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2024 WL 4802825 (Minn.App.) (Appellate Brief)
Court of Appeals of Minnesota.

In the Matter of the Welfare of the Children of: L.K., Parent.

No. A23-1762.
August 21, 2024.

Respondent L.K.'s Brief

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1. *Whether the district court and court of appeals erred as a matter of law in finding that Mother's preference for placement of the children Appellants did not constitute good cause to deviate from the placement preferences of MIFPA?*

The Minnesota Court of Appeals held that the district court did not err by not finding a good-cause exception pursuant to the placement preferences established under ICWA and MIFPA because Mother's preference was not stated in the "proper form" at the emergency hearing. Mother was not present at the emergency hearing on the Appellants' motion to stay the change in placement; her preference for placement was noted second hand. Mother's subsequent Affidavit stating her preference following the removal from Appellants was not addressed by the district court. Mother's updated placement preference as of June 2024, by affidavit, results in a change of circumstances that no longer requires a deviation for the placement preferences of MIFPA.

2. *Whether ICWA and MIFPA comport with the equal protection clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution?*

The Minnesota Court of Appeals held that MIFPA's placement preferences do not violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution under the rational-basis test.

2 *STATEMENT OF THE CASE

This is an appeal from a Martin County Child in Need of Protection or Services (CHIPS) case concerning twin children, K.I.K. and K.H.K. A CHIPS petition was filed in XX/XX/2022, shortly after the twins' birth. As infants, K.I.K. and K.H.K., were both placed in the Appellants' foster home in Fairmont immediately following their respective discharges from the Mayo Clinic Health System. K.I.K. and K.H.K. are eligible for enrollment in Red Lake Nation, a federally recognized Indian Tribe. Therefore, their foster care placement is governed by ICWA and MIFPA. Appellants are non-Indians and not biologically related to the K.I.K. and K.H.K. By all accounts, Appellants did an admirable job caring and providing for K.I.K. and K.H.K. during the approximately 16 months period prior to K.I.K. and K.H.K. being moved to R.F.'s foster home.

On August 1, 2023, Martin County informed the Appellants that the Red Lake Nation requested that K.I.K. and K.H.K. be moved to R.F.'s home on the Red Lake reservation. R.F. is a relative of L.K., an enrolled member of the Red Lake Nation and the custodian of the twin's older sibling. Martin County developed a transition plan to implement Red Lake Nation's request, but the transition plan was not executed. On September 9, 2023, Martin County informed Appellants that the children would be transferred to R.F.'s care on September 13, 2023. At that point, the twins had never met R.F, and Mother had expressed her objection to others as to the proposed change in placement.

On September 12, 2023, Appellants filed a motion to intervene and for a stay in the change of placement, arguing, *inter alia*, that there was good cause to deviate from the ***3** placement preferences of ICWA and MIFPA, and arguing that ICWA and MIFPA violated the U.S. Constitution's equal protection guarantees. An emergency hearing was held one day later, on September 13, 2023, to consider Appellants' motion. Mother was not in attendance at the emergency hearing, but her attorney was present. The district court considered Appellants' pleadings and oral arguments on September 13, 2023, and ruled from the bench that the twins should immediately be transported to R.F.'s home. On September 15, 2023, the district court issued its written decision denying the Appellants' emergency motion to stay the change of placement and deferring consideration of the other parts of the Appellants' motions to a later date.

On October 3, 2023, Mother filed an Affidavit stating, *inter alia*, that she did not want her children placed with R.F. and that she favored placement of her children with Appellants. Appellants filed an Amended Motion on October 4, 2023, requesting that the district court to join them as necessary parties or, in the alternative, to grant the motion for permissive intervention, while concurrently filing a petition to establish third party custody. A court hearing was held on October 5, 2023. The district court denied Appellants' motion for intervention as well as their third-party custody petition by order dated October 31, 2023. In so

ruling, the district court did not acknowledge or address Mother's Affidavit and her request for the twins to be returned to the Appellants' home. The district court did not rule on the merits of the constitutional claims raised by the non-party Appellants.

