bringing Steven to California. Father did not think he had any responsibility for L.’s injuries as she had a hereditary bone disorder and there was no evidence that he or mother had caused the brain hemorrhage. Father had taken L. to the hospital for a previously

arranged appointment and was shocked when told she had a brain hemorrhage and several broken bones.

When asked about Taylor's injuries to her throat, father stated there was "no way of telling who actually did it," and it was not intentional. When asked about her weight loss, father stated he did not see her getting any smaller. Father did not think Taylor had needed hospitalization - he did not notice anything was wrong.

The juvenile court found the allegations of the petition true and ordered Taylor remain detained pending disposition, which was set for October 16, 2012.

The report prepared in anticipation of disposition recommended that no services be provided to either mother or father based on section 361.5, subdivision (b)(6) and (11)².

On October 9, 2012, the social worker again contacted the tribal representative. She informed the representative that the Department was recommending mother and father not be offered services and asked if the Tribe had any placement recommendations or comments. The representative stated that the Tribe did not. The Tribal Council was scheduled to meet October 17, 2012, and if the Tribe had any recommendations, it would notify the Department.

On October 3, 2012, father was sentenced to 90 days in jail for violation of probation. Father's probation officer stated that she had been unable to contact either mother or father about doing their community service hours and father perpetually failed to appear in court. The probation officer stated that she would be recommending jail time for mother as well for failure to comply. In an interview with father, he claimed he was

² Section 361.5, subdivision (b)(6), provides, in relevant part, that reunification services need not be offered a parent if the child has been adjudged a dependent as the result of physical harm to the child or a sibling; subdivision (b)(11) provides, in relevant part, that reunification services need not be offered a parent if parental rights of a sibling has been permanently severed.

not aware that his probation prevented him from leaving the area. He opted out of work release and chose to serve the remaining hours in jail.

In an addendum report, the Department stated it had received a placement request from Idaho regarding mother's sister Renee. The request had been denied for noncompliance by the applicant.

The report also stated that Taylor had been evaluated by a pediatric audiologist and had some hearing problems. After returning from a visit on November 8, 2012, Taylor suffered three seizures in 20 minutes. She was taken to the emergency room, but tests were inconclusive.

A declaration from ICWA expert Sean Osborn stated that the first preference under ICWA for placement is for a member of the child's extended family. Thus, if any of the relatives suggested by the parents was approved, this would be the first preference under ICWA. The second, third and fourth preference were for Native American foster homes, either within the child's Tribe, or approved or suggested by the Tribe, or a general certified Indian foster home. But as the Tribe had declined to assist in finding a Native American foster home for Taylor and had no resources to offer, these preferences did not apply. Osborn did say, because the foster home in which Taylor was currently placed was the family who had previously adopted her siblings, she would be able to maintain ties with biological relatives.

At the contested disposition hearing on November 16, 2012, Elizabeth DeRouen, who worked with the Indian Child Preservation Program, testified on mother's behalf that, while she did not think active efforts had been provided in this case to prevent the breakup of the Indian family, she did not think Taylor should be placed back in her parent's home at this point. DeRouen had spoken to the Tribe and although they had not given a placement recommendation they did not oppose the child's current placement.

The juvenile court found that active efforts had been made to prevent the breakup of the Indian family and denied services pursuant to section 361.5, subdivision (b)(6) and (11). A section 366.26 termination hearing was set for April 9, 2013.

A subsequent petition for extraordinary writ was denied by this court on March 28, 2013.

On May 17, 2013, the Department filed an ex parte petition to allow surgery on Taylor to have tubes placed in her ears and to conduct an auditory brainstem response test, a test used to determine hearing loss.

The report prepared in anticipation of the section 366.26 hearing recommended termination of parental rights and a permanent plan of adoption for Taylor. The social worker again contacted the tribal representative and was told that the Tribe would not be making any statements regarding placement.

