STATE OF WHITTIER
COURT OF APPEAL

DANIEL LITTLE BEAR

v.

STATE OF WHITTIER
Ms. Kathryn Candler, Director of the
Whittier Department of Child Welfare

Decided: November 15, 2014

Justice Kitt delivered the opinion of the Court:

Mr. Little Bear, a member of the Cherokee Nation, by and through his attorney, appeals the Jenning County Juvenile Court's orders terminating his services and adoptively placing Sienna Little Bear with a non-Indian family.

For the reasons discussed below this Court affirms the orders of the Juvenile Court.

STATEMENT OF THE FACTS

On November 1, 2012, Sienna Little Bear was born at the Jenning County Hospital to Melissa Diaz and Daniel Little Bear, both age 18 and recently emancipated from foster care. Ms. Diaz and Mr. Little Bear met during their respective placements in foster care. As a member of the Cherokee Nation, a federally recognized tribe, Mr. Little Bear, was thrilled to have his first child take on his Cherokee heritage and immediately registered her with the Cherokee Nation. Sienna's paternal aunt, Patricia Redbird, also a member of the Cherokee Nation, was visiting from Oklahoma and performed a Cherokee blessing for Sienna. After leaving the hospital, Sienna and her parents moved into an apartment near Ms. Diaz's parents. Ms. Diaz struggled with postpartum depression and began using methamphetamine and alcohol on a daily basis. Ms. Diaz often left Mr. Little Bear at home with Sienna.

In May 2013, at Sienna's six-month well-child check-up, Dr. Humphrey noted Sienna was about one pound underweight and suffering from plagiocephaly. Dr. Humphrey explained that plagiocephaly occurs when babies are left on their back for long periods of time. Mr. Little Bear explained he was leaving Sienna at home in a laundry basket, an improvised crib, when he went to work for 2-3 hours periods of time. Dr. Humphrey provided Mr. Little Bear with a handout describing how to prevent plagiocephaly and verbally reviewed it with him. Dr. Humphrey also explained babies can never be left home alone. Dr. Humphrey asked Mr. Little Bear how things were at home with Ms. Diaz, and he told her that Ms. Diaz was never home, and using drugs and alcohol. He explained he was having difficulty purchasing formula and diapers, and felt very overwhelmed. Dr. Humphrey asked Mr. Little Bear to return to the medical clinic in one-week for a weight check, and sent Mr. Little Bear home with a pack of diapers and a can of formula.

On May 14, 2013, Mr. Little Bear returned to Dr. Humphrey's medical clinic. Sienna's weight dropped 3 ounces from her last weight check. Mr. Little Bear explained he was working a lot the week before, and left Sienna in the care of her maternal grandparents intermittently. Dr. Humphrey explained it was essential for Sienna to begin gaining weight and believed that her weight loss happened because she was not being fed enough. Mr. Little Bear explained he understood and said he would try harder. Again, Dr. Humphrey asked Mr. Little Bear to return the following week for a weight check, and sent him home with a pack of diapers and can of formula.

On May 21, 2013, Dr. Humphrey confirmed Sienna had gained 3 ounces. However, Dr. Humphrey remained concerned about Sienna's well-being. Sienna was still underweight and her plagiocephaly was not improving. Mr. Little Bear told Dr. Humphrey that Ms. Diaz had not been

home for days, and was reportedly prostituting and living on the streets. Dr. Humphrey explained that as a mandatory reporter, she was going to make a call to the Department of Child Welfare (DCW) to report possible neglect. Dr. Humphrey believed Mr. Little Bear was doing his best, but that his efforts were not enough for such a young child, especially when combined with Ms. Diaz's circumstances. For the third time, Dr. Humphrey asked Mr. Little Bear to return the following week for a weight check, and sent him home with a pack of diapers and can of formula.

