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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ROBERT T., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, NATHANIEL C., AND NEVAHEA C., Appellees.	2 CA-JV 2010-0074 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J185773

Honorable Peter W. Hochuli, Judge Pro Tempore

AFFIRMED

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E S P I N O S A, Judge.

¶1 Robert T. is the maternal grandfather of six-year-old Nathaniel C. and four-year-old Nevahea C. He appeals from the juvenile court's June 2010 order finding good cause to deviate from placement preferences set forth in the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 through 1963, and denying his request that the children be removed from adoptive foster care and placed with him and his wife in their Texas home. For the following reasons, we affirm.

¶2 The juvenile court terminated the parental rights of both parents—Robert's daughter, Breanna T., and Jamie C.—on June 17, 2009. That termination order is not at issue on appeal. Nor do the parties dispute that Jamie is an enrolled member of the Wichita and Affiliated Tribes (the Tribe) or that the court correctly found these proceedings subject to ICWA. The only issue on appeal is whether the court misapplied the law or abused its discretion in directing that the children remain in their current adoptive placement. We examine de novo the meaning and application of the relevant provisions of ICWA, but otherwise review the court's placement decision for an abuse of discretion. *Cf. Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, ¶ 7, 7 P.3d 960, 962 (App. 2000) (motion to transfer jurisdiction under ICWA reviewed for abuse of discretion).

¶3 In its under-advisement ruling, the juvenile court provided a detailed history of facts relevant to its decision. We refer to those facts only as necessary to address Robert's arguments. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 16, 53 P.3d 203, 207-08 (App. 2002) (little gained by rehashing court's thorough

recitation of facts), *citing State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶4 Relying on ICWA's statement that, in the absence of good cause to the contrary, "a member of the child's extended family" shall be given preference as an adoptive placement for an Indian child, 25 U.S.C. § 1915(a),[1] Robert argues the Arizona Department of Economic Security failed to present sufficient evidence to warrant a deviation from that preference. He also contends the juvenile court misapplied certain evidentiary standards required by federal law.

¶5 Although guidelines promulgated by the Bureau of Indian Affairs (BIA) for applying ICWA are not binding, Arizona courts consider them instructive in construing the federal law. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979); *see also Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, ¶ 24, 190 P.3d 180, 186 (2008); *Ariz. Dep't of Econ. Sec. v. Bernini*, 202 Ariz. 562, ¶ 13, 48 P.3d 512, 515 (App. 2002). Relevant to this discussion, Guideline F.3, "Good Cause to Modify [Foster Care, Preadoptive, or Adoptive Placement] Preferences" provides:

> (a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above [in guidelines

[1]We agree with Robert that the juvenile court's ruling is best characterized as an adoptive placement in light of its order that ADES "transfer the case to the adoptions unit within 30 days of the date of this [o]rder so that the process of adoption may commence." *See* 25 U.S.C. § 1903 (1) (iv) ("'adoptive placement' . . . shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption").

> interpreting preferences in 25 U.S.C. § 1915] shall be based on one or more of the following considerations:
>
> (i) The request of the biological parents or the child when the child is of sufficient age.
>
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
>
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.
>
> (b) The burden of establishing the existence of good cause not to follow the order of preferences established in [§ 1915] subsection (b) shall be on the party urging that the preferences not be followed.

44 Fed. Reg. at 67, 594.

¶6 Initially, we address Robert's argument that the juvenile court erred in requiring Robert "to prove no good cause existed to deviate from the ICWA mandatory placement preferences," rather than requiring ADES to prove a deviation was warranted. After considerable discussion of this issue at the beginning of the placement hearing, the juvenile court directed Robert to proceed first because it was his motion to change the children's placement. But the court reserved ruling on the question of which party bore the burden of proof on whether a deviation from ICWA placement preferences was justified. In its under-advisement ruling, the court simply wrote:

> There are a number of factors that the Court must consider. The ICWA sets adoptive placement preferences that must be followed in absence of good cause that include placement with the child's extended family, other members of the Indian child's tribe, or other Indian families. See 25 U.S.C. Section 1915. In this case it is clear that [Robert] meets the placement

> preferences. He is the biological maternal grandfather to the children. The State and Minor are asking the Court to find good cause to deviate from that preference. [Robert] and the Tribe are asking the Court to abide by the preferences and place the children with [Robert].

