

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF TIMOTHY W. ET AL.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF TIMOTHY W. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,

V.

JENNIFER D., APPELLANT, KEITH W., SR., APPELLEE AND CROSS-APPELLANT,
AND TLINGIT HAIDA TRIBE, INTERVENOR-APPELLEE.

Filed March 5, 2013. No. A-12-704.

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

Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., for appellant.

Barbara Prince for appellee Keith W., Sr.

IRWIN, MOORE, and PIRTLE, Judges.

MOORE, Judge.

INTRODUCTION

Timothy W.; Autumn W.; Elizah W.; Keith W., Jr. (Keith Jr.); and Isaiah W. are Indian children who were adjudicated by the separate juvenile court of Sarpy County under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). After the case was transferred to the separate juvenile court of Douglas County, Jennifer D. filed a motion for placement of the children in her home, which motion was denied. On appeal, Jennifer alleges that the court erred in denying her due process rights and in not properly applying the Indian Child Welfare Act (ICWA) to the proceedings. The father of four of the children, Keith W., Sr. (Keith Sr.), cross-appeals. Because we find that the court did not make the required findings under ICWA and that the record does not support foster care placement of the children under ICWA, we reverse, and remand for further proceedings.

BACKGROUND

Jennifer and William B. are the biological parents of Timothy, born in 1995. Jennifer and Keith Sr. are the biological parents of Autumn, born in 1997; Elizah, born in 1999; Keith Jr., born in 2000; and Isaiah, born in 2005. William is not a party to the present appeal.

The State filed a petition on July 30, 2010, in the separate juvenile court of Sarpy County, alleging that the children were children as defined by § 43-247(3)(a) as a result of the faults or habits of Jennifer. The petition alleged (1) that on or about July 17, 2010, and again on July 29, the four youngest children were removed from Jennifer's care due to excessive and inappropriate physical discipline on one or more of the children and that Timothy was currently placed with Keith Sr.; (2) that on or about August 21, 2008, the children were removed from Jennifer's care after the home was found in an unsafe and unsanitary condition, that Jennifer was provided services and the case was dismissed on March 20, 2009, and that on September 23, the home was again found in an uninhabitable condition but Jennifer moved with the children to the home of the paternal grandparents; (3) that Jennifer is chronically unemployed, has not provided stable housing, has moved numerous times over the last 1½ years, and is now homeless; and (4) that law enforcement and Child Protective Services received numerous referrals for the family over the last year and the Nebraska Department of Health and Human Services (DHHS) has provided aid to the family but the family remains in need of services for the health, welfare, and safety of the children. With regard to Keith Sr., as to Autumn, Elizah, Keith Jr., and Isaiah, the petition alleged that the children came within the meaning of § 43-247(3)(a) through no fault of Keith Sr. and that Keith Sr. was not the custodial parent and was unable to protect his children while they are in the care of Jennifer. The petition also contained allegations against William as to Timothy. Finally, the petition alleged that the children were or may be eligible for enrollment in the Tlingit Haida Tribe, that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the need for placement in foster care, but that those efforts were unsuccessful. The State also filed on July 30, 2010, a separate ICWA notice to the parents and tribe. On the same day, the juvenile court entered an order finding sufficient probable cause for temporary custody and placement of the children with DHHS; that returning the children to their home would be contrary to their health, safety, or welfare; that an emergency which threatened the safety of the children exists; and that reasonable efforts were attempted to prevent removal.

On August 3, 2010, a detention hearing was held. The next day, the juvenile court entered an order continuing the detention of the children. The court found that active efforts had been made to prevent or eliminate removal, including services such as family support, assignment of a service coordinator, and employment and housing assistance. The court further found that Jennifer had been accused of physical abuse of one of the children and was incarcerated. In a subsequent nunc pro tunc order, the previous order was corrected to reflect that the children are placed in the temporary custody of DHHS for placement with Keith Sr.

On March 14, 2011, the Tlingit Haida Tribe of Alaska filed a notice of intervention in the proceedings, although the record does not indicate that any further action was taken by the tribe.

On May 9, 2011, Jennifer changed her plea and admitted to count I of the petition as amended by interlineation. The amended petition alleged (1) that on July 17 and 29, 2010, the four youngest children were removed from Jennifer's care due to physical discipline by Jennifer;

(2) that on or about August 21, 2008, the children were removed from Jennifer's care after the home was found in an unsafe and unsanitary condition, that Jennifer was provided services and the case was dismissed on March 20, 2009, that on September 23, 2009, the home was again found in an uninhabitable condition but Jennifer moved with the children to the home of the paternal grandparents; and (3) that Jennifer has been unemployed for over 1 year, has not provided stable housing for her children, and has moved numerous times over the last 1½ years. The court advised Jennifer of her rights and dispositions, accepted Jennifer's admission, found a factual basis existed, and adjudicated the children under § 43-247(3)(a).

