DIVISION ONE
FILED: 01/10/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CHRISTINA H.,	)	No. 1 CA-JV 11-0145
	)	
Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, KEYARA H.,	)	103(G) Ariz. R.P. Juv. Ct.; Rule 28 ARCAP)
	)	
Appellees.	)	

Appeal from the Superior Court in Yavapai County

Cause No. V1300JD201080013

The Honorable David L. Mackey, Judge

AFFIRMED

Patricia A. O'Connor — Prescott
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General — Phoenix
By David M. Osterfeld, Assistant Attorney General
Attorneys for Appellee ADES

S W A N N, Judge

¶1 The trial court terminated the parental rights of Christina H. ("Mother") and placed her daughter ("the Child") in a foster home licensed by the Yavapai-Apache Nation. The Indian Child Welfare Act ("ICWA") applied to the Child's placement, and

Mother argues that the court abused its discretion by ignoring one of the placement preferences that ICWA requires the court to follow. Specifically, she argues that the court acted improperly when it placed the Child in a tribally licensed foster home rather than placing her with a member of the Child's extended family. Because we hold that the trial court did not err when it found good cause to deviate from ICWA's order of preferences, we affirm its decision to place the Child in the foster home.

FACTS AND PROCEDURAL HISTORY

¶2 The Child, who was born on September 7, 2010, has a biological father who is unknown;[1] Mother is a member of the Yavapai–Apache Nation. Mother's membership in the Nation makes the Child eligible for enrollment.

¶3 On September 10, 2010, ADES received a report from the Verde Valley Medical Center that at the Child's birth both she and Mother tested positive for amphetamine. Mother admitted that she had used methamphetamine within days of giving birth to the Child. She also admitted that she had used alcohol and marijuana in excess during the first four months of her

[1] ADES had originally alleged that the Child's biological father was Eric Q. or John Doe, "a fictitious name used to designate any other male individual claiming to be the father of the child and whose true identity and whereabouts are unknown." Genetic testing ruled out Eric Q. as the father, and the court severed John Doe's parental rights to the Child on the ground of abandonment under A.R.S. § 8–533(B)(1).

pregnancy. Mother had a long history of substance abuse. Four of her nine children were reported to have been born substance-exposed.[2] Before the Child's birth, Mother had been receiving psychiatric and substance-abuse services from the Verde Valley Guidance Clinic. After her birth, the Child required early intervention services because she suffered from significant delays in her cognitive and physical development.

¶4 On September 13, 2010, ADES filed a dependency petition. It alleged that because of her substance abuse, Mother had neglected the Child. On the same day, ADES notified the Nation of the dependency proceedings. Two days later, at the preliminary protective hearing, Mother stipulated to the issues of dependency. The juvenile court ordered that the Child be placed in ADES's legal custody and control. Later, ADES referred Mother for substance-abuse treatment, random urinalysis testing, supervised visits, parent aide services, and child and family team meetings. On October 22, 2010, at the initial dependency hearing, the court found that the Child was dependent as to Mother.

¶5 On December 27, 2010, Mother was sentenced to serve eighteen months in prison for violating the terms of her

[2] None of Mother's other children were still in her care when ADES removed the Child.

probation. She had been using illegal drugs and alcohol, and she had failed to report to her probation officer five times.

¶6 On January 6, 2011, ADES met with the Child's maternal grandmother. Grandmother said that she was motivated to take the Child "because she is my granddaughter." She also told ADES that she did not want the Child "to be passed on and passed on." ADES concluded its evaluation by finding that Grandmother had the capacity to care for the Child, but noted that "she only wants to care for [the Child] until [Mother] gets out of jail in 18 months and then return [the Child] to [Mother]." The report recommended Grandmother as "a temporary placement as she only wishes to care for [the Child] until [Mother] gets out of jail."

¶7 On February 16, 2011, the day of the report and review hearing, the Nation moved to intervene in the proceedings. Because she was incarcerated, Mother did not attend the hearing in person; counsel, however, appeared on her behalf. ADES moved to change the case plan from reunification to severance and adoption. The Nation opposed severance, hoping that Mother would seek rehabilitation and become capable of caring for the Child. The court granted ADES's motion and found that it had made reasonable efforts to prevent the Child's removal and that it had made active efforts to finalize the case plan of reunification.

¶8 ADES then moved for the court to place the Child with Yolanda and Herbert T., foster parents licensed by the Nation ("the Foster Parents"). In addition to being licensed by the Nation as foster placements, one of the Foster Parents was alleged to be a "cousin" and a "local relative."[3] The Child's half-sister had already been placed in their home. The Nation advised the court that the Child's aunt, who lived in Pennsylvania, had expressed interest in serving as the placement.

