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Court of Appeal of the State of Cal
Opinion
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In re LARISSA G. et al., Persons Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent,

v.

GINA L., Defendant and Appellant; CALIFORNIA INDIAN LEGAL SERVICES, Intervener and Respondent.

Nos. D024180; DO24517 !

Fourth Appellate District

Division One

Super. Ct. No. 500853 C & D

Appeal from orders of the Superior Court of San Diego County, Hon. Michael J. Imhoff, Juvenile Court Referee. Affirmed in part; reversed in part; remanded in part.

COUNSEL

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Lloyd M. Harmon, Jr., County Counsel, Susan Strom, Chief Deputy County Counsel and Gary Seiser, Deputy County Counsel, for Plaintiff and Respondent.

California Indian Legal Services and James E. Cohen and Nancy S. Rank, for Intervener and Respondent.

Christopher Blake, upon request of the Court of Appeal, for Minors.

Filed March 7, 1996

CERTIFIED FOR PARTIAL PUBLICATION[FOOTNOTE 1]

KREMER, P. J.:

INTRODUCTION

In this dependency case, Gina L. appeals the juvenile court's six-month

review order suspending her visits with her minor children Larissa and Michael G. and its subsequent order transferring jurisdiction to the Navajo Nation (Nation) pursuant to the Indian Child Welfare Act (ICWA) (25 U.S.C. section 190 1 et seq.). FOOTNOTE 21 As to the first order, Gina contends there was insufficient evidence that continuing visitation would be detrimental to the children, the court improperly vested discretion regarding resumption of visits in the Department of Social Services (DSS) and a therapist, and the court erroneously required her to participate in a substance abuse program and testing. We agree there was insufficient evidence to support the suspension of visits and reverse and remand for a hearing on this issue. As to the second order, Gina contends her objection and good cause precluded the transfer of jurisdiction, the court erred in ordering the children placed with paternal relatives on a reservation in Arizona, and it erred in finding that the ICWA applied before determining paternity. We conclude that while the court did not err in placing the children in Arizona and the contention regarding application of the ICWA is moot, the court erred in transferring jurisdiction to the Nation. We accordingly reverse the transfer order.

I. BACKGROUND

In addition to Larissa and Michael, Gina has five other children. The youngest three were declared dependents due to physical and emotional abuse and are in confidential placements with no reunification services ordered. Gina was convicted of and served prison time for child abuse. She was on probation for child abuse when this case was initiated. Her primary parenting problem was apparently an inability to control her anger.

Twins Larissa and Michael were born prematurely on August 23, 1994, to Gina and Clyde G., a registered Navajo Indian. Dependency petitions were filed on September 6, alleging abuse and neglect of the twins' half brother, Gina's son Rick L. Amended petitions filed on September 30 added allegations that Gina and Clyde engaged in violent confrontations, Clyde drank to excess, and Gina abused her daughter Megan L. and her husband's grandson Richard J. FOOTNOTE 31 On October 17, Gina submitted on the count alleged in the original petition. The court dismissed the remaining counts with an agreement it could consider them in rendering a dispositional order. Larissa and Michael were detained and then placed in foster care upon their release from the hospital. Both children had medical problems and were developmentally delayed.

II. SIX-MONTH REVIEW

According to the reports dated June and July 1995 that DSS prepared for the six-month review, Gina had been "very sporadic regarding compliance with her reunification plan." Her therapist said that she had "deteriorated substantially" and behaved erratically. Gina's meetings with the therapist

had been infrequent and she had not attended therapy since April 1, 1995. She had threatened the therapist and the social worker and frequently failed to show up for visits with the twins. When Gina did visit, her interaction with the children varied from failing to remove them from their strollers or carseats to holding them and changing their diapers. Gina's relationship with Clyde was volatile and included fights for which the police were summoned. In December 1994, Gina spent a week in jail for hitting Clyde with a hammer. Gina and Clyde screamed at each other at a May 17, 1995, visit with the minors. Gina had not benefited from an anger management class.

