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IN RE INTEREST OF ENRIQUE P. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. DARLENE H., INTERVENOR-APPELLANT.

813 N.W.2d 513

Filed April 17, 2012. No. A-11-662.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. ____: ____. An appellate court reviews questions of law independently of the juvenile court's conclusions.
3. **Indian Child Welfare Act: Child Custody: Appeal and Error.** Under the Indian Child Welfare Act, factual support must exist in the trial record for the purpose of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Reversed and remanded for further proceedings.

Jonathan Seagrass, of Legal Aid of Nebraska, for appellant.

No appearance for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

MOORE, Judge.

INTRODUCTION

Darlene H., the maternal grandmother of the children in this case, appeals from an order of the separate juvenile court of Douglas County, which ordered the immediate cessation of all efforts by the Nebraska Department of Health and Human Services (the Department) to place the children with relative foster care or adoptive placements. On appeal, Darlene alleges that the court erred in deviating from the placement preferences set forth in the federal Indian Child Welfare Act (ICWA) and the Nebraska Indian Child Welfare Act (NICWA) without making a finding of good cause for such deviation. The State has waived filing a brief in this case. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev.

2008), this case was ordered submitted without oral argument. Because we find that the juvenile court erred in ordering the cessation of all efforts for relative placement, we reverse the order and remand the cause for further proceedings.

BACKGROUND

This case revolves around the ongoing and longstanding juvenile proceedings involving four children: Enrique P. (born in June 1993), Carina P. (born in December 1995), Christian P. (born in November 1999), and Christianna P. (born in December 2001). In 2003, the children were adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) in that they lacked proper parental care by reason of the faults or habits of their mother, Shannon P. Because of the children's enrollment, or eligibility for enrollment, in the Omaha Tribe, the NICWA has been applied to the case. The Omaha Tribe was given leave to intervene as a party in March 2004.

Shannon died in January 2007. The Department has been unsuccessful in its attempts to locate the children's alleged fathers. Darlene was given leave to intervene as a party in May 2007. The children have been in numerous out-of-home placements since 2003, and for several years, the permanency objective has been adoption. A previous appeal by Darlene following orders entered in 2009 and 2010 was dismissed, for lack of an appealable order, in a decision without opinion on May 19, 2010, in case No. A-10-329.

The present appeal arises out of orders entered by the juvenile court following an adoption review and permanency planning hearing held on June 16, 2011. This hearing was held at the request of the children's guardian ad litem (GAL), who filed a motion for early review alleging that there had been no movement toward obtaining permanency for the children since the previous court date and asking that the matter be set for an early review to assess the progress of the case toward achieving permanency.

The court received various exhibits into evidence, including a June 9, 2011, court report from the Department, a report from the State Foster Care Review Board (FCRB), and a report from the GAL. In addition, the caseworker who had been assigned to

the case since May 3, 2011, and who prepared the court report, also testified about the Department's efforts to locate adoptive placements for the children.

The record shows that since entering foster care in June 2003, Enrique has lived in 9 foster homes, Carina has lived in 14 foster homes, Christian has lived in 13 foster homes, and Christianna has lived in 11 foster homes. All of the children were placed together in a potential adoptive home in Minnesota in 2009; however, this placement lasted only about 3 months due to allegations by Christianna of physical abuse that eventually proved to be unfounded. The children were returned to Omaha, Nebraska, where they have remained.

At the time of the June 2011 hearing, the permanency objective for all of the children was adoption. Enrique is 18 years old (he turns 19 in June 2012), Carina is 16, Christian is 12, and Christianna is 10. Enrique and Christian are placed together with foster parents who are willing to provide permanency, either through adoption or guardianship. The boys are doing well in this placement and have indicated that they would be happy to remain with their current family. Enrique has stated that he does not want to be placed with relatives due to the length of time it has taken them to care for him and his siblings. Christianna's current foster mother reportedly does not wish to provide permanency for Christianna through adoption or guardianship; however, she is willing to continue to provide foster care to Christianna for as long as necessary. Due to the lack of a permanent placement for Christianna, the caseworker made attempts to contact a relative of Christianna's living in Macy, Nebraska, and also attempted to contact a relative living in Sioux City, Iowa, apparently without any positive results. We note that the only mention of seeking relatives for purposes of placement in the court report was in regard to Christianna. At the time of the June 2011 hearing, Carina was in the process of receiving inpatient treatment for substance abuse and other issues, but she had expressed a desire to return to her most recent foster placement upon completion of her treatment. Carina's most recent foster mother was willing to provide permanency for Carina through adoption or guardianship.