¶9 On March 1, 2011, ADES moved to terminate Mother's parental rights to the Child.[4] On March 9, 2011, the court granted the Nation's motion to intervene under ICWA. On March 21, 2011, the court granted ADES's motion to transfer custody of the Child to the Foster Parents.

¶10 On April 20, 2011, at the initial severance hearing, the Nation did not oppose ADES's motion to terminate Mother's

[3] Later, at the settlement conference, testimony from ADES clarified that the Foster Parents were members of the Nation, but that they were not the Child's relatives.

[4] ADES alleged three grounds for termination. The first was that Mother had neglected the Child under A.R.S. § 8–533(B)(2). The second was that the Child was under three years of age, she had been in an out-of-home placement for six months or longer, and that Mother had substantially neglected or willfully refused to remedy the circumstances that caused the out-of-home placement under § 8–533(B)(8)(b). And the third was that Mother was unable to discharge her parental responsibilities because of her chronic abuse of dangerous drugs and alcohol and that the abuse would continue for an indeterminate period under § 8–533(B)(3).

parental rights to the Child. At the report and review hearing on May 18, Mother said that she was considering consenting to severance of her parental rights, but she wanted ADES to explore "an adoptive placement with family prior to her consent." Mother mentioned Ms. Smith–Mahape, whom she described as "a cousin." The Nation said that it had investigated Mahape in its enrollment department, but that there was "no lineage for Mahape." The Nation also objected to placement with Mahape "for confidential reasons."

¶11 On July 11, 2011, Mother entered into a mediation agreement, waiving her right to a trial and agreeing to attend a settlement conference. At that conference on July 20, Mother once again waived her right to a trial and submitted the matter to the court.

¶12 During the conference, Beth Nelson, the ADES case manager, testified before the court. In her opinion, Mother was unable to fulfill her role as a parent because of her substance abuse; further, her inability to function as a parent would continue for an indeterminate length of time. Nelson confirmed that Mother had not participated in the substance-abuse program before her incarceration. Nelson also stated that severance and adoption would serve the Child's best interests, that she was adoptable, and that she had a potential adoptive home with the Foster Parents. Their home could meet all of the Child's needs,

including her special needs arising from her developmental delays. Further, their home was a "preferred placement" under ICWA because they were members of the Nation living on the reservation. Finally, Nelson pointed out that the Child had already bonded with the Foster Parents as well as with her half-sister.

¶13 When Mother's counsel asked Nelson about placing the Child with Grandmother, Nelson testified that she "didn't really have any reason to believe that she wanted to be considered as a permanent placement." Nelson admitted that after the home study, she had not called or written Grandmother to ask whether she wanted to be a permanent placement. But she also testified that Grandmother had not asked Nelson to reconsider her as a permanent placement.[5]

¶14 Wendy Brishke, a social worker for ADES specially trained in ICWA, testified that ADES had provided Mother with services that were designed to prevent the breakup of the Indian family. The efforts were unsuccessful, Brishke said, because Mother had failed to participate. She also said that Mother had failed to parent any of her other children and that continued

[5] During Nelson's testimony, Mother's counsel asked Nelson about communicating with Grandmother, specifically if Nelson had asked her about becoming a permanent placement: "When's the last time that you called her and spoke with her and asked her that?" An "unidentified female" in the courtroom immediately said "Never." The court told her that she needed to remain quiet.

custody of the Child would likely result in serious emotional or physical damage to the Child. In Brishke's opinion, the Child's placement with the Foster Parents was "a preferred placement under the second tier" in ICWA.

¶15 Brishke admitted that she had not reviewed ADES's home study on Grandmother. It had not been included in the file that ADES provided her. When asked if reading a home study about a grandmother who qualified for the "first tier" would have "made a difference" in her opinion, Brishke said "perhaps." When asked if it would have been "beneficial" to her in making her determination about "whether or not the first tier could have been met," she again said "perhaps." But when asked whether she found it "concerning" that ADES had not provided her with Grandmother's home study, Brishke said "no."

¶16 Brishke explained that she had spoken with ADES about Grandmother and had been told that Grandmother had declined to have a "background check" done on her home. That meant that ADES could not know "the background of the people in the home" and therefore could not ensure the Child's safety. Brishke also testified that she had spoken with the Nation and learned that it was not recommending a placement with Grandmother.

¶17 The Nation also testified. It approved of the Child's placement with the Foster Parents and agreed that there was good cause to opt for the second tier rather than the first. The

Child was receiving good care at the tribally licensed Foster Parents' home. The Nation also pointed out that any off-reservation placement, even if it were with family members who wanted a long-term relationship, would remove the Child from the reservation and her relatives who lived there.

