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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2067**

In the Matter of the Welfare of the
Children of: S. R. K. and O. A. K., Parents.

**Filed May 15, 2017
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Clay County District Court
File Nos. 14-JV-16-1365, 14-JV-16-1367, 14-JV-16-1371

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Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

The district court terminated appellants’ parental rights to their respective children, each of whom is an Indian child. We conclude that the district court did not err by finding that the county made “active efforts” to reunify the family, as required by the Indian Child Welfare Act (ICWA) and the Minnesota Indian Family Protection Act (MIFPA). But we

conclude that the district court erred by not making a finding as to whether appellants' continued custody of the children is likely to result in serious emotional or physical damage to the children, as also is required by ICWA and MIFPA. Therefore, we affirm in part, reverse in part, and remand for the required findings.

FACTS

S.R.K. and O.A.K. were married in 2012. They had an on-again, off-again relationship before and during the pendency of this case. S.R.K. is a registered member of the Spirit Lake Nation and the mother of the five children at issue in this case: a boy born in 2006, a girl born in 2009, a girl born in 2010, a boy born in 2014, and a girl born in 2016. O.A.K. signed a recognition of parentage of the third child, and he is the presumed father of the two youngest children because of his marriage to S.R.K. There is no presumed or adjudicated father for the two oldest children.

In late July 2015, Clay County removed the four oldest children from S.R.K.'s home and petitioned for a determination that the children are in need of protection or services. The county developed out-of-home placement plans for the children, which were intended to reunite each child with his or her parent or parents and to improve S.R.K.'s and O.A.K.'s parenting deficiencies, which were caused by chronic homelessness, mental-health issues, chemical dependency, and general instability.

In April 2016, the county petitioned to terminate S.R.K.'s and O.A.K.'s parental rights to the four oldest children. In September 2016, the county amended the petition to also seek the termination of S.R.K.'s and O.A.K.'s parental rights to the youngest child. A three-day trial took place on October 27, October 31, and November 21, 2016. On

December 6, 2016, the district court issued its written decision, in which it granted the county's termination petition in all respects. S.R.K. and O.A.K. appeal.

D E C I S I O N

Child-welfare proceedings are governed by chapter 260C of the Minnesota Statutes. *See* Minn. Stat. §§ 260C.001-.637 (2016). Proceedings to terminate parental rights to Indian children also must comply with ICWA and MIFPA. *See* 25 U.S.C. § 1912 (2016); Minn. Stat. § 260C.001, subds. 2, 3; *see also* 25 U.S.C. §§ 1901-1923 (2016); Minn. Stat. § 260.751-.835 (2016). “Congress enacted ICWA in 1978 to address the rising concern . . . over the consequences . . . of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.” *In re Welfare of R.S.*, 805 N.W.2d 44, 49 (Minn. 2011) (alteration in original) (quotation omitted); *see also* 25 U.S.C. § 1902; Minn. Stat. § 260.753.

This court will affirm a district court's termination of parental rights if at least one statutory ground for termination is supported by the evidence and termination is in the child's best interests. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). A district court may not terminate parental rights to Indian children without receiving testimony of a qualified expert witness and without evidence supporting termination beyond a reasonable doubt. 25 U.S.C. § 1912(f); Minn. R. Juv. P. 39.04, subd. 2(b). This court applies a clear-error standard of review to a district court's findings. *In re Welfare of A.D.*, 535 N.W.2d 643, 648 (Minn. 1995).

I. Mid-Trial Continuance

Appellants initially argue that the district court erred by scheduling the third day of trial to occur more than one week after the second day of trial. Their argument is based on the following statute:

Except for proceedings involving a child alleged to be in need of protection or services and petitions for the termination of parental rights, hearings may be continued or adjourned from time to time. In proceedings involving a child alleged to be in need of protection or services and for the termination of parental rights, *hearings may not be continued or adjourned for more than one week unless the court makes specific findings that the continuance or adjournment is in the best interests of the child.*

Minn. Stat. § 260C.163, subd. 1(b) (emphasis added).

At the end of the second day of trial on October 31, 2016, the district court proposed that the parties finish their presentation of evidence 21 days later, on November 21, 2016. The district court explained to counsel that the court was unable to reconvene at an earlier date because it was required to hear previously scheduled matters in other child-protection cases. Neither S.R.K.'s attorney, O.A.K.'s attorney, nor the guardian *ad litem* objected to the date of the third day of trial.

At the beginning of the third day of trial, O.A.K.'s attorney moved for a mistrial on the ground that the district court had not complied with section 260C.163, subdivision 1(b), because the district court did not make any findings as to whether the continuance of more than one week was in the best interests of the children. O.A.K.'s attorney argued to the district court that "the continuance here was based solely on . . . scheduling issues, and nothing related to the best interests of the child." The county and the guardian *ad litem*

opposed O.A.K.'s motion; S.R.K. took no position. The district court denied the motion. The district court made a finding at that time that it was in the children's best interests to continue the trial so that all parties could complete their presentation of evidence. The district court reiterated its best-interests finding in its subsequent written decision on the merits.