On May 22, 2012, Ms. Diaz was shot and killed in a dispute involving methamphetamine. Police, accompanied by DCW social worker Sonia White told Mr. Little Bear the news. Ms. White told Mr. Little Bear that DCW was investigating Sienna's welfare and safety and that Mr. Little Bear would be required to cooperate with her investigation over the next 30 days. Mr. Little Bear agreed to cooperate and hoped the assistance of DCW would help him be a better parent to Sienna. Ms. White helped Mr. Little Bear sign up for WIC, a supplemental nutrition program. Ms. White also assisted Mr. Little Bear with obtaining a crib and clothing for Sienna. Ms. White directed Mr. Little Bear to a program for Native American fathers, and encouraged him to sign up to gain support from other fathers in similar situations. Finally, Ms. White referred Mr. Little Bear to a grief counselor and made certain he could receive 10 sessions free of charge.

Despite attending sessions with his grief counselor, Mr. Little Bear struggled immensely with Ms. Diaz's death. Mr. Little Bear felt overwhelmed with the responsibilities associated with being a single parent. He did not return to Dr. Humphrey's office with Sienna as requested. Unemployed, Mr. Little Bear was unable to pay bills and faced eviction for failing to pay rent. Ms. White referred Mr. Little Bear to a job training program and subsidized housing. However,

when Mr. Little Bear went to sign up, there was a waitlist for both programs. When Mr. Little Bear reported to Ms. White that he was facing homelessness within one week, Ms. White searched for emergency shelter for Mr. Little Bear and assisted him with relocating. Subsequently, Ms. White filed a petition in the Jenning County Juvenile Court under Section 100(b) of the Whittier Juvenile Code.[1]

On June 15, 2013, the Juvenile Court adjudicated Sienna a dependent child under Whittier Juvenile Code § 100(b). The Juvenile Court appointed Jeffrey Stone, counsel for Sienna, and Maria Sanchez, counsel for Mr. Little Bear. Sienna was placed with her maternal grandparents. The court properly found that Sienna is subject to the Indian Child Welfare Act (ICWA).[2] DCW filed a Notice of Intervention from the Cherokee Nation with the Juvenile Court. Although the tribal court declined jurisdiction, the Cherokee Nation provided a declaration stating that the ICWA requirements for Sienna's removal from Mr. Little Bear had been met. Pursuant to U.S.C.A. § 1912(e), in making its decision to place Sienna in foster care, the court referenced Dr. Humphrey's reports and heard testimony from Ms. White, a qualified expert witness in light of her education, training, American Indian heritage and routine dealings with American Indian families. The Juvenile Court concluded Mr. Little Bear's continued custody of Sienna was likely to result in emotional or physical damage to her. 25 U.S.C.A. §

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[1] Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adudge that person to be a dependent child of the court: The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate and appropriate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse. Whit. Juv. Code § 100(b).

[2] The federal law is the applicable law in the State of Whittier.

1912(d). The Juvenile Court ordered that Sienna be placed with her maternal grandparents during reunification.

On August 20, 2013, the court conducted adjudication and disposition hearings. With the purpose of reunification in mind, the court offered remedial services to Mr. Little Bear. The court sustained allegations under Whittier Juvenile Code § 100(b). Sienna's maternal grandparents appeared at the hearing and asked DCW to remove Sienna from their home because she cried all night and had digestive problems. No other relatives would accept Sienna's placement with them. Sienna was therefore re-placed in a non-relative foster home with Matthew Davidson and Howard Pratt, a non-Indian, Caucasian, married couple planning to adopt. The tribe consented to Sienna's placement with a non-Indian foster family to facilitate reunification efforts.

Shortly after her placement with Mr. Davidson and Mr. Pratt, Sienna stopped crying at night and followed a normal sleep schedule. Her digestion problems ceased. Mr. Davidson and Mr. Pratt paid careful attention to Sienna's weight and plagiocephaly. They enriched Sienna's diet with proper nutrition and enrolled her in private physical therapy to strengthen her neck. At night, they placed Sienna in a prescribed helmet so her head could regain its proper shape. In November 2013, at Sienna's one-year well-child check-up, Dr. Humphrey noted Sienna's significant and healthy weight gain, and that her plagiocephaly had nearly resolved itself due to the efforts of Mr. Davidson and Mr. Pratt. Mr. Davidson and Mr. Pratt enrolled Sienna in play therapy, which they both participated in.