On May 13, 2011, Keith Sr. admitted to the allegations in the petition pertaining to him. The court advised Keith Sr. of his rights and dispositions, accepted Keith Sr.'s admission, found a factual basis existed, and adjudicated the children under § 43-247(3)(a).

On August 10, 2011, the court entered an order by stipulation of the parties vacating custody for Timothy with DHHS and placing custody for Timothy with his father, William, in California.

On October 7, 2011, the court entered an order finding that active efforts had been made to eliminate the need for removal of the children and that returning them to the parental home would be contrary to their best interests at this time because there needed to be a transition and further therapeutic services. The court found that a petition to terminate parental rights was not required to be filed because the children were being cared for by Keith Sr. The court stated that Jennifer "has been doing a tremendous job in making progress through her therapeutic services." In addition to the services ordered for Jennifer and the children, Timothy was placed back into the custody of DHHS to reside with Keith Sr. (No findings or requirements were made with respect to Keith Sr. other than the placement reference.)

On October 31, 2011, the court ordered that Jennifer could have unsupervised parenting time with the children and that placement of Autumn should include placement with Jennifer. On November 15, Autumn was placed with Jennifer. On January 13, 2012, the court entered an order finding that the children should remain in the custody of DHHS with placement of Timothy with Keith Sr. and placement of Elizah and Keith Jr. with Jennifer upon proper walk-through and investigations. Autumn was placed at "Youth Links" under a separate Douglas County docket.

On February 2, 2012, the separate juvenile court of Douglas County accepted the transfer of this case. On March 23, the court held a disposition and permanency planning hearing. Although there were conversations had on the record, no witnesses were sworn. The court was told that Jennifer was being evicted or had been evicted and that the children were staying with Keith Sr., except Autumn who was at "Youth Links." Jennifer was staying at the "MICA House" shelter. There were no recommendations for Keith Sr. in the case plan provided to the court at the hearing. The court was advised that since the beginning of the case, the children were allowed to stay with Keith Sr. Jennifer's attorney expressed concern that this was an ICWA case and that there had not yet been sworn testimony at the hearing. The court questioned whether ICWA was applicable as it could not locate an order or judicial finding that ICWA applied to the case. No order from this hearing is found in the record; however, at the end of the hearing, the court orally stated that the children would remain in the legal custody of DHHS with temporary placement with Keith Sr. Jennifer was allowed supervised visitation.

On March 29, 2012, Jennifer filed a motion requesting an order finding the children to be Indian children as defined by the Nebraska Indian Child Welfare Act (NICWA). No order from this motion is found in the record.

On April 4, 2012, a continued disposition hearing was held. The court received exhibits including the notice of intervention filed in Sarpy County by the Tlingit Haida Tribe and certificates of enrollment for all of the children. The court orally found that “as of today, based on the evidence, that the children are enrolled members of this tribe and that [ICWA] is applicable to these proceedings, and it is so ordered.” The court then heard testimony from various witnesses.

Teresa Smith, a family consultant with Boys Town In-Home Family Services, testified about the services provided to Jennifer. Jennifer currently worked at an on-call position for \$10 an hour, and she received food stamps. Smith helped Jennifer look for rent and utility assistance to supplement her income, though she was unable to obtain it in time to prevent eviction from her most recent housing where she had lived from November 2011 through March 2012. Since the eviction, Smith helped Jennifer apply for housing through various community or federal programs and locate shelters where the entire family could go. Jennifer was accepted into the “MICA House” shelter prior to the March hearing, which shelter would also accept her children. Residents may stay at the shelter for 30 days, while working to obtain financial and housing stability. Smith was also working with Jennifer to arrange housing when she leaves the shelter. Smith testified that Jennifer was always cooperative and worked to access community resources. Smith did admit that she had concerns, based upon Jennifer’s history, with stable housing and whether she would be able to maintain new housing. Smith did not work with Keith Sr., and she only visited his home to pick up the children.

Jennifer Hillebrandt, a family permanency specialist with Nebraska Family Collaborative (NFC), testified that she did not have any safety concerns about the children residing with Jennifer at the shelter. However, Hillebrandt was concerned about Jennifer’s housing problems in the past, as it related to the children’s need to have stability, especially when they have strong behaviors. Hillebrandt was not aware of any restrictions on the placement of the children with Keith Sr. At that time, she had no specific concerns for the children’s risk of harm while in Keith Sr.’s home.

