

IN THE UTAH COURT OF APPEALS

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| State of Utah, in the interest |) | MEMORANDUM DECISION |
| of A.D., C.D., J.T., and S.T., |) | (Not For Official Publication) |
| persons under eighteen years |) | |
| of age. |) | Case No. 20071011-CA |
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| L.D., |) | F I L E D |
| |) | (March 27, 2008) |
| Appellant, |) | 2008 UT App 111 |
| v. |) | |
| State of Utah, |) | |
| Appellee. |) | |

Seventh District Juvenile, Monticello Department, 170258
The Honorable Mary L. Manley

Attorneys: William L. Schultz, Moab, for Appellant
Mark L. Shurtleff, John M. Peterson, and Carol L.C.
Verdoia, Salt Lake City, for Appellee
Martha Pierce, Salt Lake City, Guardian Ad Litem

Before Judges Thorne, Bench, and Billings.

PER CURIAM:

L.D. (Grandfather) appeals the juvenile court's order terminating his custody and guardianship of his grandchildren and placing them in the custody of the Division of Child and Family Services (DCFS). We affirm in part and set specific issues for further briefing.

A juvenile court's findings of fact will not be overturned unless they are clearly erroneous. See In re E.R., 2001 UT App 66, ¶ 11, 21 P.3d 680. A finding of fact is clearly erroneous only when, in light of the evidence supporting the finding, it is against the clear weight of the evidence. See id. Additionally, a juvenile court has broad discretion regarding judgments, based on the juvenile court's specialized experience and training, as well as its ability to judge credibility firsthand. See id. In reviewing a juvenile court's order, this court "will not disturb

the juvenile court's findings and conclusions unless the evidence clearly preponderates against the findings as made or the court has abused its discretion." In re R.A.J., 1999 UT App 329, ¶ 6, 991 P.2d 1118.

Grandfather asserts that the juvenile court erred in excluding him from the courtroom while the children testified.¹ Rule 37A of the Utah Rules of Juvenile Procedure permits a child witness to testify outside of the presence of a parent or guardian. See Utah R. Juv. P. 37A(b). To justify excluding a party under this rule, the court must first determine that the child "will suffer serious emotional or mental strain if required to testify in the party's presence, or that the child's testimony will be unreliable if required to testify in the party's presence." Utah R. Juv. P. 37A(b)(1).

Grandfather argues that the juvenile court erred in determining that the children would suffer serious emotional or mental strain testifying in his presence because each had said that they could testify in his presence if they had to. Given the entirety of the evidence, the juvenile court's determination that the children would suffer serious strain or that their testimony would be unreliable was not clearly erroneous. The court heard both expert witness testimony and direct testimony from the girls before determining that Grandfather should be excluded from the courtroom. The expert witness opined that the children would experience severe strain testifying in the presence of their abuser because they all feared Grandfather. Each child testified that they were afraid of Grandfather and that they did not want him to be present. Additionally, the court observed that the girls' demeanor and body language changed when they knew that Grandfather was listening, indicating stress and anxiety. One child specifically noted that she would have trouble "thinking straight" if Grandfather were present. Overall, the juvenile court had sufficient evidence to support its determination that the children "would suffer serious emotional or mental strain" if Grandfather was present during their testimony and therefore properly excluded him.

Grandfather also argues that rule 615 of the Utah Rules of Evidence would prohibit his exclusion. See Utah R. Evid. 615. Further, he asserts that the trial court should have removed the children from the courtroom rather than removing him to chambers. Neither of these issues were preserved below.

1. Both Mother and Grandfather were excluded from the courtroom, but Grandfather has no standing to assert that Mother's exclusion was in error.

Generally, this court will not address issues raised for the first time on appeal. See In re E.R., 2001 UT App 66, ¶ 9. To preserve a substantive issue for appeal, a party must raise the issue before the trial court. See Hart v. Salt Lake County Comm'n, 945 P.2d 125, 129 (Utah Ct. App. 1997). The issue "must be specifically raised, such that the issue is sufficiently raised to a level of consciousness before the trial court." Id. at 130. Here, although Grandfather resisted being excluded, he did not specifically object on these grounds, raised for the first time in his petition on appeal. Accordingly, we will not consider them on appeal.

Grandfather also asserts that there was insufficient evidence to find the children were abused and, therefore, they should be removed. Grandfather argues that he had logical explanations for particular events. However, the juvenile court found Grandfather, and Mother as his ally, to lack credibility. The girls' testimony provided sufficient evidence of abuse. Each testified to a pattern of abuse. The girls' testimony was consistent as to when the abuse began and how Grandfather treated each of the children. Their testimony was the direct evidence of abuse. Additionally, testimony from expert witnesses established that the children would be at risk if returned to Grandfather. The juvenile court had sufficient evidence to support its determination that the children were abused and should be removed from the home.

Finally, Grandfather asserts that the juvenile court failed to comply with the Indian Child Welfare Act (ICWA). See 25 U.S.C. §§ 1901-19 (2000). In state court proceedings involving the custody of a child who is a member of an Indian tribe, the tribe must be given notice of the proceedings and an opportunity to intervene. See id. § 1912(a). Additionally, to justify a removal from an Indian custodian, the juvenile court must find by clear and convincing evidence that continued custody by the Indian custodian "is likely to result in serious emotional or physical damage to the child." Id. 25 U.S.C. § 1912(e). DCFS must also satisfy the juvenile court that active efforts have been made to prevent the breakup of the Indian family and that the efforts have been unsuccessful. See id. § 1912(d). Furthermore, certain preferences in placing children in foster homes are required unless good cause is shown. See id. § 1915(b).

Here, the record shows that notice was sent to the Navajo tribe, providing notification of the ongoing proceedings and the opportunity to intervene. Additionally, at trial, expert testimony was provided by two experts, both opining that returning the children to Grandfather would likely result in

serious emotional and physical harm. The juvenile court properly made the required finding under section 1912(e).

However, the issue of the juvenile court's compliance with other ICWA requirements warrants further briefing. Accordingly, briefing is requested on the following issues:

(1) Whether the juvenile court properly determined that DCFS made active efforts to prevent the break up of the Indian family, and;

(2) Whether the juvenile court complied with ICWA regarding applying the required preferences or determining good cause excused the preferences in the placements of the children.

Accordingly, the briefing schedule on these issues will proceed and will be provided by separate order. The juvenile court's order is affirmed as to the other issues identified in the petition on appeal.

William A. Thorne Jr.,
Associate Presiding Judge

Russell W. Bench, Judge

Judith M. Billings, Judge