To properly preserve an issue for appellate review, a party must assert an objection in the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Doe 175 v. Columbia Heights School Dist.*, 842 N.W.2d 38, 43 (Minn. App. 2014). The objection must be timely so that the district court has an opportunity to comply with the law at a time when compliance is required. *See Imperial Developers, Inc. v. Seaboard Sur. Co.*, 518 N.W.2d 623, 628 (Minn. App. 1994) (concluding that party waived objection to timeliness of hearing by not objecting when hearing was scheduled), *review denied* (Minn. Aug. 24, 1994). In this case, O.A.K. did not assert a timely objection because he did not object at a time that would have allowed the district court to comply with the statute, which requires either a continuance of less than one week or best-interests findings. *See* Minn. Stat. § 260C.163, subd. 1(b). By waiting until the beginning of the third day of trial, O.A.K.'s trial attorney brought the issue to the attention of the district court after the continuance already had occurred. In addition, S.R.K. did not assert any objection, even after O.A.K.'s motion. This is an especially appropriate occasion to enforce the general principles about preservation of objections because the purpose of the statute (to ensure the speedy resolution of child-protection cases) would not have been served if the district court had declared a mistrial, and it would not be served if this court were to conclude that the district

court committed reversible error by scheduling the third day of trial for a date that was 11 days too late.

Thus, we conclude that O.A.K. and S.R.K. forfeited their argument by failing to assert it at the end of the second day of trial, when the district court was discussing scheduling matters with all counsel.

II. Active Efforts

Appellants next argue that the district court erred by finding that the county made “active efforts” to reunify them with their respective children. They contend that the evidence does not support the district court’s findings.

In general, a district court may not terminate parental rights without finding that the county made reasonable efforts to reunify parent and child. Minn. Stat. § 260C.301, subd. 8. In a case governed by ICWA and MIFPA, a district court must find that the county “made *active efforts* to the Indian child’s family” to provide “appropriate and meaningful services available to the family based upon that family’s specific needs.” Minn. Stat. § 260.762, subd. 3 (emphasis added); *see also* 25 U.S.C. § 1912(d). “Active efforts” means

a rigorous and concerted level of effort that is ongoing throughout the involvement of the local social services agency to continuously involve the Indian child’s tribe and that uses the prevailing social and cultural values, conditions, and way of life of the Indian child’s tribe to preserve the Indian child’s family and prevent placement of an Indian child and, if placement occurs, to return the Indian child to the child’s family at the earliest possible time. Active efforts sets a higher standard than reasonable efforts to preserve the family, prevent breakup of the family, and reunify the family

Minn. Stat. § 260.755, subd. 1a; *see also* Minn. Stat. § 260.762, subd. 1. The “active efforts” requirement is satisfied if the county provides “frequent and varied services” that are appropriate for the governing case plan or plans over the course of the county’s involvement in the case. *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. App. 2007), *review denied* (Minn. Mar. 28, 2007); *In re Welfare of T.J.J.*, 366 N.W.2d 651, 656 (Minn. App. 1985). The county must prove active efforts beyond a reasonable doubt. *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 165 (Minn. App. 2005). This court applies a clear-error standard of review to a district court’s findings on this issue. *In re Children of T.R.*, 750 N.W.2d 656, 660 (Minn. 2008).

O.A.K. contends that the county “did not make any real effort to reunify” him with his children. The district court found that the county made active efforts and that O.A.K. “failed to participate meaningfully in his case plan until just recently.” The district court’s findings are supported by the evidence. O.A.K.’s case plan called for a chemical-dependency evaluation, visitation sessions with the children, and a parental-capacity assessment. O.A.K. testified that a county child-protection case manager explained the requirements of his case plan and gave him “a one-page to-do list.” A case manager referred O.A.K. to a parental-capacity evaluation. The county offered and paid for family-skills services for O.A.K., but the family-skills workers closed his file when they were unable to communicate with him “after a number of attempts for a significant period of time.” O.A.K. testified that the county provided him with a housing voucher. A county case manager set up “regular visitations” between O.A.K. and his children and provided

transportation for the children. Lastly, the guardian *ad litem* and tribal representatives testified to their beliefs that the county had made “active efforts.”