During Sienna's first two months in foster care, Mr. Little Bear attended parenting classes at the Indian Family Support Center, and did not miss a single visit with Sienna. Ms. White often transported Mr. Little Beat to and from class. Ms. White also arranged for one-on-

one therapy for Mr. Little Bear, which he attended for six weeks. Mr. Little Bear attended a play therapy session to observe Sienna. Mr. Little Bear got a part-time job at a café and began saving for Sienna's return to his care. However, in November 2013, Mr. Little Bear was ticketed by the police for being in inebriated in public. Mr. Little Bear started missing scheduled visits with Sienna.

On December 15, 2013, at the six month hearing, the court noted Mr. Little Bear's initial progress and more recent missteps, and ordered Mr. Little Bear to enroll in substance abuse counseling. However, Ms. White accidentally delayed the enrollment paperwork, causing Mr. Little Bear to enroll in class one month late. Once enrolled, however, Mr. Little Bear regularly attended his group. On December 23, 2013, Mr. Little Bear had a long visit with Sienna, Mr. Davidson and Mr. Pratt at the mall. Together, they took pictures with Santa and exchanged gifts. Mr. Little Bear gave Sienna a Cherokee Indian doll and a homemade card.

For the next few months, Mr. Little Bear regularly visited with Sienna. On March 17, 2013, Mr. Little Bear was arrested for driving under the influence of alcohol. At his criminal trial Mr. Little Bear was found guilty and incarcerated for 12-18 months. Mr. Little Bear's incarceration made visiting with Sienna difficult, although Mr. Davidson and Mr. Pratt did bring her to the Jenning County Jail on several occasions for visits. Whenever he could, Mr. Little Bear called Sienna and sent her mail.

In June 2014, at the 12-month hearing, the Juvenile Court terminated remedial services. Mr. Little Bear desperately wanted the opportunity to parent Sienna once released from jail. Ms. Sanchez objected to the termination, arguing that active efforts were not made by the DCW to preserve the family, and asked to set the matter for contest. The court declined Ms. Sanchez's request, finding that there was clear and convincing evidence that active efforts were made, and

that any further efforts would be futile because of his incarceration. Mr. Sanchez again objected, arguing that the Juvenile Court was required to make a finding that active efforts were made beyond a reasonable doubt, and that the efforts of DCW did not meet this standard. The Juvenile Court overruled Ms. Sanchez's objection. In accordance with ICWA's pre-adoptive placement preferences, the DCW contacted Sienna's paternal aunt, Ms. Redbird, to inquire about her interest in adopting Sienna. Ms. Redbird had previously expressed interest in having Sienna placed with her when Sienna first entered foster care, but DCW declined placement with Ms. Redbird since reunification with Sienna could not be facilitated out of state. Ms. Redbird indicated she would gladly have Sienna in her home and wished to adopt her. However, Mr. Stone, joined by counsel for the DCW, objected to Sienna's change in placement. The court set the matter for contest, and asked the parties to address whether good cause existed to depart from ICWA's placement preferences.

On July 2, 2014, at the hearing addressing whether good cause existed to depart from ICWA's placement preferences, Mr. Stone argued that the Juvenile Court should depart from the adoptive placement preference because Sienna would suffer emotional harm if separated from Mr. Davidson and Mr. Pratt, whom she referred to as "Dad" and "Daddy," respectively. Mr. Stone also argued it was in Sienna's best interests to remain with her foster fathers. Mr. Stone supported his position with testimony from Sienna's play therapist, Carolyn Swift. Ms. Swift explained that Sienna appeared uninterested in Mr. Little Bear during therapy. For instance, Sienna reached for Mr. Davidson when she needed help with her snack, and looked to Mr. Pratt and pointed at him when she wanted help with her coloring book, and he assisted her promptly. Ms. Swift also testified that it was as though Mr. Little Bear was not even present when he appeared at play therapy.

