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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

PASCUA YAQUI TRIBE, Petitioner, v. THE SUPERIOR COURT OF KERN COUNTY, Respondent; KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Real Party in Interest.	F041800 (Super. Ct. No. JD096162) **OPINION**

THE COURT*

ORIGINAL PROCEEDING; petition for extraordinary writ review.

Christopher R. Booth for Petitioner.

No appearance for Respondent.

B.C. Barmann Sr., County Counsel, and Jennifer L. Thurston, Deputy County Counsel, for Real Party in Interest.

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* Before Vartabedian, Acting P.J., Harris, J. and Cornell, J.

Petitioner Pascua Yaqui Tribe, a federally-recognized Indian nation, seeks extraordinary writ review (Welf. & Inst. Code, § 366.26, subd. (*l*); Cal. Rules of Court, rule 39.1B) of respondent court's order to hold a section 366.26 hearing for Marina C., an Indian child. Petitioner contends the court erred by denying its petition brought, pursuant to the federal Indian Child Welfare Act (ICWA; 25 U.S.C. § 1900 et seq. [1]), to invalidate its dispositional orders for noncompliance with the ICWA. We agree and will grant relief.

PROCEDURAL AND FACTUAL HISTORY

Marina was born in January 2002. Her mother, who then was also a minor, admitted using PCP during her pregnancy and tested positive for PCP at the time of Marina's birth. Real party Kern County Department of Human Services (the Department) consequently detained Marina and initiated the underlying dependency proceedings (see Welf. & Inst. Code, § 300, subd. (b)). As of the originally-set dispositional hearing, the Department had information that the mother was of Pascua Yaqui Indian heritage. The court in turn continued the hearing so the Department could give petitioner notice under the ICWA. On April 8th, the continued hearing date, the Department submitted on a March 28th report which stated in relevant part:

> "On March 27, 2002, the undersigned spoke with Justin Rodieri, Social Worker for the Pascua Yaqui Tribe in Tuscon, Arizona. Mr. Rodieri requested the mother's date of birth and social security number, which was [*sic*] provided. Mr. Rodieri stated that the maternal grandmother, Irene [C.], is an enrolled member of the tribe; however, it would need to be determined if the mother, Maricela [C.], is an enrolled member before the tribe determines whether or not they will become involved in this matter. Mr. Rodieri relayed that it would normally takes [*sic*] approximately one week to determine if the mother is enrolled; however, due to several ceremonial activities taking place, it may take longer at this time. As of the writing of this report, the undersigned has not received any information as

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[1] All statutory references are to the ICWA and Title 25 United States Code unless otherwise indicated.

to a decision by the tribe regarding any desired involvement with the child's case."[2]

During the hearing, the court asked the social worker whether the Tribe had been noticed and if so, whether in writing or by phone. The social worker answered: "I have the phone call and I also have a signed certified return receipt." The court accepted the social worker's representation but asked her to "sometime today" submit a copy for the court's file. There is no indication in the record that the social worker ever complied with the court's direction.

Meanwhile, the court adjudged Marina a dependent child and ordered out-of-home placement as well as reunification services for the mother. There is no record that the court or the Department served petitioner with a copy of the April 8, dispositional order.

Ten days later on April 18, petitioner moved in writing to intervene in the dependency pursuant to the ICWA (§ 1911(c)). In its motion, petitioner indicated its awareness of the juvenile dependency petition filed in January and Marina's eligibility for membership in the Tribe. In addition to intervention, the Tribe also requested notice of all future hearings and copies of all documents in the record. For whatever reason, respondent court did not set the motion for hearing until the end of May at which time the court's clerk calendared the matter for June 7.

On June 7, the court granted the motion to intervene. During the hearing, the court inquired of petitioner's counsel whether the Tribe would be taking any particular action at that point in time. Counsel replied he had only just received the record. He did ask that the court be willing, if necessary, to reopen the issue of temporary placement because

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[2] We take this opportunity to remind the Department that a parent's enrollment in a tribe is not a prerequisite for the application of the ICWA. (§ 1910(4); *In re H.A.* (2002) 103 Cal.App.4th 1206.) Enrollment is but one means of establishing membership in a federally-recognized Indian nation. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.)

the Tribe preferred a tribal placement for Marina. The court appeared to agree that the matter was open.