S.R.K. contends that the county did not make active efforts to reunify her with her children. The district court found that the county made active efforts, that S.R.K. was aware of her case plans, that the case plans were realistic, that “the requirement that active efforts toward reunification be made by the County is satisfied,” and that “[a]ctive efforts . . . have been unsuccessful.” The district court’s findings are supported by the evidence. A county case manager provided S.R.K. with a summary of her case-plan requirements, which included chemical-dependency evaluations and treatment, visitations with her children, and a parental-capacity assessment. The case manager worked directly with S.R.K.’s chemical-dependency worker and attempted to make another referral when S.R.K. no longer wished to work with that chemical-dependency worker. S.R.K.’s first chemical-dependency worker also made chemical-dependency treatment referrals for S.R.K. The county provided S.R.K. with a housing manager. A county case manager scheduled S.R.K.’s visits with the children and provided transportation for the children. A case manager met S.R.K. at her residence to discuss her case-plan requirements when S.R.K. did not want to meet elsewhere. The county provided S.R.K. with a new case manager when S.R.K. expressed distrust of her first case manager. The county provided S.R.K. with tokens for public transit. A case manager attempted to put family skills, individual therapy, and anger management services in place for S.R.K., but S.R.K. was uncooperative. A case manager assisted S.R.K. in setting up counseling. S.R.K. testified that the county provided her with resources to apply for medical insurance. A case manager summarized the

county's efforts by testifying, "I truly don't know what else we could be doing on our end to help her." Finally, the guardian *ad litem* and three tribal representatives testified to their beliefs that the county had made "active efforts."

We conclude that the district court did not clearly err in its findings that the county made active efforts with respect to both parents.

III. Likelihood of Damage

Appellants also argue that the district court erred by not making a finding as to whether 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, as required by statute. Their argument is based on the following statute, which governs cases involving the termination of parental rights to Indian children:

No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, 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.*

25 U.S.C. § 1912(f) (emphasis added); *see also* Minn. Stat. § 260.771, subd. 6(a).

In its findings of fact and conclusions of law, the district court made several statements that allude to the issue raised by appellants and acknowledged the requirements of the above-quoted statute. The district court noted that the qualified expert witness submitted affidavits stating "her opinion that continued custody by the parents is likely to result in serious physical and/or emotional damage to the Children." The district court noted that the affidavits "address all relevant issues to the Court's satisfaction" and that

returning the children to either parent “would be detrimental to [the] Children, and thus not in their best interests.” The district court made a general conclusion of law that ICWA and MIFPA “apply to these proceedings, and the legal requirements of each have been satisfied.” But, as the county concedes, the district court did not make a finding as to whether the continued custody of the children by appellants is “likely to result in serious emotional or physical damage to the child.” See 25 U.S.C. § 1912(f); see also Minn. Stat. § 260.771, subd. 6(a). The absence of such a finding is error.

In a prior opinion in a case governed by ICWA, this court stated that “the district court [is] obligated to make specific findings on the potential for serious emotional or physical harm.” *In re Welfare of Child of E.A.C.*, 812 N.W.2d 165, 176 (Minn. App. 2012), review denied (Minn. Mar. 27, 2012). Because the district court in that case did not make the required finding, we reversed and remanded to allow the district court to make a finding on the issue. *Id.* That remedy is consistent with this court’s cases concerning the general statutory requirement that, before a termination may be ordered, the district court must find that termination is in a child’s best interests. See Minn. Stat. § 260C.301, subd. 7; *In re Welfare of the Child of D.L.D.*, 771 N.W.2d 538, 545-46 (Minn. App. 2009) (reversing and remanding for findings on issue of best interests); *In re Termination of Tanghe*, 672 N.W.2d 623, 625-26 (Minn. App. 2003) (same). In *D.L.D.*, we reasoned that a specific finding must be made in the first instance by the district court, which presided over the trial and heard all the evidence, and that it would be inappropriate for an appellate court to “‘comb[] through the record to determine best interests.’” 771 N.W.2d at 546 (quoting *Termination of Tanghe*, 672 N.W.2d at 625).

Thus, we reverse and remand to the district court for a finding as to whether continued custody of the children by appellants is “likely to result in serious emotional or physical damage to the child.” *See* 25 U.S.C. § 1912(f); *see also* Minn. Stat. § 260.771, subd. 6(a).

We note that appellants have made one additional argument: that the evidence presented by the county, including the testimony of a qualified expert witness, is insufficient to allow the county to prove beyond a reasonable doubt that the continued custody of the children by appellants is likely to result in serious emotional or physical damage to the children. *See* 25 U.S.C. § 1912(f); *see also* Minn. Stat. § 260.771, subd. 6(a). Appellants’ argument focuses on their assertion that the tribe’s expert witness gave equivocal testimony, which may have been inconsistent with affidavits she previously had executed. We note that ICWA does not necessarily require the district court to rely solely or primarily on the testimony of the qualified expert witness when making the finding required by the statute. *See Children of J.B.*, 698 N.W.2d at 167. In any event, appellate review of this argument is premature at this time because the district court has not yet made any finding on the issue specified by section 1912(f). Thus, we decline to consider the issue at this time and specifically note that S.R.K. and O.A.K. retain the right to assert the argument at a later stage of the case.

Affirmed in part, reversed in part, and remanded.