

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 12/06/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

JEFF O., KAREN O.,

Appellants,

v.

ARIZONA DEPARTMENT OF ECONOMIC
SECURITY, CHARNAE C., OLEDA O.,
DAVIN O.,

Appellees.

Court of Appeals
Division One
No. 1 CA-JV 11-0082

DEPARTMENT E

Coconino County
Superior Court
No. AD 2007-0009
DECISION ORDER

The court, Judges John C. Gemmill, Donn Kessler and Patrick Irvine, participating, has considered the opening brief, answering brief and trial court record. Appellants Jeff O. and Karen O., husband and wife (collectively, "Jeff"), appeal the juvenile court's denial of their motion to intervene in the adoption petition of three Navajo children by their non-Indian foster placement (the "foster parents"). For the following reasons, we affirm.

Jeff is a paternal uncle of the younger two children; the third child is an older half-sister unrelated to Jeff by blood. The children are subject to the Indian Child Welfare Act ("ICWA") of 1978. The children were placed with the foster

parents after unsuccessful attempts to place them with family and other ICWA-compliant options. Jeff initially declined to be considered for placement because he could not accommodate the children in his home. More than a year later, Jeff informed the Arizona Department of Economic Security ("ADES") that his circumstances had changed and he wished to take the two younger children. The oldest child, however, did not wish to be placed with Jeff or to be separated from her siblings. The biological parents also preferred the children to remain in the foster parents' home, where the children had frequent contact with the biological parents and other relatives who lived on the nearby Navajo reservation.

As a member of the children's extended family, Jeff has preference over all other placement options under 25 U.S.C. section 1915(a) (2006) of ICWA. Guidelines for the Bureau of Indian Affairs provide, however, that the trial court may deviate from ICWA preferences if there is good cause based upon "the request of the biological parents or the child when the child is of sufficient age." 44 Fed.Reg. 67584 § F.3(a) (Nov. 26, 1979). Accordingly, the biological parents signed an affidavit stating their request that all three children remain with the foster parents.

After a contested evidentiary hearing, the juvenile court found good cause to deviate from ICWA's placement preferences

("good cause finding"), based largely in part on the wishes of the biological parents and older child, and ordered that the children remain with the foster parents. See Coconino County Cause No. MD 2007-0014. The juvenile court permitted Jeff to intervene in that case. Jeff timely appealed that ruling and we affirmed the juvenile court. See 1 CA-JV 11-0019, 2011 WL 3820513 (Ariz. App. Aug. 30, 2011).

While that case was under advisement in this Court, ADES and the foster parents filed a petition in the juvenile court to adopt the children. Jeff moved to intervene in the adoption proceedings, arguing that it would be improper to proceed with the adoption before the appeal of the good cause finding was resolved. Jeff moved to stay the adoption proceedings. At a hearing on the motion to stay, the juvenile court denied his request, finding that Jeff had no standing because it had not yet received his motion to intervene.

Jeff filed a special action petition challenging the denial of his stay request. He argued that he had standing under ICWA because the good cause finding would likely be overturned on appeal. See 1 CA-SA 11-0085 (Ariz. App. April 4, 2011). This Court accepted jurisdiction and ordered a stay to the extent the juvenile court must first hear, consider and decide Jeff's motion to intervene before proceeding with the adoption hearing.

*Id.*¹ This Court expressed no opinion, however, "on the outcome which the trial court should reach as to the motion to intervene." *Id.* at 2.

At the hearing on the motion to intervene, Jeff argued for mandatory intervention under Arizona Rule of Civil Procedure ("Rule") 24(a) and permissive intervention under Rule 24(b). Jeff argued that he should be allowed to challenge the adoption based on his interests in visitation and placement of the children under ICWA. ADES responded that Jeff's ICWA-based challenges had already been addressed in the dependency proceedings and allowing them to be re-raised in the adoption proceedings would just prolong litigation without adding any new information. The foster parents echoed ADES's objections and urged the court to consider the children's need for permanency.

The juvenile court denied Jeff's motion to intervene and later granted the adoption petition. Jeff timely appeals from the denial of his motion to intervene.

On appeal, Jeff contends that he was entitled to intervene to (1) assert his rights to priority placement and visitation under ICWA; and (2) preserve his ability to bring an appeal of

¹ The Navajo Nation also moved to stay the adoption petition but was likewise denied. Although the Navajo Nation joined in the special action petition, this Court found that it lacked standing to request a stay in a majority decision on that issue. 1 CA-SA 11-0085. The Navajo Nation is not a party to this case.

the adoption order on those grounds. Jeff raised these same issues in the underlying dependency action and in the appeal of the good cause finding. Because we have recently affirmed that ruling, his claims of error on these grounds are moot.

Jeff additionally argues that the juvenile court did not adequately weigh the *Bechtel* factors before denying permissive intervention under Rule 24(b). We disagree.

In *Bechtel v. Rose*, 150 Ariz. 68, 72, 722 P.2d 236, 240 (1986), the trial court summarily denied the grandparents' motion to intervene in a dependency action involving their grandchildren. Our supreme court held that in determining a motion for permissive intervention, a court must consider relevant equitable and legal factors and make an individualized assessment on the record as to whether intervention would be in the child's best interests. *Id.* Our supreme court found an abuse of discretion because there was "absolutely no indication" that the trial court did so before it denied the grandparent's motion to intervene. *Id.* at 74, 722 P.2d at 242.

In contrast, the transcript of the hearing in this case shows that the juvenile court did weigh the *Bechtel* factors and made a finding on the record. Jeff raised *Bechtel* in support of his motion, and the parties argued whether the factors support intervention. Specifically, Jeff asserted a strong interest in visitation and the placement of the children under ICWA and

argued he should be allowed to raise these issues in the adoption proceedings. The foster parents and ADES responded that the trial court already determined these issues in finding good cause to deviate from ICWA, so intervention would not result in any additional information. They also argued that Jeff would suffer no harm because the adoption proceedings would not interfere with his appeal of the good cause finding, which if reversed, would be voidable under ICWA. They then asked the court to consider the children's need for permanency against the time they have already spent in foster care and urged the court not to prolong litigation.

After considering these arguments, the trial court concluded that "[intervention] would cause undue delay and it [was] not in the best interests of the children to delay that matter any further."² We find no abuse of discretion under *Bechtel*.

Finally, Jeff argues that proceeding with the adoption in his absence would likely result in an adoption order, which would effectively preclude this Court from granting relief in the dependency action. Such a result, he argues, would violate Arizona Rule of Juvenile Court Procedure 103(F), which limits

² Although the trial court incorrectly referred to the intervention as "the stay," it later clarified that it was actually addressing the motion to intervene.

the juvenile court's authority to consider new issues while an appeal is pending. Because we did not consider these adoption proceedings in our review of the dependency action, they had no effect on our resolution of that case. Therefore, we reject this claim.

For the foregoing reasons, we find no error. Therefore,

IT IS ORDERED affirming the juvenile court's denial of Jeff's motion to intervene in the adoption proceedings.

/s/

PATRICK IRVINE, Judge