¶18 At the close of the conference, the court found by a preponderance of the evidence that severing Mother's parental rights furthered the Child's best interests and that ADES had made active efforts to provide Mother with services and programs designed to prevent the breakup of the Indian family. The court also found evidence beyond a reasonable doubt that the Child would suffer serious emotional or physical damage if she were to continue in Mother's custody. Finally, the court found that placement with the Foster Parents was "in accordance with the Tier 2 preference of ICWA 25 USC 1915." It also found good cause to deviate from the "preference Tier 1 given that the [C]hild will remain in [her] home nation and have contact with [her] biological siblings."

¶19 On August 24, 2011, the court filed its written order, which terminated Mother's parental rights to the Child and granted legal custody to ADES. The order repeated that the court had found good cause to place the Child in a "Yavapai-Apache licensed foster home with her half-sibling" rather than in a home belonging to a member of her extended family.

¶20 Mother timely appeals from that order. She asserts that "the evidence showed that possible placement with [Grandmother] was not fully investigated." She argues that by not requiring further investigation, the trial court both abused its discretion and misinterpreted ICWA "by deviating from the preference Tier 1" found in 25 U.S.C. § 1915(b). This court has jurisdiction under A.R.S. §§ 8–235, 12–120.21(A)(1) and –2101(B).

STANDARD OF REVIEW

¶21 We review ICWA and its requirements de novo. *Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, 570, ¶ 14, 190 P.3d 180, 184 (2008). Any findings of fact that the trial court made during the proceedings "will be upheld unless they are unsupported by the evidence." *Maricopa Cnty. Juv. Action No. A-25525*, 136 Ariz. 528, 533, 667 P.2d 228, 233 (App. 1983).

DISCUSSION

¶22 Congress passed ICWA after finding "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children [were] placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). Recognizing that "no resource . . . is more vital to the continued existence and integrity of Indian tribes than

their children," 25 U.S.C. § 1901(3), Congress declared that the policy of ICWA is

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .

25 U.S.C. § 1902.

¶23 ICWA puts that policy into effect by requiring certain standards to be met in all child custody proceedings involving Indian children. *See A-25525*, 136 Ariz. at 531, 667 P.2d at 231. One such proceeding is the "preadoptive placement," which is defined as "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement." 25 U.S.C. § 1903(1)(iii).

¶24 Section 1915(b) states the standard the court must apply when ordering an Indian child's preadoptive placement under ICWA.[6] The child must "be placed in the least restrictive

[6] In her statement of the issue presented, Mother says that the court deviated from "the preference Tier 1 of ICWA 25 USC 1915." Later, she says that the "[p]lacement of Indian Children is regulated by ICWA, 25 U.S.C. § 1915(a)(1)." But the placement of Indian children is governed by § 1915 in general, with § 1915(a) applying specifically to their "adoptive placement." 25 U.S.C. § 1915(a). Although the record reflects the Foster Parents' willingness to adopt the Child, the placement ordered by the court was only a "preadoptive placement" because it did not result "in a final decree of adoption." 25 U.S.C. §

setting which most approximates a family and in which his special needs, if any, may be met." *Id.* Further, the child "shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child." *Id.* Finally, § 1915(b) requires that

> 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 This list in § 1915(b) is not merely a catalogue of available options; the court is not free to pick any one of them in "preference" to placing the Indian child with a non-Indian family.[7] The list is a "placement hierarchy" that is "dictated" by § 1915(b). *Coconino Cnty. Juv. Action No. J-10175*, 153 Ariz. 346, 350, 736 P.2d 829, 833 (App. 1987); 25 U.S.C. § 1915(d) (referring to "the order of preference specified in this

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1903(1)(iv). Therefore review under § 1915(b) -- and not § 1915(a) -- is appropriate.

[7] A.R.S. § 8-514(C), which is the state statute regulating the placement of Native American children in foster homes, has a list substantially similar to the one in 25 U.S.C. § 1915(b). The state statute, however, says explicitly that its list reflects the "order" of placement preferences. A.R.S. § 8-514(C).

section"). When the court decides to place an Indian child in a tribally licensed foster home rather than with a member of that child's extended family, it "deviates" from the preference expressed in § 1915(b)(i) to the preference expressed in 1915(b)(ii). *Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 415, 419, ¶ 15, 258 P.3d 233, 237 (App. 2011). Section 1915(b) allows the court to deviate from a placement preference only if it finds "good cause" to do so. *Id.*

¶26 ICWA does not define "good cause" and does not mention any factors that the court should consider when determining if good cause exists. 25 U.S.C. §§ 1901–1963. This is not surprising; guidelines published by the Bureau of Indian Affairs tell us that ICWA contains terms that were deliberately left open to interpretation by the courts. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979). In fact, the guidelines cite "good cause" as an example of one of ICWA's undefined terms. *Id.* The guidelines explain that "the legislative history of the Act states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." *Id.* (citing S. Rep. No. 95-597 (1977)).