Appellants filed an appeal, and the Court of Appeals issued a precedential decision affirming in part, reversing in part, and remanding for further proceedings on the motion for permissive intervention and third-party custody. As part of this, the Court of Appeals ***4** concluded that the district court did not err by not finding a good-cause exception to MIFPA's statutory placement preferences. While the district court did not rule on the constitutional challenges raised by Appellants, the Court of Appeals concluded that those constitutional challenges were properly before it and held that MIFPA's placement preferences do not violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. The Court of Appeals did not rule on the constitutionality of ICWA.

**5 STATEMENT OF THE FACTS*

This case is about two medically fragile young twins: K.I.K. and K.H.K. Their biological mother, L.K., is an enrolled member of the Red Lake Nation. L.K. maintains her parental rights to twins, despite the children being in foster care for an extended period.

The district court held an emergency hearing on Wednesday, September 13, 2023, to consider the Appellants' emergency motion requests to intervene in the CHIPS case and to stay the County's plan to remove the children from the Appellants and place them with R.F., who lives on the Red Lake reservation in northern Minnesota (approximately a 6- hour drive from the Appellants' foster home).

L.K. was not present at the emergency hearing on September 13, 2023, but had left a voicemail for her attorney over the weekend. Transcript for 9/13/23 hearing at 2. Due to notice and timing considerations, the September 13th "…hearing was only to address the change of placement." App.ADD.001. In the Appellants' pleadings, they indicated that L.K. expressed a preference to the Appellants, as recently as August 22, 2023, for the twins to remain with them and that she absolutely did not want the twins placed with R.F. (Doc. ID #90, ¶ 30). While L.K. was not able to directly weigh in on the issue of the emergency stay on September 13, 2023, L.K.'s counsel indicated that he had heard through both Martin County and the Appellants that L.K. preferred the twins to remain in foster care with the Appellants and that L.K. "…has had more communication with the foster parents recently than she has with me." Transcript for 9/13/23 hearing at 12-13. Further, as an officer of the court, the assistant county attorney stated: "I believe that human services did witness or hear a phone call between foster parents and L.K. that L.K. did indicate that she wished ***6** the children to stay with the current foster parents...." Transcript for 9/13/23 hearing at 14. Thus, the district court was on notice at the emergency hearing that other parties or participants understood L.K. to be opposed to the twins being moved from the Appellants' foster home in order to be placed with R.F.

The district court acknowledged the representations being made as to L.K.'s preferences but questioned whether her alleged preference could be considered "reasonable" based on what the district court considered to be a long history of noncompliance with the CHIPS case plan. Transcript for 9/13/23 hearing at 14. In its Order issued September 15, 2023 on the question of the emergency stay, the district court found that none of the "good cause" exceptions to the MIFPA placement preferences existed. App. ADD. 003. With respect to parental preference, the district court stated: "As to the Mother's preference, the Court would have to receive that request directly from the Mother. Even then, as the Court noted during the hearing, it would have to determine whether that request was reasonable." App. ADD.003. The district court approved the County moving the twins to R.F. and asked R.F. to attend the next court hearing to provide an update on the children. App. ADD.004.

On October 3, 2023, L.K. signed and filed an Affidavit opposing placement of the twins with R.F. and articulating her strong preference for the twins to be placed with the Appellants. *See* Doc. ID #113. Mother's October Affidavit favored placement of [KH.K.] and [KI.K.] with [Appellants] in at that time. (Doc. ID #113). L.K. believed at the time that Appellants were the best

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suited to meet the children's needs *(Id.)* L.K. was opposed to ***7** placement with R.F. *(Id.)* L.K. directly advised the district court and parties of her preferences with respect to her children's placement, albeit after the emergency hearing.

A district court hearing was held on October 5, 2023. During the hearing, counsel for L.K. referenced her recent affidavit and reiterated her position, asking that the twins be returned to the Appellants. Transcript 10/5/23 at 17-21. Counsel for L.K. specifically argued for a "good cause" exception under the ICWA and MIFPA placement preferences, noting that L.K.'s preference was for the twins to be placed with the Appellants, after having reviewed the statutory placement preferences. Transcript 10/4/23 at 19. Counsel for L.K. also asked the district court to consider the children's medical needs and the lack of proximity between R.F. and L.K. Transcript 10/4/23 at 19. The district court heard arguments from counsel but did not take sworn testimony from anyone. At the conclusion of the hearing, the district court stated that it would allow post-hearing submissions to be filed by October 13, 2023, after which time the matter would be taken under advisement. Transcript 10/5/23 at 35-36.

