STATE OF MINNESOTA
IN COURT OF APPEALS
A09-885

In the Matter of the Welfare of the Children of:
M. A. and T. C., Parents.

Filed November 17, 2009
Affirmed
Johnson, Judge

Dakota County District Court
File No. 19-J8-07-058586

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Considered and decided by Lansing, Presiding Judge; Stoneburner, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

The Dakota County District Court transferred permanent legal and physical custody of two children from their parents to a friend of the family. Because the children's mother is a member of the White Earth Band of Ojibwe, the Indian Child Welfare Act (ICWA) applies. On appeal, the parents argue that the district court erred because efforts to reunify the family were not culturally appropriate and because there is not good cause to overcome the ICWA's preference for placement in the home of the children's maternal grandmother. We conclude that the evidence supports the district court's findings of fact and conclusions of law and, therefore, affirm.

FACTS

M.A. and T.C. are the parents of two girls who are the subjects of this case. S.A.-C. presently is 11 years old, and T.A. presently is 5 years old.

In July 2007, law-enforcement officers searched the home of M.A. and T.C. and seized cocaine and marijuana. Law-enforcement officers contacted Dakota County Social Services because the controlled substances were located in places that were within the children's reach. In August 2007, the county filed a Children in Need of Protection or Services (CHIPS) petition pursuant to Minn. Stat. § 260C.007, subds. 6(8), 6(9) (2006). Later that month, the county notified the White Earth Band of the pending CHIPS matter, and a tribal representative attended subsequent hearings. In September 2007, the district court adjudicated the children to be in need of protection based on the parents' general admissions.

The children continued to reside in their parents' home until a special-review hearing in November 2007, at which the district court addressed ongoing issues of drug and alcohol abuse and domestic violence by and between the parents. At the special-review hearing, the district court decided to place the children in foster care. M.A. requested that the children be placed in foster care with B.K., a friend of M.A. who also is S.A.-C.'s godmother. The tribal representative approved of the foster-care placement with B.K. Michelle Ham, the assigned county social worker, worked with M.A. and T.C. to develop an out-of-home placement plan. The plan required both parents to complete parenting and psychological evaluations, complete counseling for domestic violence, and actively participate in treatment for chemical dependency. On several occasions, Ham asked M.A. if there were any relatives who could be considered as a possible placement option. Each time, M.A. declined to identify anyone.

In March 2008, Ham learned that M.A. previously had given birth to six other children. M.A.'s parental rights to two of those six children were involuntarily terminated, and she voluntarily terminated her parental rights to the other four children. Ham also learned that M.A. had received social services in Hennepin County for 14 years, during which time she struggled with chronic alcohol abuse and domestic violence.

In October 2008, by which time the children had been in foster care with B.K. for 11 months, the county petitioned to transfer permanent legal and physical custody of the children to B.K. After the county filed the petition to transfer custody, C.A., who is the children's maternal grandmother, identified herself as a possible placement option. C.A. indicated to Ham and a family therapist that she had not previously volunteered because

she was afraid of T.C. and was worried about her ability to keep herself and the children safe from him. C.A. was concerned because T.C. previously had threatened her with a knife and recently had threatened to kill M.A. if C.A. became involved in the pending CHIPS proceeding.

Ham immediately began assisting C.A. by providing services and attempted to determine whether C.A. could be a temporary placement option for the children. Ham, however, became increasingly concerned about whether C.A. could adequately protect the children because of her interactions with M.A. and T.C. C.A. admitted that M.A. and T.C. typically stay overnight at her home approximately one night per week. Ham was concerned about C.A.'s ability to distance herself from the parents if the children were placed with her. Ham also learned that C.A. had not had much contact with the children and that neither of the children was very familiar with her. Ham ultimately concluded that C.A. would not be an appropriate person for a foster-care placement.

In March 2009, the district court held a trial on the petition to transfer permanent legal and physical custody of the children to B.K. Six witnesses (Ham, a child psychologist, a family therapist, a parenting educator, the tribal representative, and the guardian ad litem) testified that the county had made active efforts to reunify the family but that, despite those efforts, neither M.A. nor T.C. could be effective parents in the reasonably foreseeable future. The same witnesses also testified that the children likely would experience emotional or physical harm if they were returned to either parent. In addition, five of the six witnesses identified above (all except the tribal representative) testified that good cause exists to overcome the ICWA's preference for placement with a

member of an Indian child's extended family and that it would be in the children's best interests if legal and physical custody were transferred to B.K. In contrast, the tribal representative testified that it would be in the children's best interests for legal and physical custody to be transferred to C.A.