The following month counsel for the Tribe prepared a petition pursuant to section 1914 to invalidate Marina's foster care placement.[3] According to the petition, the order removing Marina from her mother's care and placing her in foster care violated the ICWA because there was no testimony from qualified expert witnesses that Marina's continued custody by her mother was likely to result in serious emotional or physical damage to the child. The court's clerk filed the petition on July 16, but took no apparent action to specially set the petition for hearing.

Meanwhile, the Tribe filed a supplement to its petition again asking the court to grant the original petition to invalidate. In the alternative, the Tribe moved to extend reunification services for another six months and immediately transfer Marina to the foster care of a Tribe member. The Tribe cited portions of the ICWA requiring that (1) active efforts be made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family (§ 1912(d)), and (2) in the case of an out-of-home placement, the agency or court effecting the placement shall follow the Tribe's order of preference so long as the placement was the least restrictive setting appropriate to the child's particular needs (§ 1915(b)). According to a resolution of the Pascua Yaqui Tribe, placement preference should be given to a Yaqui family over a generic foster

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[3] Section 1914 states:

> "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title."

placement. The Tribe proposed placement of Marina with a Tribe member from Los Angeles County who had a California foster home license and was also certified by the Tribe to provide foster care to a child like Marina.

The court considered the Tribe's petition to invalidate on August 16, 2002, the same date as the six month status review in Marina's case. The Department recommended that the court terminate services for the mother because she failed to meet any of the reunification objectives, except for her attendance at some visits with Marina. To the extent the mother drug-tested, she repeatedly tested positive. She also failed to appear for drug tests on five occasions. The Department further urged the setting of a section 366.26 hearing to select and implement a permanent plan for Marina.

At the August hearing, the Department argued there was no reason to retroactively apply the ICWA because at the time of April dispositional hearing (1) the Tribe had notice and (2) the court had no evidence Marina was an Indian child. The Department also urged that the Tribe waived any defect by not appealing the dispositional order. The court tried to clarify the Tribe's position in response but county counsel interrupted to say there could be no determination that the ICWA applied unless the Tribe said so. The court in turn asked counsel for the Tribe:

> "you are arguing even though [the Tribe] did not intervene, [the Tribe] did not notice us that the child was an eligible enrolled member or your client wanted ICWA to apply, we should go back now and apply ICWA?"

Counsel for the Tribe replied in the affirmative. He added "I don't believe that the procedural requirements of the ICWA can be waived . . . ."

After further argument amongst the various attorneys present, the court inquired of counsel for the Tribe whether he was still arguing Marina should be returned to the mother. Counsel stated that the Tribe was not blind to the mother's problems. Nevertheless, he added the Department must follow the procedures set forth in the ICWA. First, the Department must secure the opinion of a qualified expert witness

within the meaning of the ICWA. Then, assuming Marina was not returned to her mother's custody, the Tribe wanted the child placed with their member in Southern California. Also, the mother should receive six more months of services to reunify.

At the end of the hearing, the court took the matter under submission. Two months later, the court issued a written ruling denying the Tribe's petition, terminating reunification services for the mother and setting a Welfare and Institutions Code section 366.26 hearing. In denying the Tribe's petition, the court reasoned the Tribe was properly noticed for the April dispositional hearing and then waited approximately three months before petitioning to invalidate the dispositional order of removal from parental custody and placement in foster care.

This writ proceeding followed.

DISCUSSION

I. *Introduction*

In challenging the juvenile court's denial of its petition to invalidate, the Tribe contends the court should have revisited the issue of Marina's out-of-home placement to determine whether active efforts had been made to prevent the breakup of the Indian family (§ 1912(d)) and whether qualified expert witnesses would testify that parental custody was likely to cause Marina serious emotional or physical damage (§ 1912 (e)). In any event, the Tribe argues the court should have extended six additional months of reunification services to the mother. Last, according to petitioner, the court should have deferred to the Tribe's out-of-home placement preferences and ordered Marina's immediate placement with the foster family certified by the Tribe. (§ 1915.)