The district court issued its decision in an Order dated October 31, 2023. App. ADD.005. In this Order, the district court specifically notes the amended pleadings filed by the Appellants on October 4, 2023, the post-hearing pleadings filed by the Guardian ad Litem on October 13, 2023, and the post-hearing pleadings filed by Red Lake Nation on October 13, 2023. The district court's Order dated October 31, 2023, did not note receipt of L.K.'s affidavit, which was filed October 3, 2023, or her counsel's post-hearing letter, filed October 13, 2023. The district court did not otherwise acknowledge or consider L.K.'s input or requests, nor did it consider L.K.'s ongoing and express wishes as to the children's ***8** placement. In its 3-page Order, the district court dismissed the Appellants' third-party custody petition for lack of jurisdiction, denied the Appellants' motion for permissive intervention and denied Red Lake Nation's motion to find the Appellants' to be frivolous. The district court did not expressly rule on the other motions.

In May and June of 2024, R.F. had a change of circumstance in her residence, resulting in a termination of the foster care placement and an emergency placement with another Indian relative, M.L., as detailed below. The children were moved from placement on June 10, 2024. Resp. L.K. ADD.071. The move from R.F. to M.L. was made on an emergency basis. *Id.* This resulted in a placement change that allowed the children to be placed with their half-brother and in closer proximity to L.K. *Id.* Placement of the children with M.L. allowed for easier access to supervised visits with the children but also continued to allow contact with R.F. and the children's half-sister in R.F.'s care. *Id.*

Mother submitted an updated Affidavit on July 1, 2024, indicating her preference for the children to remain in placement with M.L. Resp. L.K. ADD.064. Respondent L.K. indicated: "I write this affidavit to update the court following my affidavit dated October 3, 2023. Due to a change in circumstances, I no longer favor placement of [the twins] with their former foster parents [Appellants]…" *Id.* L.K. indicated that her preference during this entire matter was that she favored placement with M.L. above other placement options, Appellants included. *Id.* L.K. supports placement with M.L. as a foster care provider and as a permanency placement resource. *Id.*_ Placement with M.L. is a preferred placement option under MIFPA and ICWA and is supported by Red Lake Nation, the County, the ***9** Guardian ad Litem and Mother. Resp. L.K. ADD.071-072. This intervening development is critical as it impacts L.K.'s position on the legal issues now pending before this Court.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT L.K.'S PLACEMENT PREFERENCE FOR THE GOOD CAUSE DEVIATION BE DELIVERED TO THE COURT IN TESTIMONY OR A SWORN STATEMENT AND L.K.'S PLACEMENT PREFERENCE HAS CHANGED.

A parent's right to make decisions concerning the care, custody and control of her children is a protected fundamental right. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054,147 L.Ed.2d 49 (2000). While the County is required to consider placement

of a child with relatives pursuant to Minn. Stat. § 260C. 193 for both ICWA and non-ICWA cases, the law also provides a mechanism for a parent to object to a specific relative. As such, "[i]f the child's birth parent explicitly requests that a specific relative not be considered for placement of the child, the court shall honor that request if it is consistent with the best interests of the child and the requirements of section 260C.221." Minn. Stat. § 260C. 193, subd.3(3)

As a threshold matter, ICWA requires that: "[a]ny child accepted for foster care or pre-adoptive 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." 25 U.S.C. § 1916 (b)