¶27 Although the concept of "good cause" is meant to be flexible, the guidelines suggest that "a determination of good

cause not to follow the order of preferences" ought to be based on one or more of these considerations:

(1) the "request of the biological parents or the child when the child is of sufficient age";

(2) any "extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness"; and

(3) the "unavailability of suitable families for placement after a diligent search has been completed."

Id. The guidelines also state that the party urging the court to deviate from the preferences has the burden of establishing that good cause exists. *Id.*

¶28 Arizona courts look to these guidelines "for assistance in interpreting and applying the provisions of ICWA." *Steven H.*, 218 Ariz. at 572, ¶ 24, 190 P.3d at 186. But because "[t]he guidelines are not binding," it follows that the trial court's determination that good cause exists under § 1915(b) does not need to be based on any of the factors specifically mentioned in the guidelines. *Id.* The court may exercise its discretion and consider other factors if it finds them relevant for determining good cause. *See A-25525*, 136 Ariz. at 534, 667 P.2d at 234.

¶29 Once the trial court makes its determination of good cause under § 1915(b), this court reviews it for an abuse of

discretion. *See J-10175*, 153 Ariz. at 349-50, 736 P.2d at 832-33; *A-25525*, 136 Ariz. at 534, 667 P.2d at 234. Under that standard, when the trial court determines that good cause exists to deviate from one § 1915(b) preference to another, the deviation will be improper only if it is "manifestly unreasonable" or if it rests "on untenable grounds." *Cf. Quigley v. City Court of Tucson*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982) (explicating the term "abuse of discretion"). The terms "unreasonable" and "untenable" must be understood in light of the child's best interests, which are "of primary concern" in all custody proceedings, including those under ICWA. *A-25525*, 136 Ariz. at 534, 667 P.2d at 234.

¶30 In *Yvonne L.*, this court addressed the question of what constitutes "good cause" for deviating from the preferences listed in § 1915(a).[8] 227 Ariz. at 423, ¶ 36, 258 P.3d at 241. There, the superior court found good cause to deviate from the first preference in § 1915(a) and decided to keep the children with foster families that wished to adopt them. *Id.* The mother

[8] 25 U.S.C. § 1915(a) states: "In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." Although § 1915(a) applies to adoptive placements, and § 1915(b) applies to preadoptive placements, both require the court to make a "good cause" determination. *Yvonne L.*, 227 Ariz. at 423 n.19, 258 P.3d at 241.

argued that the children should have been placed with her half-sister, and she asserted that her tribal nation had established that her half-sister was interested in being the children's guardian. *Id.* at 424, ¶ 37, 258 P.3d at 242. A social worker for the tribal nation, however, testified that the half-sister was uncertain of her willingness to be a guardian. *Id.* The half-sister had also told the social worker that she would not want to adopt the children. *Id.*

¶31 The tribal nation testified that the foster care placements were not "in accord" with ICWA and that it "struggled" with whether they were acceptable. *Id.* The tribal nation therefore preferred a guardianship, but it neither opposed nor supported severance and adoption. *Id.* According to the social worker, the tribal nation did not support the half-sister as a placement. *Id.* The only other family-placement option the mother suggested had been rejected because of a prior history with CPS and an inability to pass the criminal background check. *Id.*

¶32 On those facts, we held that the court did not abuse its discretion when it found good cause to allow the children to remain with their existing placements, despite the fact that the existing placements reflected a deviation from the ICWA preferences. *Id.* at 424, ¶ 38, 258 P.3d at 242.

¶33 Here, the court placed the Child with the Foster Parents rather than with Grandmother or some other relative. In terms of ICWA, the court opted to follow the preference in § 1915(b)(ii) instead of § 1915(b)(i). Mother argues that the court abused its discretion in doing so. We disagree.

¶34 The trial court heard evidence indicating that Grandmother, even though she had expressed an interest in being a temporary placement, articulated a lack of interest in being a permanent placement. Further, ADES testified that it had tried to obtain Grandmother's consent to a background check on those living in the house, but that Grandmother had refused. The trial court could have reasonably found that Grandmother, like the half-sister in *Yvonne L.*, was a family member who was unwilling and unprepared to serve as a safe, permanent placement.

¶35 Unlike the court in *Yvonne L.*, the trial court here had the full support of the Nation. The Nation agreed that the Foster Parents were a suitable "Tier 2" placement, i.e., they qualified as an ICWA placement under § 1915(b)(ii). It also argued that it was preferable to keep the Child near relatives who lived on the reservation rather than to send the Child to live with family members off of it. That comports with the court's good cause determination that it was preferable to allow

the Child to "remain in [her] home nation" and to "have contact with [her] biological siblings."

¶36 That determination is neither manifestly unreasonable nor does it appear untenable when viewed in light of the Child's best interests.

CONCLUSION

¶37 We affirm the trial court's August 24 order allowing the Child to be placed with the Foster Parents.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge