Filed 6/26/18 In re B.T. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re B.T., a Person Coming Under the Juvenile Court Law.	B286290 (Los Angeles County Super. Ct. No. DK05046)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.L., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Steff R. Padilla, Commissioner. Affirmed.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sarah

Vesecky, Senior Deputy County Counsel, for Plaintiff and Respondent.

Shannon M. Franck and Leslie A. Barry for De Facto Parents M.V. and E.V.

M.L. (Father) is a member of the Cherokee Nation. He appeals juvenile court orders terminating his parental rights over his son, B.T. (Minor), and placing Minor with non-Indian prospective adoptive parents. The Indian Child Welfare Act (ICWA) and related California statutes require juvenile courts to make specific findings when terminating an Indian parent's parental rights and define placement preferences intended to preserve an Indian child's connection to his or her tribe. We consider whether the juvenile court's orders must be reversed (a) because the court did not find, beyond a reasonable doubt, Father's continued custody of Minor was likely to result in serious emotional or physical damage to the child, or (b) because it did not investigate placing Minor with Father's adult daughter, who never stated she was interested in taking custody of Minor.

I. BACKGROUND[1]

A. Proceedings Through the First Appeal

Minor's mother, A.T. (Mother), was separated from Father and living in a shelter when Minor was born in January 2014. Roughly two months after Minor was born, the Los Angeles County Department of Children and Family Services (the Department) received a referral alleging Mother was neglecting and abusing Minor. At the Department's recommendation, Mother enrolled in an inpatient alcohol and drug treatment

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[1] In reciting the pertinent background facts, we draw on our prior opinion in *In re B.T.* (Sept. 8, 2016, B268317) [nonpub. opn.].

program that permits children to live with parents undergoing treatment.

At about the same time, Father was taken into custody (after a revocation of bail) on a 2013 charge of domestic violence against Mother. Father was convicted and sent to prison.

Shortly after Mother and Minor entered the inpatient drug and alcohol treatment program, a staff member called the Department to express concern about Mother's ability to care for Minor. The Department obtained a removal warrant, placed Minor in foster care, and filed a Welfare and Institutions Code section 300[2] petition alleging Mother's substance abuse placed Minor at risk of harm. The Department later amended the petition to add an allegation concerning Mother's mental health.

The juvenile court found the allegations against Mother true (as further amended by interlineation). The court ordered family reunification services for Mother, but not for Father. Father had been identified as an alleged father at the time, but the Department was unable to locate him and he had not appeared in the proceedings.[3] Minor was placed with caregivers M.V and E.V. (who ultimately would be designated Minor's prospective adoptive parents).

The Department thereafter located Father in prison and notified him of the proceedings. He did not contact the

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[2] Undesignated statutory references that follow are to the Welfare and Institutions Code.

[3] Section 361.5, subdivision (b)(1) states reunification services need not be provided to a parent if a juvenile court finds by clear and convincing evidence the parent's whereabouts are unknown.

Department until a week after his release from custody, in February 2015. Shortly thereafter, Father filed a section 388 petition asking the juvenile court to "[v]acate all findings and orders concerning [Minor] and allow [Father] to have his day in court represented by counsel, including the opportunity to establish paternity and seek custody."

The juvenile court ordered DNA testing for Father, which established he was Minor's natural father, and granted a hearing on his section 388 petition. The court found the Department had not provided proper notice of the proceedings, but the court nevertheless concluded Father should be denied reunification services. The court reasoned: "[Father] knew Mother was pregnant and failed to make any effort to locate child and develop relationship. [The Department] notified [Father] in December 2014 and [Father] failed to request contact until two months later. Since he has been offered visits, he has missed over 50% of the authorized visits."[4] Father was, however, permitted to continue visiting Minor.

Soon after the hearing on Father's section 388 petition, the Department filed a section 342 petition[5] alleging Father's history of substance abuse and criminal history (including a "violent altercation" between Mother and Father in 2013) placed Minor at

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[4] Father filed a notice of appeal from the juvenile court's order. His appellate attorney filed an opening brief pursuant to *In re Phoenix H.* (2009) 47 Cal.4th 835, and we dismissed the appeal as abandoned.