The Department, as real party, disagrees on various grounds. First, it contends the court could properly deny the Tribe's petition to invalidate because the Tribe never sought review of the dispositional findings and orders and those findings and orders are not subject to collateral attack by a petition to invalidate. Second, because there was no evidence at the April dispositional hearing that Marina was an Indian child, the court did

not need to follow the ICWA's requirement of expert testimony before ordering her removal from her mother's custody. Third, the Department argues even if the court should have applied the ICWA at the dispositional hearing, there was clear and convincing evidence that active efforts were made to prevent Marina's removal from her mother's care. Fourth, the lack of expert evidence was harmless, according to the Department, because there was other substantial evidence that continued parental custody would have caused Marina serious detriment. Last, given the reasonable services that the mother received, there was no reason to extend additional services to her.

On review, we agree with the Tribe, not the Department, and will grant relief by remanding the matter for further proceedings consistent with the ICWA.

II. *Revisiting the April Dispositional Orders*

The primary issue in this case is whether the Tribe, by its petition to invalidate, could essentially compel the court to turn back the clock and revisit its dispositional orders. As previously mentioned, respondent court believed the Tribe was essentially too late with its petition. The court reasoned the Tribe had been properly noticed for the April dispositional hearing and then waited approximately three months before petitioning to invalidate the dispositional order of removal from parental custody and placement in foster care.

The Department likewise argues the Tribe had proper notice but adds the Tribe waived notice as an issue because it never raised the question in the juvenile court. The Department further contends that if the Tribe wanted to contest the April dispositional findings and orders it should have sought appellate review of those findings and orders. On review of the record, we disagree with both respondent court and the Department. There was insufficient evidence of ICWA-required notice to the Tribe. Further, the Tribe neither unreasonably delayed in petitioning to invalidate nor did it waive its arguments on appellate purposes.

A. **No evidence of ICWA notice compliance**

According to the Department's report for the April dispositional hearing, there was evidence that Marina might be eligible for membership in the Tribe and that a social worker had a telephone conversation with someone associated with the Tribe who would look into the matter. The social study contained no evidence that the Department complied with the ICWA by serving the Tribe with adequate notice. When the court inquired about the notice issue at the hearing, the social worker referred to the telephone call and a return receipt for an unidentified mailing.

Under these circumstances, respondent court's finding of sufficient notice was erroneous. The Department failed to establish it gave notice to the Tribe "by registered mail with return receipt requested, of the pending proceedings and of their right to intervention." (§ 1912(a).) The Department's reliance on its social worker's telephone call was meaningless so far as the ICWA was concerned. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1423.)

As this court has previously observed, compliance with ICWA notice requirement involves nothing more than the completion of a preprinted form promulgated by the State of California, Health and Welfare Agency, for the benefit of county welfare agencies and the attachment of a copy of the dependency petition. (*In re H.A., supra,* 103 Cal.App.4th at p. 1211; *In re Desiree F., supra,* 83 Cal.App.4th at p. 475.)[4] Here, however, the Department submitted neither a copy of the notice it served nor the return receipt allegedly received, despite the court's direction that such proof be submitted. Even now with this writ petition pending and this court's recent ruling in *In re H.A., supra,* 103 Cal.App.4th 1206, real party still has taken no action to establish that it did comply with

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[4] The form is entitled "NOTICE OF INVOLUNTARY CHILD CUSTODY PROCEEDING INVOLVING AN INDIAN CHILD" and is numbered "SOC 319."

the ICWA and when service was completed. In *In re H.A., supra,* 103 Cal.App.4th at page 1215, we held a Department, who seeks the foster care placement of a child who may be eligible for Indian child status, must serve the requisite notice pursuant to the terms of the ICWA (§ 1912(a)) and file with the superior court copies of proof of the registered mail or certified mail and the return receipt(s), the completed notice form that was served, and any responses received. The alternative is "the strong likelihood of reversal." (*In re H.A., supra,* 103 Cal.App.4th at p. 1214.)

B. **No waiver of the issue in the juvenile court**

The Tribe did not waive the issue of proper notice. While it is true counsel for the Tribe never specifically disputed the question in the juvenile court, he also never misled the court into believing the Tribe waived any claims as to proper notice. At the June 7th hearing on the motion to intervene, the Tribe's attorney made clear that he was not in position to make any concessions. He had just received a copy of the record that day. Then at the hearing on the petition to invalidate counsel for the Tribe took the position that the ICWA's procedural requirements could not be waived.