Jennifer Cornett, also a family permanency specialist with NFC, worked with the family from July 2011 until February 2012. Cornett testified that Jennifer cooperated with all the services provided to her and that she even sought services and programs on her own not provided by NFC or DHHS. Since the inception of the case, Cornett estimated that Jennifer had lived in seven different places, which was concerning because of the children’s behavioral issues.

Cornett had not received any reports of problems in Keith Sr.’s home, and there were no restrictions regarding placement of the children with Keith Sr. However, approximately 1 week prior to the hearing, there was an altercation involving Keith Sr., the family, and several other people at a park during a supervised visit with Autumn, which altercation began when an unrelated person used inappropriate language toward one of the children. Cornett thought Keith Sr. could have made better choices to avoid the incident by walking away and leaving the park instead of allowing the situation to escalate.

Jennifer also testified that she had been employed for 6 months as a client specialist in a drug and alcohol treatment facility.

At the end of the hearing, the representative for DHHS told the court that it may be premature to place the children back with Jennifer, but that DHHS would have no objection to placing the children with Jennifer in the event that she has suitable housing lined up when she leaves the shelter. DHHS felt it would be appropriate to continue placement of the children with Keith Sr. at that time. The county attorney did not support placement with either Jennifer or Keith Sr. and recommended foster care. Finally, the guardian ad litem for the children recommended keeping placement with Keith Sr. and reviewing Jennifer's housing situation after she leaves the shelter.

At the conclusion of the hearing, the court orally stated that under the circumstances and the risk of harm the children were subjected to, it could not leave the children in the care of Keith Sr. Neither could the court place the children in the shelter with Jennifer where in less than 2 weeks they would be moved again. The court ordered that the children would remain in the custody of DHHS in a neutral, appropriate setting, such as "Youth Links" or foster care. The other recommendations were taken under advisement. The court ordered unsupervised visitation with Jennifer and the children and ordered supervised visitation with Keith Sr. No written order from this hearing was found in the record.

On May 3, 2012, DHHS filed notices of change of placement for Keith Jr. and Isaiah, indicating the requested changes occurred on April 26 and April 28, respectively, and were due to aggressive behaviors exhibited by the boys. NFC contacted the Tlingit Haida Tribe and consulted the Ponca Tribe prior to placement; however, both tribes stated that there were no ICWA homes available at that time. Keith Jr. and Isaiah were moved from the foster home they were placed in following the April 4 hearing to two separate foster homes.

On June 6, 2012, Jennifer filed a motion for placement of Autumn, Elizah, Keith Jr., and Isaiah in her home. Jennifer alleged that placement would be in the children's best interests, that placement of the children with her was appropriate under the NICWA, that DHHS and NFC were in agreement with the placement, and that Jennifer obtained appropriate housing which was reviewed by NFC. A hearing on the motion was held on June 11. In its opening remarks, the court stated that "on the record but not memorialized in writing the Court did make a finding that the [ICWA] was applicable to these proceedings, as that had not been resolved before the Court."

Sherri Eveleth, the ICWA program specialist with DHHS, testified that she first became involved with the family in December 2010. Eveleth provides consultation to staff and external partners concerning ICWA compliance, serves as tribal liaison, attends family team meetings, drafts policy, and facilitates culturally appropriate services. Eveleth has a bachelor's degree in social and behavioral sciences and a juris doctorate, and she has attended national trainings on ICWA, child development, multicultural studies, and Indian law issues. She is a member of "the Community Initiative for Native Children and Families [and was] a primary drafter of the Iowa Indian Child Welfare Act."

Eveleth stated:

My initial concerns as far as compliance with active efforts in particular when the case was in Sarpy County was that there had been no communication or little communication with the children's tribe. The tribe was not involved in case planning. There seemed to be

no culturally relevant services that were being offered or provided at that time as well as placement -- placement of the children. When it was considered, there were no placements within placement preferences. I was concerned that there was no cultural plan in place to keep the children in contact with their culture.

Some of her concerns were resolved, "in large part due to the efforts of [Jennifer] in this case." Jennifer sought out and successfully completed many culturally relevant services through the Ponca Tribe.

Eveleth was concerned that the children were not currently placed within the placement preferences of ICWA. Regarding Jennifer's housing instability, Eveleth testified:

Native communities in general are transient. They often stay with families. Generations live together very often. And add to the factor -- add to the transient nature of Native communities, there are issues of poverty or the lack of available services to support housing that may not meet mainstream, middle class standards but may be much more appropriate in cases to work with the housing and to bring the housing up to better standards if there are safety concerns than removing the children.