[5] A section 342 petition is used to allege new facts or circumstances, other than those under which an original petition was sustained, that would further justify jurisdiction over a child under section 300.

risk of serious physical harm. The petition additionally alleged Minor was at similar risk from Father's history of domestic violence.

The Department's adjudication report discussed Father's multiple arrests for domestic violence: two incidents involving his ex-wife in 1999 and 2005, and the incident involving Mother in 2013. It also recounted his long history of substance abuse, including arrests for possession of cocaine and methamphetamine and several arrests for driving under the influence.

A last-minute information report for the juvenile court noted Father was not attending most of his allowed visits with Minor. The report also mentioned a social worker who performed a walk-through of Father's home was unable to view the entire residence because bedrooms belonging to a tenant and Father's adult son were locked. The report recounted a statement Father made during the home walk-through: "When talking about weapons in the home, [Father] stated that the adult son's room remains locked so that if Probation were to stop by they would know that whatever things his son has in his room aren't associated with him [i.e., Father]."

The juvenile court sustained the allegations in the section 342 petition. It ordered Minor removed from Mother and Father pursuant to section 361, subdivision (c) and again denied Father reunification services. Father appealed this order, contending the court erred in removing Minor from his physical custody because Minor never resided with him. We affirmed the order because any error was harmless: Father was not entitled to custody of Minor as an alleged (as opposed to a presumed) father and, regardless, a request for physical custody would have been denied as detrimental to Minor's well-being in light of Father's

history of substance abuse and domestic violence, the Department's inability to fully inspect his home, and Father's poor record of visiting Minor.

B. Father's Indian Ancestry and Reunification Services

Father became a registered member of the Cherokee Nation in February 2016. Prior to that, the Cherokee Nation took the position that Minor did not satisfy the definition of an Indian child under ICWA and the juvenile court ruled the case was not governed by ICWA.[6] After registering, Father filed a section 388 petition asking the juvenile court to revisit its ICWA orders.

The Cherokee Nation then intervened in the proceedings. Jay Silk (Silk), a Cherokee Nation child welfare specialist, submitted a declaration recommending the court find, among other things, that "active efforts HAVE NOT been provided by the [D]epartment to provide remedial services to [Father], to prevent the breakup of this Indian family as required by 25 U.S.C. § 1912(d)." The juvenile court deemed the case an ICWA case and ordered six months of reunification services for Father. Specifically, the court ordered Father "to participate in [a] 12-step program with a court card and sponsor," a "five-week domestic violence program," and "individual counseling to address [his] long drug and alcohol use and the effect on the children."

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[6] Title 25 United States Code section 1903(4) defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . . ."

Roughly six months later, the juvenile court terminated Father's reunification services because he was not in compliance with his case plan. The court explained: "It is a simple, straight forward case plan. It is not a difficult case plan. He needs to get clean. He needs to get sober. He needs to do a program. He has not done those things nor is he visiting on a consistent basis."

Noting the absence of any objection from Silk, the juvenile court found good cause to continue Minor's current placement with M.V and E.V., which represented a deviation from ICWA placement preferences. A last-minute information report prepared by the Department indicated Minor's current placement facilitated ongoing contact with siblings in the care of the maternal grandfather as well as participation in Indian cultural activities. The Department's report noted Father had identified only one potential alternative placement for Minor—Father's sister—but explained she could not even serve as a visitation monitor unless she obtained a waiver in light of her criminal record. She had failed to do so despite receiving instructions from the Department.

C. Termination of Father's Parental Rights

The juvenile court held a section 366.26 selection and implementation hearing in September 2017. Exhibits admitted at the hearing included several Department reports and a declaration from Silk. Silk's declaration stated the Department made "active efforts" to assist Father, which "failed due to [Father] not correcting the conditions that led to removal," and there was "Good Cause to deviate from Indian Child Welfare placement preferences as there [wa]s no available family or tribal home[ ]." Silk's declaration also stated "that beyond a reasonable

doubt the continued custody of the child . . . by the parents will likely . . . result in serious emotional or physical damage to the child."

Father was not present at the section 366.26 hearing, but his attorney argued his parental rights should not be terminated because the allegations against him were based on his dated "criminal record and past history." Minor's counsel argued for termination, emphasizing Father had not visited Minor in nearly a year and had failed to follow through on reunification services addressing substance abuse issues. The court asked Silk for his opinion regarding Minor's placement, noting that the current placement was a "non-I.C.W.A. compliant home." Silk acknowledged that and said: "I did talk to [Father] a couple days ago and he mentioned something about another relative. I would just like to mention it so that way it can be looked at. I don't know if the Department looked at it already or not. [¶] But I believe the Department has made every effort to locate family. But there's another member[, B.L., that] he mentioned to me; so I'd like to bring that up in court."[7]

The juvenile court ruled it would terminate both parents' parental rights, finding the Department "provided more—much more than active efforts" to Father. The court also found, beyond a reasonable doubt, "it's in the best interest of this child to

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[7] The B.L. that Silk mentioned (we use only her initials) is Father's adult daughter (Daughter). Daughter's only involvement in the dependency proceedings was writing a letter two years prior to the section 366.26 hearing that opined Father is "a good parent" and "deserves a chance to parent his son." Nothing in the letter suggested Daughter wanted or would be willing to take custody of Minor if Father could not.

terminate parental rights."[8] The court determined Minor was adoptable and ordered him "placed with the adoptive home with the same caretakers who have had [him] since [¶] . . . [¶] October[ ] 2014." The court believed this non-ICWA compliant placement was appropriate because "[t]here is no family at this time, and the court has repeatedly looked into family. [¶] The court has heard from the Cherokee Nation. They understand this is a non-I.C.W.A. approved placement, but it is—there is a ground for exception in this particular matter."

II. DISCUSSION

Father contends the juvenile court erred in terminating his parental rights based merely on a "best interest" finding and in deviating from ICWA's placement preferences without good cause. We find neither argument persuasive.

Although Father is correct that ICWA and related California statutes require more than a finding that terminating parental rights is in the Minor's best interest, there is no cause to reverse merely because the juvenile court made no finding on the record, beyond a reasonable doubt, that giving Father custody of Minor would be likely to result in serious emotional or physical damage to the child. Father's history of substance abuse and domestic violence, his failure to address these issues through

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[8] The juvenile court's written minute order states the court also found "beyond a reasonable doubt, including written testimony by a qualified ICWA expert and parent's waivers of ICWA expert's live testimony that continued custody of the children by the parents is likely to result in serious emotional or physical damage to the children." That finding was not made on the record by the court during the hearing.

family reunification services provided by the Department, his inconsistent visits with Minor, and Silk's declaration all establish no different outcome is reasonably probable but for the missing statutory finding. In addition, statutory placement preferences did not require the court to consider placing Minor with Daughter because Daughter never "came forward" as a placement option, as Father now suggests.

A. The Absence of a Finding That Minor Was Likely to Suffer Emotional or Physical Damage Does Not Warrant Reversal

Section 366.26, subdivision (c) defines circumstances in which a juvenile court both cannot and need not terminate parental rights over an Indian child.

As to the former (cannot terminate), section 366.26, subdivision (c)(2)(B)(ii) provides: "The court shall not terminate parental rights if: [¶] . . . [¶] (B) [i]n the case of an Indian child: [¶] . . . [¶] (ii) [t]he court does not make a determination at the hearing terminating parental rights, supported by evidence beyond a reasonable doubt, including testimony of one of more 'qualified expert witnesses' . . . that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child."[9] There is a parallel provision in

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[9] Similar requirements appear elsewhere in the Welfare and Institutions Code and California Rules of Court. (See, e.g., § 224.6, subd. (b)(1) ["In considering whether to involuntarily place an Indian child in foster care or to terminate the parental rights of the parent of an Indian child, the court shall: [¶] (1) Require that a qualified expert witness testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the

ICWA: "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(f).)

As to the latter (need not terminate), section 366.26, subdivision (c)(1) provides "the court *shall* terminate parental rights" when, among other things, "the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services," unless one or more exceptions apply. (Emphasis ours.) Pertinent here, subdivision (c)(1)(B) provides the court need not terminate parental rights when it "finds a compelling reason for determining that termination would be detrimental to the child [because] [¶] . . . [¶] (vi) [t]he child is an Indian child and . . . termination of parental rights would not be in the best interest of the child . . . ." This "Indian Child Exception confers broader discretion to the court, in the case of an Indian child, than it would otherwise possess at a permanency planning hearing to

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child."]; Cal. Rules of Court, rule 5.485(a) ["The court may only terminate parental rights to an Indian child or declare an Indian child free of the custody and control of one or both parents if at the hearing terminating parental rights . . . , the court: [¶] . . . [¶] (2) Makes a determination, supported by evidence beyond a reasonable doubt, including testimony of one or more 'qualified expert witnesses' . . . that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child"].)

consider whether termination would be detrimental to an adoptable child." (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1322.)