Ms. White's reports were also used to support Mr. Stone's position. In her December 2013 report, Ms. White explained "Sienna appears bonded to Mr. Davidson and Mr. Pratt. She clings to them and refers to them as 'Dad' and 'Daddy.' Sienna is enrolled in gymnastics and yoga for toddlers. She is performing other age appropriate tasks that the gentlemen have helped Sienna learn, such as building blocks and practicing her ABCs." Ms. White also noted that Sienna was enrolled in a part-time preschool program and advancing with her peers. Importantly, Ms. White explained that Mr. Davidson and Mr. Pratt's respective families fully embraced Sienna. Together, they all celebrated Christmas where Sienna met her potential adoptive grandparents. In consideration of Sienna's Cherokee background, many family members gave Sienna traditional Cherokee gifts, such as dolls and moccasins, and a Cherokee children's book. In her report for the 12 month hearing, Ms. White commented that Sienna had grown further attached to Mr. Davidson and Mr. Pratt, and appeared to especially love their dog, a Golden Retriever named Buddy. Ms. White concluded that "it was as though Mr. Davidson and Mr. Pratt's entire world revolves around Sienna's happiness, growth and stability, and that for Sienna, her entire world revolves around them."

Mr. Stone also called a child development specialist from the University of Whittier, Mr. Thomas Peabody to testify. After reviewing the reports on Sienna, Mr. Peabody explained that with any removal from a loving home, there is some risk that the child may not recover or find attachment again. In his professional opinion, Mr. Peabody concluded that while no one could predict how Sienna would respond in the future, it was likely that Sienna would suffer trauma if removed from her foster fathers, and that the trauma may be irreparable.

In support of Mr. Little Bear's position that there was not good cause to depart from ICWA's placement preferences, Ms. Sanchez called an expert from the Cherokee Nation, Tribal

Elder Mr. Ed Sky, to testify. Mr. Sky testified that based on his review of the case's various reports, that it was clear Sienna had an attachment to Mr. Davidson and Mr. Pratt. However, Mr. Sky testified that Sienna's attachment to Mr. Davidson and Mr. Pratt was not nearly as significant as her Cherokee heritage, and that Ms. Redbird and Sienna could form a bond similar to the one Sienna has with her foster fathers. Mr. Sky felt confident that any trauma experienced by Sienna could be addressed through proper parenting, support from the Cherokee tribe, and therapy.

Ms. Sanchez also called a child psychologist from the Indian Family Support Center, Ms. Deborah Marcus. Ms. Marcus testified that Sienna was clearly able to form attachments and that while she may experience temporary loss if removed from Mr. Davidson and Mr. Pratt, she would form a lifetime attachment to Ms. Redbird and, importantly, to her Indian heritage. Ms. Marcus based her opinion on her research demonstrating that once a child forms attachment, she can form attachment again, especially when the child is well adjusted like Sienna.

Finally, Ms. Sanchez called Mr. Little Bear's therapist, Mr. Ronald Gutierrez to testify on his behalf. Mr. Gutierrez informed the court that Mr. Little Bear was making significant progress prior to his incarceration and that he desperately wanted to parent Sienna. Mr. Gutierrez reported that Mr. Little Bear actively participated in Sienna's life to the extent possible, and that even while incarcerated, he continued to do his best to participate in reunification efforts. For example, he sent Sienna cards and during his visits with her, he fully focused on her needs. Mr. Little Bear participated in the jail's parenting courses, and regularly asked Mr. Davidson and Mr. Pratt for updates on Sienna during his weekly calls with them.

At the conclusion of the testimony, the Juvenile Court ordered Sienna adoptively placed with Mr. Davidson and Mr. Pratt. Mr. Little Bear timely appealed both the termination of his remedial services and the adoptive placement order. Sienna remains in the care of Mr. Davidson and Mr. Pratt.

DISCUSSION

In 1978, Congress passed the Indian Child Welfare Act. This federal law, adopted by the State of Whittier, recognizes that an alarmingly high percentage of Indian families are broken up by the removal of their children from public agencies and placed in non-Indian foster and adoptive homes. 25 U.S.C.A. § 1901(4). This outcome is precisely what brings this matter before the Court today. However, for the reasons described in this opinion, this Court upholds the orders of the Juvenile Court.

A. Active Efforts: Termination of Remedial Services

Mr. Little Bear argues that the Juvenile Court did not apply the proper standard of proof when it terminated his services. In addition, Mr. Little Bear argues the court erred when it applied the futility test to determine whether Mr. Little Bear should receive continued services.