At the July 19, 1995, six-month review, the court ordered that Gina's visits would commence when she demonstrated progress in her reunification plan, particularly therapy, and that if she failed to attend therapy regularly or the therapist felt it necessary, Gina would be required to take part in a 12-step program and substance abuse treatment and submit to chemical testing.

III. VISITATION

Gina contends the court erred in suspending visits until she progressed in her reunification plan and therapy because there was insufficient evidence that continuing visitation would be detrimental to the children; the suspension was a punitive measure designed to force her to comply with the plan; the court improperly vested total discretion regarding resumption of visits in the Department of Social Services (DSS) and the therapist, thus violating the separation of powers doctrine; and the court erroneously required her to participate in the substance abuse components of the reunification plan. [FOOTNOTE 41

Generally, visitation must be provided as part of a reunification plan, and must be as frequent as possible consistent with the minor's well-being. (Welf. & Inst. Code, section 362.1.) However, visits may be curtailed if they are not in the child's best interests. (Cf. *In re Daniel C. H.* (1990) 220 Cal.App.3d 814, 838-839; *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 123 8.) The juvenile court enjoys broad discretion to determine visitation issues (*Jn re Megan B.* (1991) 235 Cal.App.3d 942, 953) and the children's best interests (*Jn re Eric B.* (1987) 189 Cal.App.3d 996, 1005).

While it is abundantly clear Gina is a severely troubled individual, it is not at all clear from this record that those deficiencies were played out during visitation or in any other way adversely affected her children in connection with visitation. Accordingly, we reverse the court's order limiting visitation and remand for a further hearing.

Gina has a long history of seriously abusing her other children. In December 1994 she attacked Clyde. She apparently gained nothing from an

anger management class ending in April 1995 where, according to the instructor, she "rarely worked on issues of anger" and her presence was "very disruptive." The instructor characterized her as unstable, manipulative, and very disturbed. Similarly, before Gina ceased going to therapy in April 1995, according to her therapist she had "drastically deteriorated," "repeatedly demonstrated erratic behavior," and shown "poor impulse control." Twice since January 1995, the therapist had "smelled alcohol on both Gina and/or Clyde when they came to their therapy session."

From October 19, 1994, through May 31, 1995, Gina missed 12 out of 27 visits. Of the remaining visits, she was late three times: by 15 minutes, 25 minutes, and 45 minutes. The visit for which she was 45 minutes late lasted only 15 minutes. The social worker described visitation as inconsistent and "often extremely inappropriate." According to the social worker, Gina and Clyde "were screaming at each other throughout the May 17, 1995, visit" and this visit was "potentially volatile." However, the parent/child contact log, of unknown authorship, states of the May 17, 1995, visit: "Parents were outside arguing when I got there visit was discontinued." Thus, it is unclear whether the screaming took place in the children's presence.

The log describes Gina's interaction with the children at only seven of the visits. On two occasions, she held and changed Michael. Once, she held and fed him. At another visit, she changed Larissa. Another time, she tried to feed both children. On another occasion, she did not look at or hold the minors for the first half of the one-hour visit. Two visits went well.

Thus, the log contains visitation information partially favorable to Gina. The strongest factor against her concerns the May 17, 1995, visit; however, the record regarding this visit is ambiguous. Furthermore, there was no testimony concerning the quality of the visits. While the record is replete with instances of Gina's serious personal deficiencies, it is sparse regarding the impact of these characteristics on the minors during visits. Thus, we are unable to say whether the juvenile court acted properly in impliedly concluding that the children's best interests required suspension of visitation pending Gina's progress in her reunification plan. We need not discuss her contention that the suspension was a punitive measure designed to force her to comply with her plan.

For the guidance of the juvenile court on remand, we address Gina's assertion that the court erred in giving DSS and her therapist discretion regarding resumption of visits. An order for visitation may provide DSS with guidelines concerning "prerequisites of visitation or any limitations or required circumstances." (In re Danielle W., supra, 207 Cal.App.3d at p. 1237, fn. omitted; accord In re Moriah T. (1994) 23 Cal.App.4th 1367, 1374-1 375.) The parent's therapist, bound by standards of professional independence and integrity, is in a position uniquely suited to assessing

the parent's progress and readiness for visits. The court here did not accord DSS and Gina's therapist unfettered discretion to determine whether visitation would resume. Rather, it legitimately required they be guided by the standard of Gina's progress in therapy.

Finally, we reject Gina's claim that there was no evidence she had a substance abuse problem and that the substance abuse component of the court's order was a punitive measure designed to ensure her participation in therapy. As noted above, her therapist reported that twice since January 1995, she "smelled alcohol on both Gina and/or Clyde when they came to their therapy session." While this statement is less than crystal clear, if, as Gina intimates, Clyde was the only one with a drinking problem, the therapist would not have used the word "both." Moreover, since the amended petition alleged Clyde's drinking and Gina's concomitant failure to protect, and Gina lived with Clyde, she is wrong in saying that the substance abuse conditions were unnecessary in eliminating the conditions that lead to the dependency (*In re Dino E.* (1992) 6 Cal.App.4th 1768, 1777). It was appropriate to have this matter investigated in therapy and, if therapeutically necessary, addressed.

We reverse the juvenile court's six-month review order insofar as it suspended visitation and remand for a hearing on this issue. As the parties agreed at oral argument, the children are to remain in their Arizona placement pending the outcome of the hearing. If the hearing results in a change in the suspension order, Gina may file a Welfare and Institutions Code section 388 petition concerning placement.

IV. ICWA

On September 6, 1995, the court heard the Nation's request for a transfer of jurisdiction^[FOOTNOTE 51] and DSS's request for a change of placement to the home of the paternal aunt and uncle on the Navajo reservation in Arizona. Gina opposed the motions. The court concluded that Gina lacked veto power over the transfer decision, transferred jurisdiction, and ordered the children placed with the aunt and uncle.

Contentions and Discussion

Gina contends that her objection to transfer of jurisdiction to the Nation operated as a veto and good cause precluded the transfer; the court erred in ordering the children placed with the relatives in Arizona, which made visitation difficult and thus jeopardized reunification; and the court erred in finding that the ICWA applied before determining paternity. We conclude that Gina had veto power over the transfer but that the placement order was proper, and that the remaining contentions are moot.

Transfer of Jurisdiction

Section 191 l(b) provides in pertinent part:

“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: . . . I

The language of section 19 11 (b) appears plainly to give a parent the right to veto a transfer of jurisdiction. To determine whether such a reading is proper, we examine administrative guidelines regarding the section, cases from other jurisdictions interpreting it and the policy underlying the section.

Guidelines for aid in interpreting the ICWA, promulgated by the Bureau of Indian Affairs of the Department of the Interior, interpret this statutory language as follows:

“ . . . Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child’s tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

“Since the Act gives the parents and the tribal court of the Indian child’s tribe an absolute veto over transfers, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer.”
(Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed.Reg. 67584,67590-67591 (Nov. 26, 1979).)

While these guidelines were not intended to have binding legislative effect, their construction of the ICWA is entitled to great weight. (Id. at p. 67584; In re Junious M. (1983) 144 Cal.App.3d 786,792, th. 7.)

Cases from other jurisdictions interpret section 191 l(b) to confer on the parent veto power over transfer of jurisdiction. (Matter of Adoption of Baby Boy L. (‘Ran. 1982) 643 P.2d 168 concerns adoption of a child never domiciled in an Indian community born to a non-Indian mother and an Indian father. The court stated:

“A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents

of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.” (Matter of Adoption of Baby Boy L., supra, 643 P.2d at pp. 175-176.)