Here, the juvenile court found only that it was in Minor's "best interest" to terminate Father's parental rights—i.e., that the Indian Child Exception to section 366.26, subdivision (c)(1)'s mandate to terminate parental rights did not apply. The juvenile court made no finding on the record, as required by section 366.26, subdivision (c)(2)(B) and title 25 United States Code section 1912(f), that Father's continued custody of Minor was, beyond a reasonable doubt, likely to result in serious emotional or physical damage to Minor.

Reversal of the rights termination order under review, however, is required only if it is reasonably probable the juvenile court would not have made both of these findings. (See *In re A.L.* (2015) 243 Cal.App.4th 628, 640-643) [failure to address active efforts to prevent breakup of Indian family under section 366.26, subdivision (c)(2)(B)(i) and Rule of Court 5.485 was harmless "[b]ecause it was not reasonably probable that the finding, if made, would have been in [appellant's] favor"]; see also *In re A.C.* (2015) 239 Cal.App.4th 641, 654-656 [lack of expert evidence in support of juvenile court's finding under section 224.6 was harmless].)

Had Father raised a proper objection to the absence of the requisite finding,[10] it is obvious the juvenile court would have

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[10] The absence of an objection to the findings as made by the juvenile court on the record arguably forfeits Father's ability to challenge the lack of a section 366.26, subdivision (c)(2)(B) finding as error on appeal. (See, e.g., *In re G.C.* (2013) 216 Cal.App.4th 1391, 1398-1399.) Rather than engaging in a forfeiture analysis, however, we opt to resolve Father's contention

found Father's custody of Minor was likely to result in serious emotional or physical damage to Minor. This is so for several reasons. First, Silk's declaration satisfied the requirement that this finding be supported by testimony of a qualified expert.[11] Second, although Father notes there was no evidence of domestic violence after 2013, the risks to Minor remained serious because Father made negligible efforts to address them. (See *In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1413 [parent's "lack of participation in the proceedings" suggested nothing had "changed with regard to her ability to assume custody of the minor"].) Father's criminal record included multiple arrests for domestic violence, the most recent of which involved Father slapping Mother while she was pregnant with Minor, and reunification services were terminated because he failed to comply with the court's orders to address his substance abuse and domestic violence issues.[12] Third, Father exhibited little interest in

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on the merits in light of the strong evidence demonstrating no error was prejudicial.

[11] Father appears to argue the relevant opinion in Silk's declaration lacked foundation. We hold this contention *is* forfeited for lack of a contemporaneous objection.

[12] Father argues that "[b]ecause [he] declined any assistance from the [social] worker in enrolling [in a substance abuse program], she found him . . . to be very competent." Insofar as Father suggests the social worker's assessment of his "competence" is in any way related to his ability to care for Minor, the context of the social worker's report makes clear it is not so related. The social worker was only assessing his need for assistance in enrolling in a program: "The undersigned would ask if he needed any assistance with enrolling and he would decline any assistance. [Father] presented as very competent

visiting Minor throughout the proceedings and had failed to visit him at all for nearly a year prior to the section 366.26 hearing. And fourth, although Father claims "[t]here was no current information in the reports demonstrating a correlation between the condition of [Father's] home and any supposed threat to [Minor's] emotional or physical well-being," the court could infer a threat to Minor from the social worker's inability to inspect two locked rooms and Father's evasive response to the social worker's question about weapons in the home. Such an inference does not reflect generic disapproval of "crowded or inadequate housing." (See 25 C.F.R. § 23.121(d) (2018).) These facts, together, are strong evidence of an emotional and physical risk to Minor if placed in Father's custody.