Finally, Eveleth stated that she had no safety concerns for any of the children if placed with Jennifer that would rise to the level of serious emotional or physical danger to the children. Her recommendation was for the children to be placed in Jennifer's physical custody with support services in place. Eveleth did not testify regarding Keith Sr.

Joan Ostblom, a family permanency specialist for NFC, took over the case from Cornett on April 4, 2012. Ostblom testified that Jennifer obtained independent housing 3 or 4 weeks prior to the hearing. At the time of the hearing, the three youngest children were all in separate foster homes because NFC could not find someone to take all of them together due to their behaviors. Both Keith Jr. and Isaiah have therapists and are working with community treatment aides to address the behaviors exhibited in the foster homes. Ostblom recommended that the children be allowed to return home with Jennifer. Jennifer cooperated with NFC's case management, attended family team meetings, and communicated with Ostblom regarding questions or concerns.

Smith testified about the services she was working on with Jennifer. Recently, they were accessing community resources for beds and other household items, working on parenting skills, creating a parenting plan, and creating schedules for the children to provide structure if they were to return home. Smith and Jennifer planned that while Jennifer was at work, Keith Jr. would continue to attend a day camp and a babysitter was in place for the other children.

Jennifer testified that she moved into her new residence around May 22, 2012. NFC paid the deposit, and Jennifer paid the first month's rent. She was still employed full time as a client specialist in a drug and alcohol treatment facility. Jennifer also testified about a former boyfriend and agreed to refrain from having contact with him or having him in her home if she was so ordered by the court.

No evidence was presented by Keith Sr. at the hearing. During the hearing, the court would not allow Keith Sr.'s attorney to ask the witnesses about placement in Keith Sr.'s home. The court asked Keith Sr. if he opposed Jennifer's motion for placement, to which his attorney

responded that Keith Sr. would like placement of the children with him, but in the alternative, he would support placement with Jennifer.

At the end of the evidence, the court orally stated that it could not grant Jennifer's request for placement and that it was unsure where to go with the case. The court was most concerned with DHHS' and NFC's management or lack thereof over the case's lifespan. On June 13, 2012, the court entered an order taking the matter under advisement. Pending further order, the court ordered supervised visitation for both parents.

On July 11, 2012, the court entered an order denying Jennifer's motion for placement, stating that she must demonstrate more stability and a definite plan for childcare. In its seven-page order, the court summarized the facts that it received from Sarpy County and made factual findings regarding the previous hearings of March 23, April 4, and June 11. The court did not adopt the recommendations from DHHS regarding Jennifer and referred the matter back to DHHS for "more substantive recommendations under the circumstances." Although it denied placement of the children with Jennifer at that time, the court ordered reasonable visitation to be supervised by DHHS. With regard to Keith Sr., the court noted the "'melee'" involving Keith Sr., his wife, and the children in the park, which could have been avoided by Keith Sr. Based upon an evaluation of Autumn submitted to the court, the court was also concerned that Keith Sr. may have a history of substance-related problems; continues to use alcohol and marijuana; and has experienced problems with anger, aggression, depression, and anxiety. Although the children were adjudicated as to Keith Sr., the court was concerned that there had not been sufficient investigation into his circumstances or parenting and that nothing had been required of him by the court. The court ordered Keith Sr. to submit to a chemical dependency evaluation and a psychological evaluation. The court also ordered Keith Sr. to provide proof of his school attendance during the pendency of the case. Finally, the court ordered that ICWA was applicable to the proceedings. Jennifer appeals from this order, and Keith Sr. cross-appeals.

ASSIGNMENTS OF ERROR

Jennifer asserts, as summarized, that the juvenile court erred in detaining her children in violation of her due process rights and in violation of ICWA. Keith Sr. assigns similar errors in his cross-appeal. The State has waived filing a brief in this case.

STANDARD OF REVIEW

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

ANALYSIS

The primary question in this appeal is whether the juvenile court adhered to the requirements of ICWA. Both Jennifer and Keith Sr. assign error to the court's July 11, 2012, order which continued placement of the children in foster care without evidence or findings as required under ICWA. We note that contrary to the juvenile court's delayed finding, this case has been an ICWA case since its inception, as shown by the petition and notice filed in July 2010.

ICWA was enacted by Congress in 1978. Its stated purpose is

“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.”