C. **Delay due to the court**

Next, any delay in this case was largely due to respondent court. There was no evidence in the record as to <u>when</u> the Department served with the Tribe notice pursuant to the ICWA. This occurred despite the court's sua sponte duty to assure that the Tribe received proper notice pursuant to the ICWA before conducting the April dispositional hearing (*In re Desiree F., supra,* 83 Cal.App.4th at pp. 471-472) as well as the fact that the Department never complied with the court's order to file its proof of service. Thus, it is impossible to say that the Tribe's motion to intervene was belated.

In any event, the Tribe filed its motion to intervene and discovery request on April 18th. However, the court's clerk took no action to set a hearing date on the motion until the end of May, a delay of over 40 days. Then, the court's clerk calendared the matter for June 7, a delay of at least another week.

It was not until that June date that the Tribe even received discovery of the record here. Although counsel for the Tribe did not submit the petition to invalidate for filing until July, the time he expended does not appear unreasonably dilatory considering the need to review the record, consult with his client for direction, and prepare the petition. Once the petition was filed, the court once again took no action to set the petition for hearing.

Indeed the court apparently considered the Tribe's petition in mid-August only because there was a scheduled six-month review hearing. Even then, after hearing argument on the petition as well as the status review, the court took the matter under submission and did not rule for two months.

D. **No appellate waiver**

Last in this regard, we disagree with the Department's claim that the Tribe's failure to appeal the dispositional findings and orders amounts to appellate waiver. There is no evidence in the record that the Tribe had any notice of the dispositional findings and orders until June 7 when it first received discovery of the court's file. Coincidentally, June 7th was the 60th day. (See Cal. Rules of Court, rule 39(b).) How the Tribe can be blamed for appellate inaction under these circumstances is beyond this court's comprehension.

E. **Consequences of Noncompliance with ICWA Notice**

The failure to provide the necessary notice by itself does not constitute prejudicial error when the Tribe has participated in the proceedings. (*In re Kahlen W., supra*, 233 Cal.App.3d at pp. 1422 & 1424.) Here, the Tribe obviously received some kind of notice given its subsequent effort to intervene. Nevertheless, respondent court conducted the April dispositional hearing at its peril given the evidence suggesting the act applied and absent evidence that the Department properly served the Tribe with notice of these proceedings and completed that service at least 10 court days before the hearing (§ 1912(a); Fed. Rules Civ. Proc., rule 6(a) 28 U.S.C.). Given the lack of such evidence

as well as the fact that the court conducted the dispositional hearing without regard to the ICWA's procedural requirements, the Tribe was entitled to an order invalidating the court's prior findings and orders to the extent they did not comply with the ICWA. (§ 1914, *ante* fn. 3; *In re Desiree F., supra,* 83 Cal.App.4th at pp. 471-472.) Despite the need for timely resolution of child custody proceedings, neither respondent court nor the Department can benefit from the delay they created. (*In re Kahlen W., supra,* 233 Cal.App.3d at p. 1425.)

III. *Foster Care Placement*

In addition to its precise notice requirements, the ICWA establishes minimum federal standards, both procedural and substantive, governing the removal of Indian children from their families. (*In re Alicia S.* (1998) 65 Cal.App.4th 79, 81.) In particular, the act provides that a party seeking foster care placement of an Indian child under state law, such as the Department in this case, must satisfy a court 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." (§ 1912(d).)

In addition, a court may not order foster care placement absent a determination,

> "supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (§ 1912(e).)

The goal in this regard 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." (§ 1902.)

At the April dispositional hearing, respondent court made the following findings by clear and convincing evidence:

> "reasonable efforts have been made to prevent or eliminate the need for removal of the child from the physical and legal custody of the mother[;]" and
>
> "there is a substantial danger to the physical health, safety, protection or physical or emotional well-being of the child or there would be if the legal and physical custody of the child is not removed from the [mother.]"

Petitioner contends the court should have granted its petition to invalidate (§ 1914, *ante* fn. 3) because neither of these findings satisfied the ICWA. There was neither evidence of "active efforts . . . designed to prevent the breakup of the Indian family" (§ 1912(d)) nor any "testimony of qualified expert witnesses" (§ 1912(e)). Real party disagrees, arguing (1) the court's "reasonable efforts" finding is the functional equivalent of an "active efforts" finding and (2) the lack of qualified expert witness testimony was harmless error given the mother's PCP use.