Taylor's current foster mother has Native American ancestry, which was documented when the family adopted the twins. But she is not an enrolled member of a tribe. Since the family adopted the twins, they have kept in touch with the Tribe, have taken the girls to Native American events and sites, and have read to them from books regarding Native Americans in an effort to keep them connected to their Native American heritage. This was confirmed in a discussion with the tribal representative on March 28, 2013. When the tribal representative learned that the initial application for placement with father's aunt, Melissa H., had been denied, she had no objection.

The report stated that, because no relatives had been able to be approved for placement and the Tribe had chosen not to assist in finding other Indian homes, the Department had no other resources for native homes. The report further reviewed relatives who had applied for placement and been denied: mother's sister, Renee, who lived in Idaho, had failed to complete the home study; father's mother, Linda, was denied due to her criminal history and 30 child welfare referrals; father's brother, Tim, was denied due to his criminal history and current investigation of child neglect; father's

grandmother, Sophia, was denied for failing to maintain contact with the Department; and father's sister, Melissa, was denied due to inability to provide a safe, secure and stable home.

An adoption assessment found Taylor was likely to be adopted. Taylor had been diagnosed with asthma and was prescribed albuterol, but she was meeting developmental milestones. The current foster parents, who had previously adopted the twins, were considered the prospective adoptive parents and were committed to adopting Taylor.

An addendum report stated that father's sister, Melissa, was further assessed for placement, but the report did not recommend placement with her. Melissa was 22 years old, did not have any children of her own, was unmarried but living with a boyfriend, and supported herself and her boyfriend with SSI she received from a diagnosis of anxiety and Hodgkin's Lymphoma. When asked about mental health issues, Melissa stated she was no longer on any medication and had "come to deal with her past." The report noted that Melissa had been hospitalized as a teenager for suicidal ideation and self-mutilation behavior, but was not currently on medication and had discontinued counseling two years earlier.

Melissa claimed she did not see mother and father on a regular basis, but checked in with them occasionally. Melissa did not have any concerns about mother and father's parenting skills and thought they were "very attentive" parents and that mother was "a really good mom." Melissa had seen Taylor two days before she was hospitalized and thought she looked "good and healthy." Because Taylor was diagnosed with failure to thrive just days after Melissa saw her, the Department was unsure whether Melissa was able to recognize and provide for the medical needs of the child. When asked if she would maintain a relationship with mother and father if she adopted Taylor, Melissa stated she would do whatever the Department asked her to do. She realized that adopting Taylor would mean the child would be separated from her sisters, but said, "she won't remember them," although she was open to maintaining contact with them. Neither

Melissa nor her boyfriend had a job or a driver's license. Melissa had last seen Taylor two days before she was hospitalized. She did not request a visit with her in the subsequent nine months.

A Facebook post by Melissa's brother Tim seemed to espouse that Melissa and her boyfriend should be allowed to adopt Taylor so that she could stay in contact with mother and father "on a daily basis." Melissa responded on Facebook that she agreed with the post.

Based on the above, the Department determined that it could not be assured that Melissa could meet Taylor's needs or protect her from her parents.

At the contested section 366.26 hearing June 7, 2013, ICWA expert Osborn testified regarding placement preferences under ICWA and its California counterpart. The preferences were first family, then a Native American home of a tribal member, then a tribal-approved foster home, then a general Native American foster home, then a general foster home. As to the possible placement with Melissa, Osborn testified that Melissa had only met Taylor once and had not even requested visits with Taylor. He also noted that Taylor had been in her current placement for a long time and opined that moving her would be traumatic and would remove her from her siblings.

Osborn had spoken with a tribal representative who stated the Tribe had no opinion at this point and was fine with the current placement. Osborn spoke to mother who wanted Taylor back, but if she was not able to be returned to her, she would like her to be placed with Melissa.