In April 2009, the district court issued an order in which it concluded that good cause exists to overcome the ICWA's preference for placement with a relative. Accordingly, the district court transferred legal and physical custody of S.A.-C. and T.A. to B.K. M.A. and T.C. appeal.

D E C I S I O N

M.A. and T.C. challenge the district court's decision to transfer legal and physical custody of the children to B.K. rather than C.A. We review the district court's findings by determining whether they "address the statutory criteria, whether [they] are supported by substantial evidence, and whether [they] are clearly erroneous." *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990). "When applying the clearly erroneous standard, we view the record in the light most favorable to the district court's findings. That the record might support findings other than those made by the district court does not render the findings clearly erroneous." *Thompson v. Thompson*, 739 N.W.2d 424, 429 (Minn. App. 2007) (citation omitted).

I. Active Efforts

M.A. and T.C. first argue that the district court erred by concluding that "culturally appropriate services were provided to the Appellants to assist them in reunifying with their children."

The relevant provision of the ICWA provides, "Any party seeking to effect a . . . placement of . . . an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d) (2006). The term "active efforts" is not defined within the act. But "Minnesota courts have looked to the guidelines published by the Bureau of Indian Affairs (BIA Guidelines) for guidance in interpreting ICWA." *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 351 (Minn. App. 2007), *review denied* (Minn. Sept. 26, 2007); *see also In re Welfare of S.N.R.*, 617 N.W.2d 77, 81 (Minn. App. 2000), *review denied* (Minn. Nov. 15, 2000). The BIA Guidelines explain the term "active efforts" by stating: "These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the Tribe, Indian social service agencies and individual Indian care givers." Department of the Interior Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,592 (Nov. 26, 1979) (section D.2.); *see also In re Welfare of M.S.S.*, 465 N.W.2d 412, 418-19 (Minn. App. 1991) (quoting section D.2. of guidelines); *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. App. 2007) (relying on Minnesota Tribal/State Indian Child Welfare Agreement), *review denied* (Minn. Mar. 28, 2007).

M.A. and T.C. concede that the county made active efforts to reunify the family, but they argue that the county's efforts were not "designed to prevent the breakup of the

Indian family," *see* 25 U.S.C. § 1912(d), because "the services provided were not culturally appropriate as is required by the ICWA." M.A. and T.C. note that the tribal representative "expressed concerns about the cultural appropriateness of the services provided." The tribal representative's concerns related to the comments of a parenting educator during a supervised visitation session, who rebuked the parents concerning their conduct toward the children. The tribal representative testified that "a person of color may have a whole different perspective, a perspective on how visitation and progress may have been made for both of these parents." But the representative conceded on further examination that an Indian supervisor would have responded in the same way as the non-Indian supervisor in the specific circumstances at issue. The district court relied on the tribal representative's concession by finding that it was appropriate for the parenting educator to intervene.

Other parts of the district court record provide additional support for the district court's finding that the county's active efforts were "designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). For example, the tribal representative agreed with the out-of-home-placement plan in November 2007. Furthermore, at trial, the tribal representative was unable to identify any culturally specific services that had not been provided that would allow reunification. Moreover, M.A. and T.C. were given the option of working with American Indian Services and conducting their psychological evaluations at a culturally specific service agency, but they declined to do so.

Thus, the district court's finding that the county made active efforts "designed to prevent the breakup of the Indian family" is supported by substantial evidence.

II. Good Cause

M.A. and T.C. also argue that the district court erred by finding good cause to overcome the ICWA's preference for placement with a member of an Indian child's extended family. Specifically, M.A. and T.C. argue that the children should have been placed with C.A. because she is both a member of the children's extended family and a member of their tribe.