Active efforts are affirmative; they require the case worker to take a client through the steps of a plan, rather than requiring the client to perform the plan on their own. *A.A. v. Alaska Dep't of Family & Youth Services*, 982 P.2d 256, 261 (Alaska 1999). The Bureau of Indian Affairs has further elaborated on this requirement, stating that "These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian Child's tribe. They shall also involve and use the available resources of extended family, the tribe, Indian social service agencies and individual Indian caregivers." Bureau of Indian Affairs, *Guidelines*

for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979), *available at* http://www.nicwa.org/administrative_regulations/icwa/ICWA_guidelines.pdf.

1. **Standard of Proof**

Many courts have held that to terminate services, there must be a showing, supported by clear and convincing evidence, that active efforts were made to prevent the breakup of the family. Nevertheless, Mr. Little Bear, in reference to other jurisdictions, argues that the standard of proof is beyond a reasonable doubt. This question has not been addressed in the State of Whittier.

At least one other court has acknowledged that U.S.C.A. § 1912(d) does not specify a burden of proof. *In re Vaughn R.*, 770 N.W.2d 795, 808 (Wis. Ct. App. 2009). However, that court, along with others, have rejected a finding that the standard of proof is beyond a reasonable doubt. *See Matter of Baby Boy Doe*, 902 P.2d 477 (Idaho 1995) (holding that remedial efforts need to be established only by clear and convincing evidence); *In Interest of A.P.*, 961 P.2d 706 (Kan Ct. App. 1998) (holding that remedial efforts need to be established only by clear and convincing evidence); *In re Interest of Walter W.*, 744 N.W.2d 55 (Neb. 2008) (holding that clear and convincing burden of proof applied to state law requirements that the agency make active efforts to provide remedial services and rehabilitative programs). Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind. *In re Michael G.*, 74 Cal. Rptr. 2d. 642 (Cal. App. 4th Dist. 1998) (quoting *In re Angelia P.*, 623 P.2d 198, 203 (Cal. 1981).

Pursuant to 25 U.S.C.A. § 1912(f), termination of parental rights may only be ordered when there is proof beyond a reasonable doubt that continued custody of the child by the parent

is likely to result in serious emotional or physical damage to the child. Mr. Little Bear therefore argues that because the termination of parental rights can only be ordered upon a factual basis shown beyond a reasonable doubt, any predicate to the termination of parental rights must be similarly supported by proof beyond a reasonable doubt. *Matter of Welfare of M.S.S.*, 465 N.W.2d 412, 418 (Minn. Ct. App. 1991). This Court disagrees.

Mr. Little Bear argues that even if the standard of proof is clear and convincing evidence, the evidence that DCW utilized active efforts to provide remedial services is insufficient. However, even in cases where minimal services were provided to the parent, various courts have held those services amounted to clear and convincing evidence of active efforts. For instance, in *Walter W.*, the case manager contacted various substance abuse programs, provided information about the programs and reviewed a list of homeless shelters with the mother. 744 N.W.2d 55 at 61. The child welfare agency also provided the mother with vouchers for rent, clothing and transportation. *Id.* This level of minimal assistance was sufficient for a finding of active efforts. *Id.* at 64. Here, Ms. White performed many of the same activities, and more, than the case manager in *Walter W.*

In *Baby Boy Doe*, the father received notice from the child welfare agency regarding his right to file a paternity claim and the tribe filed the claim on his behalf. 902 P.2d at 484. An attorney was appointed for the father and the state unsuccessfully tried to encourage the father to support his children through wage garnishment. *Id.* Notably, the mother, not the social worker, encouraged the father to attend counseling. *Id.* Under these facts, the Supreme Court of Idaho still held that the efforts by the child welfare agency satisfied active efforts. This Court finds that if these mere procedural protections offered by the state could qualify as active efforts, then certainly the efforts by Ms. White were are more than sufficient to rise to the standard of clear

and convincing evidence of active efforts. This Court affirms the Juvenile Court's finding of clear and convincing evidence that active efforts were made.