¶7 Robert has failed to persuade us, in the first instance, that ADES bore the burden of proof on this issue. Although he suggests that BIA guideline F.3(b) supports his position, that provision is limited expressly to foster care and pre-adoptive placements addressed in "subsection (b)" of § 1915, and thus does not apply to adoptive placements, like this one, which are governed by subsection (a) of that statute. Moreover, assuming, without deciding, that ADES bore the burden of proving good cause existed to continue the children's placement in adoptive foster care, notwithstanding ICWA preferences, nothing in the record persuades us the court improperly shifted the burden of proof on this issue to Robert. Like the court below, we distinguish between the burden of proof and the order of presentation of evidence. *Cf. State v. Shanahan*, 10 Ariz. App. 215, 217, 457 P.2d 755, 757 (1969) (noting "traditional rule in Arizona that the order of proof is entirely within the discretion of the trial judge . . . .") *citing* Udall, Arizona Law of Evidence, § 4, p. 12 (1960).

¶8 For similar reasons, we disagree with Robert's assertion that ADES was required to prove by clear and convincing evidence that "good cause" existed for deviating from ICWA preferences. In support of this contention, Robert cites 25 U.S.C. § 1912(e), which requires clear and convincing evidence that the initial removal of an Indian child from his parent's custody is required to prevent the likelihood of "serious emotional or physical damage to the child." But Congress did not expressly establish a

heightened standard of proof with regard to deviation from the placement preferences in § 1915, and presumably would have done so if clear and convincing evidence were required. *See* § 1912(e); *see also Matter of Adoption of F.H.*, 851 P.2d 1361, 1363 (Alaska 1993) (requiring "burden of proof by a preponderance of the evidence" for deviation from ICWA placement preferences).

¶9 With respect to Robert's argument that there was insufficient evidence for the juvenile court to find "good cause" to deny his request for placement, Robert asserts the court "placed inappropriate weight" on different aspects of the evidence presented. But we do not reweigh the evidence, and we defer to the fact-finder's resolution of conflicting testimony. *See Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, ¶ 22, 159 P.3d 562, 567 (App. 2007). Robert is correct that the court did not expressly find he was not a suitable placement for the children, *see* BIA Guideline F.3(a)(3), 44 Fed. Reg. at 67, 594. Such a finding, however, was implicit in the court's detailed minute entry and its expression of "grave concerns" about such a placement "based on [Robert's] past behaviors with his own children, his lack of contact with his grandchildren, and his failure to protect his grandchildren" when he had reason to suspect his daughter was using drugs. Moreover, as ADES points out, the children's therapist testified they are bonded to their foster family and moving them would cause emotional setbacks and could have adverse long-term effects on their psychological and emotional welfare. Other courts have found such evidence sufficient to support a finding of good cause to deviate from ICWA placement preferences. *See* BIA Guideline F.3(a)(2), 44 Fed. Reg. at 67, 594 (deviation from placement preferences justified by "extraordinary physical or

emotional needs of the child as established by testimony of a qualified expert witness"); *see also In re Maricopa County Juv. Action No. A-25525*, 136 Ariz. 528, 534, 667 P.2d 228, 234 (App. 1983) (child's bonding with adoptive mother and evidence child's removal would cause "psychological damage" relevant in finding good cause for deviation from ICWA's adoptive placement preference); *cf. In re Maricopa County Juv. Action No. JS-8287*, 171 Ariz. 104, 109, 828 P.2d 1245, 1250 (App. 1991) (considering strength of bond with foster parents relevant to "good cause" in denying transfer of jurisdiction under ICWA).

¶10 Finding no error in the juvenile court's application of the law and no abuse of discretion in its placement decision, the court's ruling is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge