IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ALEXANDRA K., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, I.G., *Appellees*.

No. 1 CA-JV 17-0493
FILED 5-8-2018

Appeal from the Superior Court in Maricopa County
No. JD527122
The Honorable Karen L. O'Connor, Judge

VACATED AND REMANDED

COUNSEL

McCarthy Weston PLLC, Flagstaff
By Philip McCarthy, Jr.
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Dawn Rachelle Williams
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Chief Judge Samuel A. Thumma and Judge James B. Morse Jr. joined.

H O W E, Judge:

¶1 Alexandra K. appeals the juvenile court's order denying her motion for change of physical placement regarding her adoptive son's biological sister, I.G. She also appeals the court's denial of her motion to compel visits between I.G. and her adoptive son, J.K.,[1] and the juvenile court's order dismissing her as a party. For the following reasons, we vacate the juvenile court's orders and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 In 2013, the Department of Child Safety removed I.G. and her older half-sister A.V. from their parents' custody and placed them in separate foster homes because of A.V.'s special needs. In her placement, I.G. developed a relationship with Willie and Erin T., her foster parents' adult children. I.G.'s mother initially stated that I.G. was potentially an Indian child under the Indian Child Welfare Act ("ICWA"), but the Navajo Nation informed the Department that neither I.G. nor her mother were tribal members. In 2014, I.G.'s mother gave birth to J.K., whom Alexandra privately adopted.

¶3 In August 2015, I.G.'s parents asked Alexandra to become her placement. Alexandra then moved to intervene and requested a change in physical custody from I.G.'s current placement to her. The court denied Alexandra's motion to intervene in November. In December, the court terminated I.G.'s parents' parental rights. In doing so, the court found that ICWA did not apply and that I.G.'s parents had requested that Alexandra adopt I.G. The court allowed Alexandra intervenor status "for the purpose of determining [I.G.'s] permanent placement." During this time, Willie and Erin T. expressed an interest in adopting I.G. At the Department's request,

[1] I.G. has other siblings, A.V. and J.K., but they are not subject to this appeal.

the court ordered a change in physical custody and I.G. was placed with Willie and Erin T., where she has remained throughout these proceedings.

¶4 Before an evidentiary hearing to determine I.G.'s permanent placement, Alexandra helped I.G.'s biological mother enroll in the Navajo Nation, thereby making I.G. eligible for enrollment. Alexandra then requested that I.G.'s case be subject to ICWA, which the juvenile court granted in May 2016. Over the course of three days, the court heard evidence to determine I.G.'s permanent placement. The court determined that it would not apply ICWA because I.G. had not been subject to ICWA until after her biological parents' rights were terminated. The court then found that I.G.'s best interests were to stay with Willie and Erin T. because she had been with the family since she was 11 months old and "mov[ing] her from this secure relationship would cause her significant and unnecessary trauma." Thus, the court denied Alexandra's motion for change of physical custody. Alexandra appealed the juvenile court's order.

¶5 This Court vacated the juvenile court's order and remanded for reconsideration of I.G.'s permanent placement compliant with ICWA. A month after our disposition, Alexandra requested an evidentiary hearing and moved for custody of I.G. and for a finding of good cause to deviate from ICWA's placement preferences. The Department agreed that an evidentiary hearing was necessary to determine if good cause existed to deviate from ICWA's adoptive placement preferences. Both Appellant and the Department agreed that the court would consider all evidence admitted at the initial hearings as well as the evidence to be admitted at the August 2017 hearing.

¶6 At the August hearing, I.G.'s biological parents testified that they preferred that I.G. be permanently placed with Alexandra. The Navajo Nation's social worker also testified that the Nation preferred placing I.G. with Alexandra because she was committed to maintaining a relationship with the Navajo culture. The Department's case manager testified that the Department had not located any ICWA compliant placement preferences and that the Navajo Nation did not provide any ICWA compliant placements.

¶7 Two months later, the juvenile court found good cause to deviate from ICWA placement preferences and denied Alexandra's motion for change of I.G.'s physical custody. The court stated that two permanent placement options existed for I.G.: she could either remain with Willie and Erin T. or be placed with Alexandra. The court noted that both Alexandra and Willie and Erin T. acknowledged that they did not qualify as an ICWA

preferred placement under 25 U.S.C. § 1915(a), and both asserted that good cause existed to deviate from the ICWA placement preferences.

¶8 The juvenile court then applied 25 C.F.R. § 23.132(c), the federal regulation that guided the determination whether good cause exists to depart from ICWA placement preferences. The court noted that both of I.G.'s biological parents and the Navajo Nation requested that I.G. be placed with Alexandra notwithstanding Alexandra's and I.G.'s lack of an established relationship. The court also found that the Department had complied with ICWA by diligently searching for an ICWA preferred placement and that "[t]o-date, no ICWA compliant-placements [were] located or available to [I.G.]" Additionally, the court found that I.G. had no sibling attachment to J.K. and that Willie and Erin T. maintained I.G.'s sibling relationship with A.V. Finally, the court found that permanent placement with Willie and Erin T. was in I.G.'s best interests because she had lived with their family since she was 11 months old and that moving I.G. "from this secure relationship would cause her significant and unnecessary trauma." Accordingly, the court found that good cause existed to deviate from ICWA's placement preferences and denied Alexandra's motion for change of physical custody.