2. **The Futility Test**

Mr. Little Bear asserts that even if the standard of proof for a finding of active efforts is clear and convincing evidence, the Juvenile Court still erred when it found additional services following his incarceration would have been futile. Mr. Little Bear relies on a ruling by the Michigan Supreme Court that rejected the futility test. *In re J.L.*, 770 N.W.2d 853, 867 (Mich. 2009). There, the court stated "The ICWA obviously does not require the provision of endless active efforts, so there comes a time when the DHS or the tribe may justifiably pursue termination without providing additional services. A futility test does not capture this concept." *Id.* Mr. Little Bear argues that because the Juvenile Court employed the futility test, it did not assess whether additional services would have prevented the need for termination. 25 U.S.C.A. § 1912(d).

Mr. Little Bear ignores the timelines that are employed in dependency matters. Neither the Juvenile Court nor this Court can permit a young child like Sienna to languish in foster care. Moreover, the types of remedial and rehabilitative services required under subsection 1912(d) depend on the facts of each case. *Idaho Dep't of Health & Welfare v. Doe*, 275 P.3d 23, 33 (Idaho Ct. App. 2012). Here, Mr. Little Bear was incarcerated at the time of Sienna's 12-month hearing. With respect to incarceration, several courts have commented. In *A.A. v. State Dept. of Family and Youth Services*, the Alaska Supreme Court reasoned "A parent's incarceration significantly affects the scope of the active efforts that the State must make to satisfy the statutory requirement." 982 P.2d 256 at 261. Building on *A.A.*, in *Idaho Dep't of Health & Welfare v. Doe*, the court found that reunification efforts were frustrated by the father's

incarceration. 275 P. 3d at 33 (Idaho Ct. App. 2012) (citing *A.A.*, 982 P.2d at 261). Even in the absence of the social worker failing to provide information on a substance abuse and mental health assessment, the court still concluded there were active efforts. *Id.* at 32. Like the parents in each of these cases, Mr. Little Bear's incarceration compounded the challenges he faced reunifying with Sienna, and did not require anything further from DCW.

B. Adoptive Placement Preference

Mr. Little Bear also appeals Sienna's adoptive placement with Mr. Davidson and Mr. Pratt, arguing that there is not good cause to depart from placement preferences outlined in 25 U.S.C.A. § 1915(a).

In the absence of good cause, in any adoptive placement of an Indian child, preference shall be given to placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C.A. §1915(a). Mr. Little Bear posits that the ICWA "clearly recognizes the role of the child's extended family in helping to raise children," and that "the extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents." Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67584 (Nov. 26, 1979), *available at* http://www.nicwa.org/administrative_regulations/icwa/ICWA_guidelines.pdf. Nevertheless, this Court finds good cause to depart from the placement preference and upholds the order of the Juvenile Court.

1. Establishing Good Cause

The quantum of proof required to determine that there is good cause to deviate from the placement preference is not stated in 25 U.S.C.A. § 1915(a). However, Mr. Little Bear does not

dispute that the standard of proof shall be shall be clear and convincing evidence. *In re Alexandria P.*, 176 Cal.Rptr.3d 468, 488-91 (Cal. Ct. App. 2014). Rather, Mr. Little Bear disputes the Juvenile Court's finding that there was clear and convincing evidence of good cause to depart from the placement preference. According to legislative history, the good cause standard is used "to provide State Courts with a degree of flexibility in determining the disposition of a placement proceeding involving an Indian Child." Sen. Rep. No. 95-597, 95th Cong., 1st Sess., p. 17 (1977). The Guidelines offer that

> For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on [t]he request of the biological parents or the child when the child is of sufficient age; [t]he extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness; [t]he unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

Guidelines for State Courts, *supra*.

2. **Departure from the Placement Preferences**

The burden of establishing good cause shall be on the party seeking to depart from the preference. *Guidelines for State Courts*, *supra*. At the trial level, Mr. Stone presented compelling evidence in support of his position that the Juvenile Court should find good cause to depart from the placement preference and maintain Sienna in Mr. Davidson and Mr. Pratt's home. Mr. Stone presented evidence from qualified, expert witnesses, that Sienna's emotional needs dictated continued placement with her foster fathers, and thus established a finding of good cause to depart from the placement preference. In reliance on *In re C.H.*, 997 P.2d 776, 783 (Mont. 2000), Mr. Little Bear argues this evidence was not conclusive, and the possibility of harm does not amount to clear and convincing evidence of good cause.