A. **"Active Efforts"**

We need not settle real party's claim of statutory equivalency. In its social study for the dispositional hearing, real party submitted the following proof to support the court's reasonable efforts finding:

> "The mother . . . has been provided with referrals in the areas of parent training, child neglect counseling, and substance abuse counseling. The mother is currently participating in counseling for substance abuse, but has yet to enroll in counseling for parent training or child neglect. Drug testing has been available to the mother. Substance abuse tests administered on February 20, 2002 and February 26, 2002, were both negative for controlled substances.
>
> "The mother visits the child as ordered by the court and visits are reported to be of good quality. The mother has made moderate progress toward alleviating or mitigating the circumstances that initially placed the child at risk. Out-of-home placement remains necessary for the child while the mother completes counseling and works to demonstrate she is able to maintain a drug-free lifestyle."

Such evidence gives no indication that the department made any effort, let alone "active" efforts "designed to prevent the breakup of the Indian family." (§ 1912(d).) Even the appellate decision real party cites for the proposition that "active efforts" and "reasonable efforts" findings are synonymous (*In re Michael G.* (1998) 63 Cal.App.4th 700, 714) recognizes that the ICWA requires the court to take into account:

> "'the prevailing social and cultural conditions and way of life of the Indian child's tribe. [Remedial services] shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.' (Citation omitted.)" (*Ibid.*)

Furthermore, given the lack of such effort, the court could not have found, as also required under section 1912(d), "that these efforts have proved unsuccessful."

The Department nevertheless urges us to find there was sufficient evidence of "active efforts" and therefore the juvenile court could properly deny the petition to invalidate on this ground. However, the Department relies on post-dispositional evidence of its efforts to provide services and the mother's limited compliance. By its argument, the Department is essentially asking this court to perform the juvenile court's job, that is to be the trier of fact. That, however, is not our role. (See *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) In any event, such proof does not address the issue of active efforts within the meaning of the ICWA.

In conclusion, we find the juvenile court should have granted the Tribe's petition to invalidate given the absence of "active efforts" designed to prevent the breakup of the Indian family. (§ 1912(d).)

B. **"Testimony of Qualified Expert Witnesses"**

Just as the Department did not introduce evidence of "active efforts" within the meaning of the ICWA, it did not offer the testimony of a qualified expert witness or witnesses to the effect that Marina's continued custody with her mother was likely to cause the child serious emotional or physical damage. Consequently, the Tribe contends the juvenile court should have granted the petition to invalidate on this ground as well.

By contrast, the Department urges the lack of expert testimony was not a jurisdictional defect and instead was subject to harmless error analysis. Implicit in the Department's argument is the notion that the juvenile court could review its own noncompliance for prejudice. This is an interesting question but one which we need not resolve.

In arguing the lack of expert testimony was not jurisdictional and could be upheld as harmless error, the Department relies on *In re Riva M.* (1991) 235 Cal.App.3d 403, 411. *Riva M.*, however, is factually and legal distinguishable from the present case. *Riva M.* arose out of an appeal from a former Civil Code section 232 termination proceeding in which it was undisputed that the minor child was Indian. The tribe involved, however, did not intervene. In terminating parental rights, the court made a detriment finding without the benefit of expert testimony and without applying the requisite standard of proof under the ICWA. The appellate court rejected the parent's claims of error, noting the father never objected at the termination hearing and therefore waived any error. In finding waiver, the *Riva M.* court determined the failure to abide by the ICWA heightened standards did not amount to a jurisdictional defect. (*In re Riva M., supra,* 235 Cal.App.3d at p. 411.) Alternatively, the appellate court concluded it could apply a harmless error analysis. Reasoning that the ICWA requirements of expert witness testimony and heightened burden of proof were not of constitutional dimension, the court applied a reasonable probability standard of error. (*In re Riva M., supra,* 235 Cal.App.3d at pp. 412-413.)

Here, the Tribe, which did intervene, challenges the denial of its petition to invalidate. The Tribe's petition raised multiple claims of IWCA noncompliance, claims which the Tribe did not waive. We fail to understand how the juvenile court could properly deny the Tribe's petition when there was no qualified expert witness testimony that continued parental custody would be detrimental to Marina or how we could find the juvenile court's error harmless.