In the court report, the caseworker stated that the children needed to obtain permanent homes immediately due to the length of time the children had been in foster care and the number of placements. The court report recommended continued custody of the children in the Department for appropriate care and placement and showed the goal of achieving the primary permanency plan of adoption by July 1, 2011, for all four children. Because the children remain tightly bonded to one another, the Department continued to support sibling visits and agreed to facilitate a continuance of sibling visits once the children were in permanent homes. The court report indicated that the Department would continue to pursue relatives "for the purpose of maintaining connections with family member[s]." According to the testimony of the caseworker, the efforts he had been making to contact relatives were not interfering with other efforts the Department was making to locate adoptive placements for the children.

The GAL opined in her report dated May 25, 2011, that the children's current placements were in their best interests. The GAL also expressed her belief that Enrique, Christian, and Christianna had found homes willing to provide permanency for them and recommended that permanency for those three children be secured as soon as possible. With respect to Carina, the GAL noted that Carina had expressed a desire to return to her former foster home upon completion of her treatment and that the former foster parents had expressed a desire to have Carina in their home. The GAL recommended that the Department facilitate therapy between Carina and her former foster parents while Carina was in the process of completing her treatment.

The FCRB, in its report dated June 2, 2011, noted current barriers to achieving adoption for the children, including the length of time the children had been in foster care; caseworker turnover; the Department's lack of contact or visitation with the children; Carina's behavioral issues; the fact that the Department was checking into relatives to take all four children, which would mean another placement disruption and more time in foster care; and a report by a child placement worker who did not believe that the children would do well

if placed all together again. The FCRB's recommendations for alleviating those barriers included ceasing efforts to locate relatives to take all four children together, making permanency and placement decisions for each child individually, pursuing adoption for Enrique and Christian in their current placement and completing their adoption as soon as possible, locating an adoptive placement for Carina, and questioning Christianna's foster parents about their willingness to keep her and the possibility of a guardianship. The FCRB report noted that the Department had received the names of three other relatives of the children and that the caseworker intended to follow up with them regarding potential placement of all of the children. The FCRB agreed with the permanency objective of adoption and stated that it would also support guardianship if necessary. The FCRB found that no progress had been made toward the permanency objective of adoption because the Department continued to check into relatives for adoption.

After receiving the documentary evidence and hearing the caseworker's testimony, the juvenile court asked for comments or objections regarding the recommendations outlined in the court report. The county attorney stated his agreement with the recommendations and informed the court, "We're starting to see some progress in terms of permanency for all the children. I think that's just the path we need to maintain at this point in time." The GAL noted that Christianna's placement was not an adoptive placement, even though Christianna felt at home there, and that accordingly, she did not know "how to resolve that issue." The GAL also stated that before Carina was placed back with her prior foster family, Carina and the family needed the opportunity to participate in family therapy to evaluate whether such a placement would be appropriate. During the discussion with the juvenile court, a representative of the FCRB expressed concerns that the Department was pursuing relative placement for all four of the children together. With regard to the search for relatives of the children, the FCRB representative asked the court to ensure individualized plans for the children as opposed to trying to put them all together and "starting over." Darlene's attorney asked that the search for relative placement continue. The county attorney stated that he did not see any reason why

the Department's search for relatives could not continue "if it's not hurting anything."

At the conclusion of the hearing, the juvenile court denied Darlene's request to continue the search for relative placement, stating that the Department's efforts to continue looking for relative placement were "hurting things." The court stated further:

> If the Department is out looking for placement after eight years with relatives, despite all efforts in eight years, then it means they do not have a permanent plan for these kids, and so that is not okay. It does impair our ability to provide for the kids emotionally and psychologically.

The court observed that Enrique and Christian were in a placement where they wanted to stay and stated that the parties did not need to look anywhere else. The court further stated that because the parties were pursuing foster placement of Carina with someone who was willing to provide permanency and because the court was "okay with that," it was time to quit looking for relative placements. With respect to Christianna, the court stated that "all searches are on." The court then stated that it would require Christianna's foster parents to meet with the GAL to determine what barriers were preventing the foster parents from seeking adoption or guardianship of Christianna.