In re Interest of Zylena R. & Adrionna R., 284 Neb. 834, 840-41, ___ N.W.2d ___, ___ (2012), quoting 25 U.S.C. § 1902 (2006). NICWA was enacted by the Nebraska Legislature in 1985 to bring state policies and procedures in line with the federal act. See Neb. Rev. Stat. § 43-1502 (Reissue 2008).

NICWA requires that before foster care placement or termination of parental rights can occur, it must be shown that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” Neb. Rev. Stat. § 43-1505(4) (Reissue 2008). NICWA also provides that no foster care placement may be ordered in the absence of a determination, supported by clear and convincing evidence, including testimony of 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. § 43-1505(5).

In a foster care placement determination involving an Indian child, the failure to make either of the foregoing findings is harmless error where a de novo review indicates that clear and convincing evidence supports these findings. *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006).

In the court’s order denying Jennifer’s motion for placement and continuing the foster care placement of the children, it found that ICWA was applicable to the proceedings; however, the court made no findings that active efforts were made and proved unsuccessful or that placement with Jennifer or Keith Sr. would result in serious emotional or physical damage to the children supported by testimony by a qualified expert.

Based on our de novo review of the record, we cannot say that the court’s failure to make the required findings was harmless error because the record does not contain clear and convincing evidence to support a finding either that active efforts have been made which have proved unsuccessful or that continued custody of the children by either Jennifer or Keith Sr. would likely result in serious physical or emotional damage to the children.

The juvenile court, in its oral findings at the conclusion of the April 4, 2012, hearing, removed Timothy, Elizah, Keith Jr., and Isaiah from placement with Keith Sr. and ordered they be placed in a “neutral setting.” In its written order of July 11, 2012, following the June 11 hearing, the juvenile court continued the foster care placement of the children. The evidence from these two hearings does not show that active efforts were made to prevent the placement outside of the parental home. At the time of the April 4 hearing, all of the children except Autumn were living with Keith Sr. and there was no testimony concerning active efforts as they related to him. Both DHHS and the children’s guardian ad litem recommended continued placement with Keith Sr. At the June 11 hearing, testimony of Eveleth, the ICWA program

specialist with DHHS, cast doubt on compliance with the active efforts requirement. Specifically, there was evidence to suggest that the efforts made were not culturally appropriate, that communication with the tribe was nonexistent, and that the children's placements did not comply with ICWA standards. Further, the evidence from these hearings shows that services were provided to Jennifer to assist with her housing situation, which included securing a shelter home after Jennifer's eviction that was appropriate for her children and thereafter in securing appropriate independent housing. At the June hearing, Jennifer was living in an apartment, actively engaging with support service providers, and working full time. Thus, it appears that the efforts made, with respect to Jennifer, had in fact proved successful. There was no evidence in the record to show that after the children's removal from Keith Sr.'s custody on April 4, active efforts had been made with respect to Keith Sr. that had proved unsuccessful. Therefore, we find that the juvenile court erred in failing to find that active efforts to preserve and reunify the family had been made and were unsuccessful.

Likewise, our de novo review of the record leads us to conclude that the failure of the juvenile court to make a finding regarding whether serious physical or emotional damage is likely to occur with continued custody in either Jennifer or Keith Sr. was not harmless error because there was no evidence from a qualified expert witness to support such a finding. In fact, Eveleth, the ICWA program specialist with DHHS, testified that she had no safety concerns that would rise to the level of serious physical or emotional danger if the children were placed with Jennifer with support services in place. Eveleth provided no testimony regarding the likelihood of serious physical or emotional danger if the children were placed with Keith Sr.

Because we find the juvenile court erred in failing to find that active efforts have been made which have proved unsuccessful to prevent the breakup of this family and that serious physical or emotional damage is likely to occur if the children were in the continued custody of either parent in this case, and because our de novo review concluded that the evidence would not support either finding, we reverse the July 11, 2012, order of the juvenile court and remand the cause for further proceedings. Given this resolution, we need not address the due process arguments presented in this appeal and cross-appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Conley v. Brazier*, 278 Neb. 508, 772 N.W.2d 545 (2009). Further, we do not address Jennifer's alleged errors concerning the previous orders of the juvenile court of Sarpy County, because she did not file a timely appeal from those proceedings.

CONCLUSION

For the reasons discussed, we conclude the juvenile court erred by failing to make findings required by ICWA that active efforts to preserve and reunify the family were made which proved unsuccessful and that serious emotional or physical damage to the children would result from Jennifer's continued custody. Because the record does not support foster care placement of the children under ICWA, we reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.