¶9 On the day the court issued its ruling, Alexandra moved to compel visitation between I.G. and J.K. I.G.'s guardian ad litem objected and moved to dismiss Alexandra as a party now that the court had ruled on I.G.'s permanent placement. The court denied Alexandra's motion and granted the motion to dismiss Alexandra as a party. Alexandra timely appealed both orders.

¶10 While the appeal was pending, Alexandra moved to supplement the issues and record on appeal to address the Department's failure to comply with the Intergovernmental Agreement ("IGA") between the Navajo Nation and the State. She contended that the IGA was "of critical importance in this appeal" because it changed the order of the ICWA adoption placement preferences, thereby qualifying her as a preferred placement under ICWA. We granted Alexandra's motion and the parties submitted supplemental briefing on that issue.

DISCUSSION

¶11 Alexandra argues that the juvenile court erred by finding good cause to deviate from ICWA's placement preference as to Willie and

Erin T.[2] She argues specifically that the juvenile court failed to properly apply 25 C.F.R. § 23.132. We review ICWA's interpretation and applicability de novo, *Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, 156 ¶ 7 (App. 2000), but we review a good cause finding to deviate from ICWA preferences for an abuse of discretion, *Navajo Nation v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 339, 343–44 ¶ 14 (App. 2012).

¶12 By statute, in considering adoptive placements for an Indian child under ICWA, "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." 25 U.S.C. § 1915(a). When considering whether good cause exists, the court's determination should be based on one or more enumerated considerations, which include the request of the Indian child's parents, "[t]he presence of a sibling attachment that can be maintained only through a particular placement," and the unavailability of an ICWA preferred placement "after a determination by the court that a diligent search was conducted[.]" 25 C.F.R. § 23.132(c)(1), (3), (5).

¶13 These provisions may be altered, however, through intergovernmental agreements: "States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children[.]" 25 U.S.C. § 1919. For adoptive placement under 25 U.S.C. § 1915(a), if the Indian child's tribe establishes a different preference order by resolution, "the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child[.]" 25 U.S.C. 1915(c).

¶14 The Navajo Nation and the State have altered these preferences by entering into a binding IGA. The IGA's placement preferences section provides in relevant part that in the absence of good cause to the contrary, placement of a Navajo child shall be made pursuant

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[2] As a preliminary matter, the Department challenges jurisdiction under *Jewel C. v. Dep't of Child Safety*, 2 CA-JV 2017–0083, 2018 WL 703321 (Ariz. App. Feb. 5, 2018). We need not consider that issue because—as the Department concedes—we can assert special action jurisdiction. *See Danielson v. Evans*, 201 Ariz. 401, 411 ¶ 35 (App. 2001) (accepting special action jurisdiction *sua sponte* after finding that the court lacked appellate jurisdiction); *see also State v. Bayardi*, 230 Ariz. 195, 197–98 ¶ 7 (App. 2012) (accepting special action jurisdiction *sua sponte* after finding it unclear whether the court had appellate jurisdiction). In our discretion, we elect to accept special action jurisdiction.

to *four* enumerated considerations. The first three considerations mirror the preferred placements found in 25 U.S.C. § 1915(a). The fourth consideration is for "[o]ther adoptive family approved by the N[ation]."

¶15 Alexandra argues that she qualifies under the IGA as a preferred placement because the Navajo Nation approved of her adopting I.G. She contends that the "IGA is a binding agreement and should have been the legal authority utilized by the juvenile court for purposes of I.G.'s placement with [her]." At oral argument, the Department agreed that the IGA should have been the legal authority utilized during the evidentiary hearing—and that the juvenile court did not apply the IGA—but nonetheless argued that the juvenile court's ruling could be affirmed because the court considered the Navajo Nation's preference for Alexandra. We disagree.

¶16 The juvenile court applied ICWA to I.G.'s permanent placement proceedings and found good cause to deviate from the preferred placements. The court did not, however, consider the IGA and the potential that Alexandra was an ICWA preferred placement because the IGA was not part of the record until after Alexandra appealed. Even though the court considered the Navajo Nation's preference, that consideration does not equate to considering Alexandra as a preferred placement under the IGA. In its ruling, the court made specific findings that neither Willie and Erin T. nor Alexandra qualified as a preferred placement under ICWA and that both placement options agreed good cause existed to deviate from ICWA for that reason. The court also found that the Department had made a diligent search to find an ICWA preferred placement but that none were available. In light of the IGA's binding effect, the record no longer supports these findings. Contrary to the Department's assertion, we are unable to determine whether good cause still exists to deviate from ICWA and the IGA because a fundamental part of the court's order was that no ICWA preferred placement existed and that the Department made a diligent search for such placement, which is not accurate.[3] We express no opinion, however, on the juvenile court's ultimate resolution of this issue.

[3] Because we vacate and remand for the juvenile court to reconsider its order in light of the IGA, we need not address Appellant's arguments that her due process rights were violated by the Department's late disclosure notice before the August evidentiary hearing or that the court erred by improperly weighing the 25 C.F.R. § 23.123(c) considerations.

CONCLUSION

¶17 For the foregoing reasons, we vacate the juvenile court's orders and remand to the juvenile court for proceedings consistent with this decision.

AMY M. WOOD • Clerk of the Court
FILED: AA