IV. *Additional Reunification Services*

The Tribe also argues the court should have extended six additional months of reunification services to the mother. According to petitioner, the court could not properly find the mother received six months of reasonable services absent a showing under section 1912(d) that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. This portion of the ICWA requires "active efforts" not only to effect a foster care placement of an Indian child but also to terminate parental rights to an Indian child.[5]

Arguably, the Tribe's issue was premature because the case had not yet reached the termination stage. However, it appears counterproductive, not only to the purpose of the ICWA but also California's dependency scheme, to wait until termination proceedings to evaluate whether, during the period for reunification services, "active efforts" (§ 1912(d)) were made.

Once again on the record before this court, there is no evidence the Department made active efforts during reunification to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. As previously mentioned regarding "active efforts" prior to foster care placement, although there may have been evidence of referrals for generic substance abuse counseling and parenting classes, there was no evidence of the prevailing social and cultural conditions and way of life of Marina's tribe or any reference to the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers. (*In re Michael G.,*

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[5] While the Department argues the Tribe lacks standing to raise this issue because the mother did not file a writ petition, the Department seems to ignore the obvious. It is the stated goal of the ICWA to promote the stability and security of Indian tribes and families. This goal is achieved by the establishment of the minimum Federal standards that make up the ICWA. (§ 1902.) Thus, the Tribe necessarily has standing to challenge alleged noncompliance with the ICWA.

supra, 63 Cal.App.4th at p. 714.) Absent such evidence, the court could not properly terminate reunification services. Thus, the juvenile court erred in this regard as well.

V. *Tribal Placement Preference*

Last, the Tribe argues the court should have moved Marina out of her non-Indian foster care placement and into a Yaqui-foster home approved by the Tribe. In making this argument, petitioner relies on a portion of section 1915 which states:

> "(b) 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--
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> "(i) a member of the Indian child's extended family;
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> "(ii) a foster home licensed, approved, or specified by the Indian child's tribe;
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> "(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.
>
> "(c) In the case of a placement under subsection . . . (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, that where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.
>
> "(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with

which the parent or extended family members maintain social and cultural ties."

Here, the Tribe recently passed a resolution which followed section 1915(b) of the ICWA but provided more detailed guidance. In particular, if a local placement could not be made with an extended family member, a non-related Yaqui family or another Indian family, then the Tribe gave preference to non-local extended family members, Yaqui families, or other Indian families before it would resort to a local non-Indian foster family.

The foster placement urged by the Tribe was not local. The Yaqui foster mother lived in Los Angeles. Marina's mother did not outright oppose the Tribe's recommendation but her counsel did express her client's preference for a local placement. For its part, the Department urged the court not to remove Marina from her local, non-Indian foster placement because the child was bonding and the foster family had expressed interest in adopting Marina if the mother could not reunify. The court resolved the dispute by ruling it was not in the child's best interests to be removed from her current placement.

Because we will require the juvenile court to revisit whether out-of-home placement was even appropriate in the first instance, we might conclude we need not resolve whether the court also erred in rejecting the Tribe's preference. Even so, because the issue may resurface after remand, some direction to the court appears to be in order.

Assuming the juvenile court, after applying section 1912(d) and (e), determines out-of-home placement is still necessary for Marina, it should be guided by the following principles. To begin, section 1915 says nothing about a best interests test. Instead, section 1915(b) refers to an out-of-home placement in the "least restrictive setting which most approximates a family and in which [the child's] special needs, if any, may be met" and "within reasonable proximity to his or her home." Section 1915(c) also mentions

giving consideration to the preference of the Indian child or parent as well as to the Tribe's preference and those stated in section 1915(b).

DISPOSITION

The petition for extraordinary writ is granted. The matter is remanded to respondent court with directions to vacate its orders terminating reunification services and setting a section 366.26 hearing.

Furthermore, respondent court shall forthwith set a hearing consistent with section 1912(d) and (e). That is, assuming the Department still seeks an out-of-home placement for Marina, the Department must satisfy the court that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts proved unsuccessful. (§ 1912(d).) In addition, the court may not order foster care placement absent a determination, "supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (§ 1912(e).)

In the event the court, in compliance with section 1912(d) and (e), orders further out-of-home placement, it shall order the Department to provide the mother with remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, taking into account the prevailing social and cultural conditions and way of life of Marina's tribe or any reference to the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers. Last, the Department and the court shall follow the dictates of section 1915 in determining Marina's actual placement.