B. No ICWA-Preferred Placement Was Available

With respect to foster care and pre-adoptive placements of Indian children, ICWA and related California law provide that preference shall be given to the following—in the order listed—in the absence of good cause to the contrary: (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) 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); § 361.31, subds. (b), (h).) 25 Code of Federal Regulations part 23.132(c)(5) provides "[t]he unavailability of a

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and actually mentioned knowing the director of one substance abuse treatment agency."

suitable placement" may constitute good cause to depart from placement preferences after "a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located."[13]

Father contends the juvenile court could not find good cause to depart from these placement preferences for lack of a suitable placement because it had failed to conduct a "diligent search"—particularly because it failed to consider Daughter, who as he puts it, had "come forward." Father asserts his position is supported by the United States Supreme Court's holding in *Adoptive Couple v. Baby Girl* (2013) 570 U.S. 637 (*Adoptive*

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[13] According to guidance issued by the Bureau of Indian Affairs (BIA), "[t]he determination of whether a 'diligent search' has been completed is left to the fact-finder and will depend on the facts of each case," but best practices require, among other things, "a showing that the agency made good-faith efforts to contact all known family members to inquire about their willingness to serve as a placement, as well as whether they are aware of other family members that might be willing to serve as a placement." (Bur. Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act (Dec. 2016) p. 62 <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf>.) The guidance is not binding because it is "the courts, not the Interior Department, [that] have the primary responsibility for interpreting 'good cause' as used in Section 1915." (*Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 643; see also *In re Alexandria P.* (2016) 1 Cal.App.5th 331, 347-349 [emphasizing nonbinding nature of guidance issued by the BIA].) While the BIA may be correct that these are indeed "best practices," we decline to enshrine such practices as the irreducible minimum required by ICWA or related California law. Good cause must be evaluated on the facts of each particular case.

Couple). In that case, the high court held ICWA's adoption preferences (25 U.S.C. § 1915(a)) do not apply "when no alternative party has formally sought to adopt the child." (*Adoptive Couple*, *supra*, at p. 656.) Father argues that "if the placement preference is applicable when a relative comes forward in an adoption case, this same policy would apply in a preadoptive placement."

Father's reliance on *Adoptive Couple* is unavailing on these facts. *Adoptive Couple* suggests a person who qualifies as a preferred foster care or pre-adoptive placement provider must express amenability to the proposed placement. We are not persuaded Daughter "came forward" in any sense that could plausibly satisfy such a requirement.

As reflected in the Department's reports from 2015 through 2017, the only alternative placement Father ever identified to the Department was his sister.[14] Father never identified Daughter as a placement option, nor did she seek placement on her own. Daughter did write a letter in support of Father two years prior to the selection and implementation hearing, but that fact undercuts, rather than supports, Father's argument. It would be one thing if the Department never contacted Daughter and she were unaware of the dependency proceedings. But her letter demonstrates she was aware of the proceedings, and there is no suggestion in the letter that she was willing to take, or even would consider taking, custody of Minor if Father could not. Rather, she advocated only that Minor be returned to Father.

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[14] Father does not now contend the juvenile court should have placed Minor with his sister. As discussed *ante*, Father's sister has a criminal record and failed to take steps necessary to qualify as a placement option.

That is not "formally s[eeking]" custody or "com[ing] forward." (*Adoptive Couple*, *supra*, 570 U.S. at p. 654.)

Furthermore, Father's eleventh-hour mention of Daughter during his communication with Silk was noncommittal even on its own terms: According to Silk, Father "mentioned something about another relative." This "mention" carries no indication Father was relaying Daughter's interest in taking custody of Minor nor even of his own request that Silk or the Department evaluate her for that purpose. Thus, we need not resolve precisely what steps a prospective placement must take to trigger placement preferences in the context of foster care or pre-adoptive placement: Daughter here did nothing.

At the same time, the Department's work with Father's sister—who *was* identified as a possible placement option—is substantial evidence of a diligent search to support the juvenile court's determination that "there is a ground for exception [to placement preferences] in this particular matter." (See *In re Alexandria P.*, *supra*, 1 Cal.App.5th at pp. 353-358 [applying substantial evidence standard in review of court's finding of good cause to deviate from ICWA placement preferences].) Father's sister was the only alternative placement Father identified between 2015 and the section 366.26 hearing in 2017, and the Department provided her with instructions to attempt to qualify as an eligible placement. She never followed through despite the Department's efforts, and there are accordingly no grounds to assail the juvenile court's good cause determination.

DISPOSITION

The juvenile court's orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P.J.

We concur:

MOOR, J.

KIN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.