In Matter of S.Z. (S.D. 1982) 325 N.W.2d 53 the court considered parental rights termination proceedings involving the child of an Indian mother and non-Indian father not living on a reservation. The tribe was given proper notice and intervened. The parents objected to transfer to a tribal court. The Supreme Court of South Dakota reversed the transfer order in light of section 191 l(b) holding: “This statute provides that objection by either parent will keep jurisdiction in the state court.” (Matter of S.Z., supra, 325 N.W.2d at p. 56.) In Brown on Behalf of Brown v. Rice @.Kan. 1991) 760 F.Supp. 1459 the district court concluded a tribal court’s exercise of jurisdiction over part Indian children who had never lived on a reservation could not be pursuant to a transfer from the state court since:

“ . . . if a transfer was intended, the transfer was not ‘pursuant to law.’ Under the Indian Child Welfare Act, 25 U.S.C. 191 l(b), a case involving children not domiciled on the reservation cannot be transferred from state court without the consent of the parents.” (Brown on Behalf of Brown v. Rice, supra, 760 F.Supp. at p. 1463, th. omitted.)

Finally, though most certainly not a holding on the issue, the United States Supreme Court has referred to a parent’s veto power under the Act.

“Section 1911(b). . . creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of ‘good cause,’ objection by either parent, or declination of jurisdiction by the tribal court.” (Mississippi Choctaw Indian Band v. Holyfield (1989) 490 U.S. 30,36, italics added.)~OOTNOTE 61

Commentators agree. (E.g., Bar&, The Indian Child Welfare Act of 1978: A Critical Analysis (1980) 31 Hastings L.J. 1287, 1316-1317 & fn. 162; Jones, The Indian Child Welfare Act Handbook (1995) pp. 36,47, m. 40; Thome, Jr., A review of The Purpose, Changes and Requirements of The Indian Child Welfare Act, A Handbook (Indian Child & Family Services, 1991) p. 8.)

These interpretations appear to us to be consistent with Congressional intent. Section 1902 of the Act states:

“The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. ”

The United States Supreme Court has explained the ICWA’s purpose as follows: “The ICWA . . . ‘seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.’ [H. R. Rep. No. 95-1386, p. 23 (1978)]. It does so by establishing ‘a Federal policy that, where possible, an Indian child should remain in the Indian community,’ *ibid.*, and by making sure that Indian child welfare determinations are not based on ‘a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.’ *Id.*, at 24.” (*Mississippi Choctaw Indian Band v. Holyfield*, *supra*, 490 U.S. at p. 37, m. omitted.)

Two sometimes competing interests are involved: a parent’s interest in raising a child as he or she sees fit and the tribe’s interest in fostering its community by preserving Indian families. The Act accommodates these interests in two manners. As to Indian children domiciled on the reservation, the interests are presumed to coincide and section 191 l(a) gives an Indian tribe exclusive jurisdiction over child custody proceedings. In such cases the tribe’s interest in its children “is distinct from but on a parity with the interest of the parents.” (*Matter of Adoption of Halloway* (Utah 1986) 732 P.2d 962.)

When the child is domiciled off the reservation, relationships shift under the Act and the parents’ interests may be primary.

“The tribe’s interest in actions involving Indian children living off the reservation is not as great. A review of the ICWA’s provisions supports this difference in the interests and rights between an Indian child’s parents and his or her tribe. For example section 191 l(b) grants a preference to tribal courts in foster care and parental termination matters where an Indian child resides or is domiciled off the reservation ‘absent objection by either parent.’ (*Italics added.*) Also, section 1913(a) permits an Indian parent or custodian to voluntarily consent to a foster care placement or termination of parental rights without first notifying the tribe. Finally, under section 19 15(c), the Indian parent’s placement preference must be considered ‘[w]here appropriate.’” (*In re Baby Girl A.* (1991) 230 Cal.App.3d 1611,1621.)

In his dissenting opinion in *Mississippi Choctaw Indian Band v. Holyfield*, Justice Stevens discussed the parent's veto power and the Act's policy:

"The Act gives Indian tribes certain rights, not to restrict the rights of parents of Indian children, but to complement and help effect them. The Indian tribe may petition to transfer an action in state court to the tribal court, but the Indian parent may veto the transfer. section 1911 (b)." (*Mississippi Choctaw Indian Band v. Holyfield*, supra, 490 U.S. at p. 57, fh. omitted, Stevens, J., dis. opn.)