Under the ICWA, "When the court does not terminate parental rights . . . the transfer-of-legal-custody proceeding qualifies as a foster-care placement proceeding." *In re Welfare of Child of T.T.B.*, 710 N.W.2d 799, 804 (Minn. App. 2006), *rev'd on other grounds*, 724 N.W.2d 300 (Minn. 2006); *see also* 25 U.S.C. § 1903(1)(i) (2006). In any foster-care proceeding involving an Indian child,

> 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 U.S.C. § 1915(b) (2006). A "determination that good cause exists to avoid the placement preferences of § 1915 should be based upon a finding of one or more of the factors described in the [BIA] guidelines." *In re Custody of S.E.G.*, 521 N.W.2d 357, 363

(Minn. 1994). Pursuant to the BIA Guidelines, a determination of good cause must be based on one 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 [of section 1915].

Bureau of Indian Affairs Guidelines, 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979) (section F.3.(a)); *see also In re Welfare of S.N.R.*, 617 N.W.2d at 84-85 (quoting section F.3.(a) of guidelines); *In re Custody of S.E.G.*, 521 N.W.2d at 362 (same); *In re Adoption of M.T.S.*, 489 N.W.2d 285, 287 (Minn. App. 1992) (same).

The county contends that the district court properly found that all three bases of good cause are present. We need approve only one basis, and we believe that the third basis has the most evidentiary support. M.A. and T.C. do not dispute that "a diligent search has been completed for families meeting the preference criteria" but, rather, contend that C.A., a member of the children's extended family, was a suitable person. The district court's findings on this issue are as follows:

> [C.A.] is not an appropriate placement for the children. [C.A.] remains enmeshed in the parents' lives and will place the parents' concerns above those of the children. [C.A.] had a trial period of visits in which to demonstrate her ability to obtain and use necessary transportation resources and begin putting limits on the parents. [C.A.] chose not to use available transportation resources and exercised her weekend visits only when DCSS provided 100 percent of the

> transportation. [C.A.] chose not to begin putting limits on the parents and continued to let them reside in her home on a frequent basis. [C.A.] believes [M.A.] is a good mother. [C.A.] acknowledges she has no ability to control [M.A.] and is passive when presented with inappropriate behavior. [C.A.] claims she has a positive relationship with [T.C.] despite him breaking into her residence and threatening her with a knife. [C.A.] is aware [T.C.] has threatened to kill [C.A.] should [M.A.] end her relationship with [T.C.]. . . . [C.A.] spanked [T.A.] and hit [S.A.-C.] with a belt during the holiday visit. The children do not believe [C.A.] can keep them safe.

The evidentiary record supports the district court's finding that a suitable family meeting the ICWA's preference criteria is unavailable. C.A.'s behavior during visits with the children raised significant concerns about her ability to adequately protect the children from their parents. Several witnesses testified that there were significant safety concerns because C.A. is still aligned with the parents and does not recognize the emotional harm that they have caused to the children. Even though C.A. was seeking custody of the children, she had not set limits on M.A. and T.C. She continued to allow M.A. and T.C. to stay at her home with some regularity.

In addition, the record indicates that the children expressed concerns about C.A.'s ability to protect them and keep them safe if their parents were to be angry or aggressive. Some of these concerns stemmed from C.A.'s failure to intervene during a visitation session in which M.A. became very vocal and upset with the children because she found that S.A.-C.'s hair was pulled together with rubber bands. As a result of this incident, M.A.'s supervised visits with the children ceased. When asked about her passivity during this visitation session, C.A. stated, "I really thought I was protecting those kids by sitting

back and not getting involved in what was going on in that situation." C.A. testified that M.A. was "a very good mother" and that, other than M.A.'s tendency to fuss about S.A.-C.'s hair, she didn't see anything wrong with M.A.'s behavior during the visits she observed.

Furthermore, C.A. lacked initiative in developing a relationship with the children, which stood in contrast to B.K.'s efforts to help the children improve in their performance at school and to find stimulating extracurricular activities. C.A. acknowledged that she did not take advantage of her scheduled weekend visitations with the children unless Ham both dropped them off and picked them up at her home. C.A. explained that she could have taken the bus to visit the children at B.K.'s home but did not do so because it would have been inconvenient. This evidence indicates that C.A. likely would be unable to obtain necessary transportation for the children.

Thus, the district court's findings concerning the unsuitability of C.A. as a foster parent are supported by substantial evidence.

In sum, the district court did not err by transferring permanent legal and physical custody of S.A.-C. and T.A. to B.K.

Affirmed.