In *C.H.*, an infant Indian child was physically abused, removed from her home and placed with a non-Indian family. In response to the tribe's contention that the placement preferences

were not being followed, the court reasoned that "[t]he risk that a child might develop [emotional] problems in the future is simply too nebulous and speculative a standard on which to determine that good cause exists to avoid the ICWA placement preferences." 997 P.2d at 783. Accordingly, the court held that in the absence of expert testimony that the child would develop an attachment disorder or neurodevelopmental problems, the risk of those problems does not amount to "extraordinary" physical or emotional needs warranting good cause to depart from the ICWA placement preferences. *Id.*

This Court, however, disagrees with the conclusion in *C.H.*, and instead defers to *In re Alexandria P.*, 176 Cal.Rptr.3d 468 (Cal. Ct. App. 2014). There, an Indian child was placed with a non-Indian family, and had a history of difficulty with attachment. *Id.* at 474-75. The court was explicitly unpersuaded by *C.H.* and held "that a court may find good cause when a party shows by clear and convincing evidence that there is a significant risk that a child will be suffer serious harm as a result of a change in placement." *Id.* at 493. Here, Mr. Stone demonstrated that Sienna is emotionally bonded to her foster fathers, relies on them for help, and views them as her primary caregivers. Causing Sienna to lose stability and potentially experience loss and trauma is a risk this Court will not undertake. This Court agrees with the reasoning in *Alexandria P.*, and finds good cause to depart from the placement preference in light of Sienna's emotional needs.

Mr. Little Bear also disagrees with the Court's finding that placement with Mr. Davidson and Mr. Pratt is in Sienna's best interests. On its own terms, 25 U.S.C.A. § 1915(b) does not require a best interests consideration to depart from the ICWA placement preference. However, though Sienna is an Indian child with a case governed by the ICWA, she is also a child with needs dictated by her individual circumstances. Mr. Little Bear would have this Court use the

broad strokes of the law to arrive at an outcome that suits his interest in placing Sienna with Ms. Redbird. However, this Court declines to neglect the nuances of Sienna's unique case.

Various courts have found that trial courts may consider the child's best interests when determining whether there is good cause to depart from the ICWA placement preference. *See In re Adoption of F.H.*, 851 P.2d 1361, 1363-64 (Alaska 1993); *In re Adoption of M.*, 832 P.2d 518, 55 (Wash. Ct. App. 1992). Mr. Little Bear claims that "this Court should start with the presumption that ICWA preferences are in the child's best interest and then balance that presumption against other relevant factors to determine whether placement outside ICWA preferences is in the child's best interest." *Navajo Nation v. Arizona Dep't of Econ. Sec.*, 284 P.3d 29, 35 (Ariz. Ct. App. 2012).

According to Mr. Little Bear, when we begin with the presumption that the ICWA placement is in Sienna's best interest, there is insufficient evidence to demonstrate good cause to depart from the ICWA placement preference. Mr. Little Bear urges this Court to acknowledge there is no showing that Mr. Davidson and Mr. Pratt will expose Sienna to her Cherokee heritage, which decries the very purpose of ICWA and its intended purpose. However, the presumption that following the placement preferences is in the child's best interest is only a starting point; it is not the end of the inquiry into the child's best interests. *Alexandria P.*, 176 Cal.Rptr at 495. This Court need not repeat itself. The foregoing testimony and reports addressing Sienna's emotional and physical needs, amply demonstrate that consideration of Sienna's best interests establish good cause to depart from the ICWA placement preference.

STATE OF WHITTIER
SUPREME COURT

DANIEL LITTLE BEAR	**No. 923-2014**
v.	
STATE OF WHITTIER, **Ms. Kathryn Candler, Director of the Whittier Department of Child Welfare**	**Certiorari to the State of Whittier Court of Appeal**

ORDER GRANTING CERTIORARI

November 14, 2014

1. Did the Juvenile Court err when it found by clear and convincing evidence that the Department of Child Welfare made active efforts to provide Mr. Little Bear with remedial services?

2. Did the Juvenile Court err when it found there was good cause to deviate from the adoptive placement preference outlined in the Indian Child Welfare Act?

IT IS SO ORDERED.