***10** Both MIFPA and ICWA confer substantial powers to tribes in decisions related to the foster care placement of Indian children. However, there are still checks and balances. For example, either parent of the Indian child has the absolute right to block the transfer of jurisdiction to tribal court if there's a request to transfer jurisdiction. 25 U.S.C. § 1911 (b); *see also* Minn. R. Juv. Prot. P. 31.01, subd. 4. And while social service agencies are required to "defer to tribal judgement as to suitability of a particular home" when the tribe has intervened in the CHIPS case pursuant to Minn. Stat. § 260C.215, subd. 6(b), the district court is still authorized to make a "good cause" exception to the placement preferences under ICWA - based on the circumstances of the case. Moreover, statutory preferences are not mandates. In other words, the district court is not bound by the tribe's judgement or the statutory placement preferences, provided there is "good cause" to deviate from the placement preferences. Indeed, if the tribe's judgement as to the suitability of a particular home was conclusive in a district court CHIPS proceeding, there would be nothing for the district court to decide and the taking of other evidence would be an idle exercise. *See In the Matter of the Custody of S.E.G.* 507 N.W.2d 872, 885 (Minn. Ct. App. 1993). So long as a CHIPS case is being heard in state court, the district court cannot abdicate its role as a decision-maker by completely and automatically deferring to a tribe's wishes regarding placement.

In this case, the district court presumed that the children's best interests are served by adherence to the placement preferences of ICWA and MIFPA. This presumption is a starting point, not an ending point as it related to the best interest analysis by the district court. *See, e.g., In Re Alexandria P.*, 228 Cal.App.4th 1322, 1356 (2014)(holding that ***11** courts "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 interests."')(citing an Arizona case, *Navajo Nation v. Arizona Dept. of Economic Security* (Ariz. Ct. App. 2012) (App. 2012) 230 Ariz. 339, 284 P.3d 29, 35).

The "good cause" exceptions to ICWA and MIFPA allow the state courts to consider factors such as the wishes of the parents, the needs of the child, and the suitability of the proposed placement in making its decision. The concept of "good cause" exceptions is intended to provide state courts with "flexibility in determining the disposition of placement proceedings involving an Indian child." *In re Child of T.T.B.*, 724 N.W.2d 300, 305 (Minn. 2006). This is congruent with the fundamental public policy behind ICWA to: "***protect*** the ***best interests of Indian children*** and to promote stability and security of Indian tribes and families…" 25 U.S.C. § 1902 (emphasis added). As and amongst these policy goals, the majority of courts hold that the "best interests" of Indian children is the paramount focus of ICWA.

The current binding federal regulations enumerate the "good cause" exceptions to the ICWA placement preferences. One of those exceptions is "[t]he request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference." 25 CFR 23.132(c)(1). Similarly, under MIFPA, there is a good cause exception to the placement preferences based on the "reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the placement options that comply with the order of placement preferences." ***12** Minn. Stat. § 260.773, subd. (10). The Court of Appeals defined "'attest' generally means '[t]o bear witness,' to 'testify,' to 'affirm to be true or genuine,' or 'to authenticate by signing as a witness' *Black's Law Dictionary* 158 (llthed. 2019" (Resp. L.K. ADD.024)

At the September 13th hearing, the district court concluded that to consider L.K.'s preference as to placement, it "would have to receive that request directly from the Mother. Even then, as the Court noted during the hearing, it would have to determine whether that request was reasonable." App. ADD. 003. The district court went on to note that "Mother has been minimally involved with this case. Additionally, there is a risk that Mother continues to be under the influence of mood-altering chemicals that can significantly compromise her decision-making abilities." App. ADD. 003. Thus, the district court was hesitant to consider L.K.'s alleged placement preference based on her case plan compliance, but still said it would consider L.K.'s alleged placement preference if L.K. directly articulated it.

Once L.K. was able to review the pleadings that had originally been heard on an emergency basis (and without her presence), L.K. submitted her own affidavit, in which she explicitly states: "I absolutely do not want [KH.K.] and [KI.K.] placed with [R.F], I was opposed to their placement with her in the first place, after they had thrived in [Appellants"] care for their whole short lives." (Doc. ID #113 at 1)

L.K. submitted her October 3, 2023 Affidavit to the district court with her placement preferences and agrees with the Court of Appeals reasoning that a placement preference should be submitted under an attestation or testimony. (Resp. L.K. ADD.024). It is important a parent's voice is considered in the process of determining any good cause ***13** exception to the MIFPA placement preferences. The process of ensuring that the parent's voice comes in an acceptable and verifiable form is also equally important. While L.K.'s preference was conveyed second hand at the September 12, 2023 hearing, they were subsequently updated for the court on October 3, 2023.