"Although parents of Indian children are shielded from the exercise of state jurisdiction when they are temporarily off the reservation, the Act also reflects a recognition that allowing the tribe to defeat the parents' deliberate choice of jurisdiction would be conducive neither to the best interests of the child nor to the stability and security of Indian tribes and families. Section 1911(b), providing for the exercise of concurrent jurisdiction by state and tribal courts when the Indian child is not domiciled on the reservation, gives the Indian parents a veto to prevent the transfer of a state-court action to tribal court. 'By allowing the Indian parents to "choose" the forum that will decide whether to sever the parent-child relationship, Congress promotes the security of Indian families by allowing the Indian parents to defend in the court system that most reflects the parents' familial standards.' Jones, 21 Ariz.L.Rev., at 1141. As Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, stated in testimony to the House Subcommittee on Indian Affairs and Public Lands with respect to a different provision:

"The ultimate responsibility for child welfare rests with the parents and we would not support legislation which interfered with that basic relationship.' Hearings on S. 1214 before the Subcommittee on Indian Affairs and public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 62 (1978)." (*Mississippi Choctaw Indian Band v. Holyfield*, supra, 490 U.S. at pp. 60-61, fh. omitted Stevens, J., dis. opn.)

We conclude section 1911(b) accommodates the interests of the tribe and parents as to non-reservation children by affording the tribe certain rights, for example, rights to notice (section 1912(a)) and intervention (section 1911(c)) as well as placement preferences (section 1915), and giving the parent the ultimate say over jurisdiction but an inability to prevent application of the ICWA in a state court proceeding. Therefore, granting the parent veto power over a request to transfer jurisdiction to the tribe does not frustrate the policy of the ICWA. Rather, the statutory scheme protects the tribe's significant rights in the Indian child while still honoring the parent's fundamental rights.

The Nation argues that legislative history demonstrates that Congress chose

not to amend the ICWA to specify clearly a parental veto power. The legislative history of section 1911 (b), however, shows an intent to confer such power. Justice Stevens, in his dissent in *Mississippi Choctaw Indian Band v. Holyfield*, *supra*, offers insight into this history:

“The explanation of [section 1911 (b)] in the House Report [H. R. Rep. No. 95-1386 (1978)] reads as follows:

“Subsection (b) directs a State court, having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon the petition of the parents or the Indian tribe. Either parent is given the right to veto such transfer. The subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian and the tribe are fully protected.’ *Id.*, at 21.

“In commenting on the provision, the Department of Justice suggested that the section should be clarified to make it perfectly clear that a state court need not surrender jurisdiction of a child custody proceeding if the Indian parent objected. The Department of Justice letter stated:

“Section 101 (b) should be amended to prohibit clearly the transfer of a child placement proceeding to a tribal court when any parent or child over the age of 12 objects to the transfer.’ *Id.*, at 32.

“Although the specific suggestion made by the Department of Justice was not in fact implemented, it is noteworthy that there is nothing in the legislative history to suggest that the recommended change was in any way inconsistent with any of the purposes of the statute.” (*Mississippi Choctaw Indian Band v. Holyfield*, *supra*, 490 U.S. at pp. 60-61, fn. 8, Stevens, J., *dis. opn.*)

We conclude that section 1911(b) gives the parent of an Indian child not domiciled or residing on the reservation veto power over any decision to transfer to the tribe’s jurisdiction a proceeding for foster care placement or termination of parental rights. This conclusion supports the policy behind the ICWA by giving the parents, the persons best suited to determining the importance of the family’s Indian connection, the option of defending in the court system most reflective of family standards. It additionally conforms to the legislative aim of balancing the interests of the tribe, when the child is not domiciled on the reservation, with those of the parents.

Because the court here erred in transferring jurisdiction to the Nation over Gina’s objection, we reverse the transfer order. In view of our conclusion, we need not address Gina’s contention that there existed good

cause to deny the transfer request.