On June 29, 2011, the juvenile court entered an order, finding, among other things, that the children should remain in the temporary custody of the Department for continued appropriate care and placement. The order did not include the court's ruling from the bench regarding the search for relative placement. Darlene filed a motion for an order nunc pro tunc, and on July 26, the court entered an order nunc pro tunc, correcting its June 29 order to include an order that "'[a]ll efforts by the . . . Department . . . to place the children with relative foster care or adoptive placements should end immediately.'" Darlene subsequently perfected her appeal to this court.

ASSIGNMENTS OF ERROR

Darlene asserts that the juvenile court erred in deviating from the placement preferences set forth in the ICWA and the

NICWA (1) when it ordered the Department to immediately stop all efforts to place the children with relative foster care or adoptive placements, (2) when no party had requested such an order, and (3) because it did not make any findings in the record that good cause existed to deviate from the placement preferences and regarding what good cause was shown.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012). An appellate court reviews questions of law independently of the juvenile court's conclusions. *Id.*

ANALYSIS

The juvenile court ordered the immediate cessation of all efforts by the Department to place the children with relatives for foster care or adoption, which is a deviation from the applicable placement preferences set forth in the ICWA and the NICWA. Neither the juvenile court's order of June 29, 2011, nor the nunc pro tunc order contained an explicit written finding of good cause for deviating from the ICWA placement requirements, although the court's statements from the bench show its reasoning for the order. Accordingly, the question before us in this appeal is whether the juvenile court erred in deviating from the placement preferences.

Neb. Rev. Stat. § 43-1508(2) (Reissue 2008), which is the equivalent to the federal ICWA's 25 U.S.C. § 1915(b) (2006), provides:

> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his or her special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with:

(a) A member of the Indian child's extended family;

(b) A foster home licensed, approved, or specified by the Indian child's tribe;

(c) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(d) 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.

(Emphasis supplied.)

In *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983), the Nebraska Supreme Court considered whether good cause had been shown to deviate from the placement preferences specified in the ICWA. In that case, the Indian child's mother was deceased and the father was unknown. The lower court terminated the parental rights of any potential father, ordered that the child's custody remain with the Department and that the child be placed for adoption, and continued temporary custody with the child's foster parents pending further disposition by the Department. The child's maternal aunt appealed, alleging, among other things, that the court erred in failing to follow the placement preferences outlined in the ICWA or to make any findings of good cause for not doing so. The record in that case showed that there were several possible placements for the child which had statutory preference over the placement with the current foster parents, who had no statutory claim of preference. Although the evidence showed that the foster parents were fit and proper persons to have custody, the lower court made no finding to that effect; nor did it make a finding about the fitness of the foster parents as compared to that of the statutorily preferred individuals.

[3] On appeal, the Nebraska Supreme Court noted that the ICWA did not strictly require placement with a statutorily preferred person or agency, but, rather, required only that the statutory preferences be followed in the absence of good cause to the contrary. The court observed that the only direct finding made by the lower court was that the child's aunt was unfit to have custody of the child, a finding that was supported by the evidence. However, the court observed that the evidence was uncertain and that no finding had been made below as to

good cause for failing to follow the statutory preferences with respect to the other preferred individuals or agencies. The court observed that the ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus." *In re Interest of Bird Head*, 213 Neb. at 750, 331 N.W.2d at 791. The court further stated that the legislative history of the ICWA showed that its "good cause" provision was intended to provide state courts with flexibility in determining the placement of Indian children. The court held that under the ICWA, factual support must exist in the trial record for the purpose of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives. See *In re Interest of Bird Head, supra*. Because the record lacked any findings by the lower court as to what good cause was shown for deviation from the placement preferences with respect to persons other than the child's aunt, the court remanded the cause for consideration of whether good cause existed not to place the child with other family or tribal members.