While L.K. wishes that her preferences were considered in more detail at the time of the September and October 2023 hearings, she no longer holds those same preferences as to the placement of her children. L.K.'s placement preference change is not a part of the record currently on appeal but L.K. requests that this court take judicial notice of the change in circumstances. "An appellate court may take judicial notice of a fact for the first time on appeal." *In re Block*, 727 N.W.2d 166, 176 (Minn. Ct. App. 2007)(quoting *Smisek v. Comm'r of Pub. Safety*, 400 N.W.2d 766, 768 (Minn.App.1987) (taking judicial notice of trial court order in related proceeding). Judicial notice of adjudicative facts in civil cases may be taken at any stage of the proceeding pursuant to Minn. R. Evid. 201(f). The juvenile protection rules expands the scope of judicial notice in juvenile-protection proceedings to also include findings of fact and court orders in the juvenile protection court file and in any other proceedings in any other court file involving the child or the child's parent or legal custodian. Minn. R. Juv. Protect. P. 3.02, subd. 3. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *In re Block*, N.W.2d at 176. *(using* Minn. R. Evid. 201(b) (applicable to civil cases))

***14** The present new facts and their impact on the pending case lead directly to the request for judicial notice. The new updated placement preference of the mother through her affidavit and in the findings of fact of the district court order filed July 25, 2024, are relevant to the issues under consideration by this court. As an uncontested affidavit in the district court and contained within the findings of fact of the district court order, the new information is known within the jurisdiction of the trial court and capable of accurate and ready determination. There has been no indication as to any dispute relating to the accuracy surrounding the fact that L.K. has made changes to her placement preference and that M.L. is her current preference as described in her affidavit. The change in placement preference came between Appellants' Petition for Review of Decision on June 12, 2024, and its subsequent grant by this Court on July 2, 2024, and the deadline for Appellants' brief.

One of the two issues for which review was granted was the question of whether the lower courts erred "in finding that mother's preference for placement of her children with appellants did not constitute 'good cause' for an exception to MIFPA, Minn. Stat. § 260.773, subd,10(2)(i), because it was not stated in the 'proper form' – despite being submitted in an affidavit?" *See* Pet. For Review of Decision of Court of Appeals. Appellants' brief does not argue reversal of the good cause exception portion of the Court of Appeals decision. The absence of the briefing and of any request for reversal on the good cause exception issues by

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Appellants show that at present, the facts surrounding L.K.'s change in her placement preference are not in dispute. In sum, L.K. does not support the placement of the children with Appellants as she now supports the MIFPA preferred placement with M.L. As there is no difference at this time between L.K.'s placement ***15** preference and the placement preferences detailed in MIFPA or ICWA, the Court of Appeals decision as it relates to the consideration of Mother's preference should not be reversed or remanded.

The updated information as to L.K.'s current placement preference is a reason for the continued upholding of the Court of Appeals decision. The MIFPA placement preferences combined with the good cause exceptions provides the "flexibility in determining the disposition of placement proceedings involving an Indian child" *In re Child of T.T.B.* N.W.2d at 305. The statutory framework of listing the MIFA placement preferences and the good cause exceptions provide the necessary guidance for the district court to adapt the placement needs of the children to what suits their best interest, while taking into consideration the reasonable preferences of a parent if there were a need to deviate from the MIFPA placement preferences.

II. NEITHER MIFPA NOR ICWA VIOLATE THE EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION

Respondent L.K. joins with the arguments presented by the Minnesota Attorney General as it relates to the constitutionality of ICWA and MIFPA.

Conclusion

Respondent L.K respectfully requests that this Court upholds the June 3, 2024 Court of Appeals decision. For the reasons detailed above, Respondent L.K. does not support any request to reverse or remand the Court of Appeals' decision on the issue of the good cause exception requiring an affidavit or affirmation from a parent to express their ***16** placement preference as it relates to the good cause exception to the MIFPA placement preferences. Similarly, Respondent L.K. requests that the Court of Appeals' decision that MIFPA is constitutional under the Equal Protection Clause be upheld and joins the Minnesota Attorney General's position in defending the Constitutionality of those statutes.

Respectfully Submitted,

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