V. ARIZONA PLACEMENT

Gina asserts that good cause existed for denying DSS's request to change the children's placement to the home of the paternal aunt and uncle residing on the Navajo reservation in Arizona since it was not in "reasonable proximity" to her home (section 1915(b)). She further argues that the placement violated Welfare and Institutions Code section 361.3 since it was not conducive to visitation or reunification.[FOOTNOTE 71

Section 1915(b) states:

"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 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 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."

Welfare and Institutions Code section 361.3 provides in pertinent part:

"(a) In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 36 1, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative. In determining whether placement with a relative is appropriate, the county social worker and court shall consider, but shall not be limited to, consideration of the following factors:

"(1) The best interests of the child, including special physical, psychological, or emotional needs.

"(2) The wishes of the parent.

“(3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement.

“(4) Placement of siblings and half-siblings in the same home, if such a placement is found to be in the best interest of each of the children.

“(5) The good moral character of the relative.

“(6) The ability of the relative to do the following:

“(A) Provide a secure and stable environment for the child.

“(B) Exercise proper and effective care and control of the child.

“(C) Provide a home and the necessities of life for the child.

“(D) Protect the child from his or her parents.

“(E) Facilitate court-ordered reunification efforts with the parents.

“(0;) Facilitate visitation with the child’s other relatives.”

Both of these statutes express a clear preference for relative placement. While the court making the placement determination must consider the child’s best interests, the parents’ desires,[FOOTNOTE 81 the distance between the parents’ homes and the prospective placement, and the effect on reunification efforts and visitation, here the circumstances support the court’s decision. At the time of the order, Gina’s visits had been suspended and she had made little progress in reunifying. The children had the opportunity to live with relatives who would ensure their awareness of their Indian heritage. The court considered Gina’s desires, the distance of the proposed placement, and the effects on reunification and visitation, and ascertained that the Nation’s priority was reunification. The juvenile court did not abuse its discretion in granting DSS’s request for a change of placement. (In re Robert L. (1993) 2 1 Cal.App.4th 1057, 1067.)

VI. APPLICABILITY OF ICWA

Gina claims that the court erred in finding that the ICWA applied before determining paternity. In light of a subsequent finding that Clyde is the children’s father, this argument is moot.

VII. DISPOSITION

We reverse the juvenile court’s six-month review order insofar as it suspended visitation and remand for a hearing on this issue. The children are to remain in their Arizona placement pending the outcome of the

hearing. The juvenile court's order transferring jurisdiction to the Nation is reversed. In all other respects the juvenile court's orders are affirmed.

HUFFMAN, J. and McDONALD, J., concurring.

FOOTNOTES

FN1. Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts III, V and VI.

FN2. All statutory references are to the ICWA unless otherwise specified.

FN3. Gena was married to someone other than Clyde.

FN4. DSS asserts that Gina waived her right to challenge the visitation order by impliedly stipulating to the factual basis the court set forth for the order. At the outset of the hearing, however, when county counsel proposed suspension of visits, Gina's attorney said: "And the mother would object." Counsel never withdrew or modified this objection.

DSS also maintains that Gina waived her right to contest the substance abuse component of the reunification plan. Counsel, however, objected to the order, and her subsequent comments do not clearly constitute acquiescence.

FN5. The Nation had earlier agreed that the children might remain in their non-Indian foster home due to their medical needs. By the time of the September 1995 hearing, their medical condition had improved significantly and they were sufficiently medically stable to be moved.

FN6. *Mississippi Choctaw Indian Band v. Holyfield*, supra, 490 U.S. 30 involved the adoption of children whose parents were tribal members residing on the reservation. The mother left the reservation to give birth and both parents consented in state court to the adoption. (Id. at pp. 37-38.) The United States Supreme Court held that the state court lacked jurisdiction to enter the adoption decree because the children were domiciled on the reservation within the meaning of the ICWA. (Id. at pp. 48-49, 53.)

FN7. Welfare and Institutions Code section 281.5, which Gina also cites, concerns placement recommendations, not decisions, and is therefore irrelevant to the question here.

FN8. Clyde was in favor of the change in placement.