Osborn was somewhat familiar with Taylor's current placement and stated that the willingness of that family to maintain long-term contact with the Tribe was beneficial to Taylor. According to Osborn, if the Department wanted to deny placement to Melissa only because Taylor was attached to her current foster parents, that would not be acceptable under the ICWA. But the fact that Taylor would have a relationship with her siblings was a factor to consider, because breaking them up would also be breaking up a

Native American family. In addition, the current foster parents were able to meet all of Taylor's needs. Osborn stated that termination of parental rights would not interfere with Taylor's ability to be a member of the Tribe and receive all of its services. Osborn opined that, in this instance, all things considered, the general foster home seemed to be the most appropriate placement.

Social Worker Marian Bacis testified regarding the relative assessment process and the various concerns about placement with Melissa. Bacis testified that Melissa was initially rejected for placement based on an error, but then approved based on her home itself, fingerprinting, and any child welfare history. Bacis then interviewed Melissa as to her qualifications, and noted her own health history, her own mother's substantial child welfare history, her contact with mother and father, and the fact that she had not requested any visits with Taylor.

Karen Jay, a state adoption specialist, testified that the proposed adoptive mother has both Me-Wuk and Cherokee heritage. In the previous adoption involving the twins, there were stipulations regarding maintaining contact with the Tribe and the family had followed the recommendations. Jay had the same concerns with Melissa that Bacis had. Taylor was bonded with her current family and was getting her special needs met there. She was having some hearing problems and had a recent diagnosis of "global developmental delays." Moving her would be difficult and detrimental.

Melissa testified that she was 22 years old; she had not graduated from high school nor did she have a GED; she was unemployed but received \$865 a month in SSI for "anxiety"; her fiancé was now working as a housekeeper at a motel, but did not have a driver's license. She claimed to be cancer free. She suffered from anxiety in large groups and "certain situations," but can manage through yoga and breathing techniques. When asked what she knows about Taylor, she said "I know she's my biological niece. She is - she looks so much like her aunt Renee. She's all around adorable and we all love her very much." Melissa claimed to have seen Taylor every day for the two weeks before

she was removed from mother and father and held her and fed her “once or twice.” But she later acknowledged that she had only seen Taylor daily from July 20, 2012, when Taylor came to California, until July 24, 2012, when she was removed from mother and father. Melissa did not ask for placement of Taylor until Melissa had finished chemotherapy.

Melissa claimed her relationship with mother and father was “not close, but cordial.” When she earlier referred to mother and father as “great parents,” she was referring to them with their son Steven. She acknowledged being confused as to why Taylor was removed from mother and father. She claimed that, if she had Taylor, she would allow her to see mother and father “maybe a couple of years down the road and supervised.” She would like to keep Taylor connected to her sisters and Steven in Idaho. Melissa claimed to have been out of state during the case regarding the twins and did not hear much about it. When questioned, Melissa “basically” agreed that mother and father caused L.’s injury, but “[i]t might have been an accident, but it could have been intentional.”

Mother testified that she disagreed with the ICWA expert because she wants Taylor to be with her so she knows her whole family. Mother continued to deny any responsibility for Taylor’s failure to thrive. Mother acknowledged that Melissa suffered from anxiety, but that she controls it with breathing. Mother testified that she and Melissa had been good friends for five years and, although mother and father had had a birthday lunch with Melissa recently, they had stopped contact with her so that Taylor could be placed with her.

Father testified that he was not close to his sister Melissa and he had no concerns that moving Taylor from the home she has been in for 10 months would be harmful to her.

The juvenile court found by clear and convincing evidence that Taylor was adoptable. It found beyond a reasonable doubt that there would be serious detriment if

she were returned to mother and father. It also found that the beneficial parent-child relationship exception did not apply and there was no evidence that termination would interfere with her connection to her Tribe.

In evaluating whether there was good cause to deviate from the ICWA preferences, the juvenile court found that there was, noting Melissa's anxiety, her lack of parenting experience, her naïve view of parenting, the very little preparation done to prepare herself for parenting Taylor, and her immaturity. Any changes she had made had been during the month the case was continued and not before.