Neither the ICWA nor the NICWA defines what constitutes good cause for deviating from the statutory placement preferences; however, the Bureau of Indian Affairs has published nonbinding guidelines for determining whether good cause exists. We have previously looked to those guidelines for reference in NICWA cases concerning issues other than those present in this case. See, generally, *In re Interest of Melaya F. & Melysse F., ante* p. 235, 810 N.W.2d 429 (2011) (referencing guidelines for consideration of good cause not to transfer jurisdiction to tribe); *In re Interest of Ramon N.*, 18 Neb. App. 574, 789 N.W.2d 272 (2010) (referencing guidelines on issue of whether expert witnesses meet NICWA requirements). The Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594 (1979) (not codified), state, under subdivision (a) of the section "Good Cause To Modify Preferences," that for purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference in the ICWA 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.

The guidelines further state that the burden of establishing the existence of good cause not to follow the statutory preferences is on the party urging that the preferences not be followed. The commentary section following the above guidelines states that paragraph (iii) of the guidelines quoted above

> recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

Id. at 67,595.

In the present case, the juvenile court's written order required that all efforts to place the children with a relative for foster care or an adoptive placement end immediately. The order did not include any findings regarding good cause for deviation from the placement preferences set forth in the NICWA. However, the juvenile court did make oral findings at the conclusion of the hearing that such efforts were "hurting things" and that seeking relative placement "despite all efforts in eight years" was impairing the "ability to provide for the kids emotionally and psychologically." Assuming, without deciding, that such oral statements constitute a finding of good cause for deviation, we must determine whether the record supports such a finding. In conducting this analysis, we also assume, without deciding, that the court's order to cease seeking relative placement is analogous to a finding of good cause under the statute despite the court's failure to use the specific language of the

statute that good cause exists not to follow the placement preferences outlined therein.

In our de novo review, we conclude that the record does not support the order of the court that all efforts to seek relative placement shall end immediately. The evidence at the June 2011 hearing shows that the Department has been unsuccessful in locating relative placements for the children; however, the record does not detail what efforts have been made. Although Darlene has intervened in the proceedings and she filed this appeal, we do not know from this record why the children have not been placed with Darlene, although she makes no argument in this appeal that such should occur. Nor has Darlene asserted that the current placements for the children are not in their best interests. We also do not know from this record if the children's current placements meet any of the other statutory claims of preference. It appears from this record that the juvenile court, in making its decision to cease seeking relative placement, was reacting to the FCRB report. However, that report merely suggested that the Department stop efforts to find a relative placement for all four children together. The FCRB representative clarified at the hearing that it was suggesting an individualized approach for the children in connection with the search for relative placement.

The court's global statement, that all efforts to search for relative placement shall end, does not recognize the particular needs of each child in this case. It appears that the current foster family for the boys, Enrique and Christian, is willing to provide permanency to the boys; the boys are in favor of this permanent placement; and the Department, the GAL, and the FCRB believe that this is in the boys' best interests. The placement and adoption options for the girls, Carina and Christianna, are less certain, and the court's order effectively rules out family placement for them in the future. In addition, application of this broad order to Christianna is inconsistent with the court's oral statement that "all searches are on" for a permanent placement for her. As noted above, the court report reflects a search for relative placement by the Department for Christianna only and, otherwise, reflects that the search for relatives was "for the purpose of maintaining connections

with family member[s].” Finally, the caseworker testified that the search for relatives was not interfering with the pursuit of permanency for these children, and it is clear from the record that other permanency plans are being actively sought. As such, the record before us does not support the juvenile court’s finding that the search for relatives was presently “hurting things,” although such may have been the case in the past, which information we do not have in this record.

We acknowledge that these children need permanency and that such should occur as quickly as possible. However, the court’s order did not adequately address the requirements of the NICWA regarding placement preferences; nor does this record show good cause for the deviation, especially in the manner ordered by the court. As such, we reverse the July 26, 2011, order of the juvenile court requiring the Department to immediately end all efforts to place the children with a relative for foster care or an adoptive placement, and we remand the cause for further proceedings. Our ruling should not be construed as requiring the Department to find relative placement for any of these children; rather, we clarify that placements that do not fit within any of the preferences listed in § 43-1508(2) are to be made only upon a showing of good cause.

CONCLUSION

Because the juvenile court’s order requiring the Department to cease all efforts to place the children with a relative for foster care or an adoptive placement was not supported by good cause, we reverse the juvenile court’s order of July 26, 2011, and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.