The juvenile court also noted Taylor's strong bond with the foster parents, and while that was not in and of itself reason to deny placement to an extended family member, it was a consideration. Finally, the juvenile court noted it had "grave concerns" about Melissa's ability to protect Taylor from her parents as it was clear there was a close relationship between mother and Melissa. The juvenile court found telling mother's statement that she and Melissa had curtailed their friendship to give Melissa a better chance of obtaining placement. The juvenile court found placement with Melissa not suitable and that the Tribe had not made any specific requests for placement, and therefore there was good cause to deviate from the placement standards of the ICWA.

DISCUSSION

Mother contends there is no substantial evidence to support the juvenile court's factual finding that good cause existed to deviate from the ICWA placement preferences to place Taylor in the home of father's sister Melissa. We disagree.

California's placement preference law for Indian children is contained in section 361.31. In large part, it restates the ICWA provision in 25 United States Code section 1915 which mandates that preference in any adoptive placement of an Indian child be given, in the absence of good cause to the contrary, to placement with (1) a member of the child's extended family; (2) other members of the child's tribe; and (3) other Indian families. (25 U.S.C. § 1915(a); see Welf. & Inst. Code, § 361.31, subs. (c) & (h).)

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 County DCFS*)).) The burden of establishing the existence of good cause is on the party requesting that the preference not be followed. (§ 361.31, subd. (j); California Rules of Court, rule 5.484(b)(3).)

In reviewing a juvenile court’s decision finding good cause to deviate from the ICWA placement preferences, we apply a substantial evidence standard of review. (*Fresno County DCFS, supra*, 122 Cal.App.4th at p. 645.) 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 supporting a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court’s findings. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

Here, substantial evidence supports the juvenile court’s finding that good cause existed to deviate from ICWA’s statutory placement preferences to place Taylor with a member of her extended family. At two weeks of age, upon discharge from the hospital, Taylor was placed in the adoptive home of her twin sisters. The tribal representative for the Tribe was contacted at the inception of this case and stated the Tribe would not intervene nor did it have a preference for placement. Prior to the section 366.26 hearing, the tribal representative was again contacted and again said that the Tribe would not be making any statements regarding placement. Numerous family members were contacted about placement, but aside from Melissa, none were found qualified.

Although Melissa qualified for licensure, the evidence showed that she was unable to provide Taylor with a safe, secure and stable home. Melissa had no relationship with Taylor, perhaps seeing her only for one or two days before she was removed from mother and father's custody. Melissa had little or no insight into mother or father's past abuse of L. or their current failure to care for Taylor. Melissa expressed no concern about Taylor's health when she had seen her prior to her hospitalization. Nor did she demonstrate any solid ability to keep or protect Taylor from mother and father. Taylor was a young child with special needs; she had been diagnosed with failure to thrive and suffered from hearing loss and asthma. At the age of nine months, she was found to be three to four months behind in development.

Melissa was only 22 years old and had no children of her own. She had her own health issues, currently receiving SSI for anxiety and Hodgkin's Lymphoma. She had never been employed, did not have a high school diploma or a GED, and did not have a driver's license. Melissa had little in the way of good parenting models. Her own mother had many child welfare referrals and three of Melissa's siblings were removed and placed for adoption.

Given the evidence of Melissa's inability to provide Taylor with a safe, secure and stable home, good cause existed for the court to bypass the placement preference for Melissa as Taylor's extended family member.

Finally, we note that, although the foster home in which Taylor was placed was technically non-ICWA complaint, the foster mother had Native American ancestry and had established a track record of working with the Tribe with Taylor's siblings and in providing appropriate Native American education and cultural experiences to the children. It was likely she would do the same for Taylor.

Substantial evidence supports the juvenile court's order.

DISPOSITION

The order is affirmed.

Franson, J.

WE CONCUR:

Gomes, Acting P.J.

Poochigian, J.