IN THE COURT OF APPEALS FOR THE CHOCTAW NATION OF OKLAHOMA

IN THE MATTER OF J.D., A PERSON UNDER
EIGHTEEN YEARS OF AGE:

DANIEL RAGLE AND LESLIE RAGLE, APPELLANTS,

vs

CHOCTAW NATION OF OKLAHOMA, EX REL. DEPARTMENT OF
CHILDREN AND FAMILY SERVICES/INDIAN CHILD WELFARE
and RUSTY HAYES AND FAITH HAYES, APPELLEES.

NO.-AC-20-1
APPEALS COURT NUMBER
NO.-JD-18-8
DISTRICT COURT NUMBER

Original appeal from the Choctaw Nation District Court, J. Branam, presiding. The Department of Children and Family Services removed the juvenile case to the Choctaw District Court. The juvenile had been with the foster family/Appellant for in excess of six months. After removal to the Choctaw Nation District Court, the Department of Children and Family Services gave notice to remove the juvenile from the Appellants' home. The Appellants objected to the removal and this proceeding resulted. The trial court allowed the Department to change placement after a hearing. We hold that the trial court used the wrong standard in deciding this case, to-wit; a family preference rather than determining if the decision of the Department in removing the juvenile was arbitrary. We reverse and remand for further proceedings with instructions.

REVERSED AND REMANDED WITH INSTRUCTIONS

Blake Lynch, Wagner and Lynch, Wilburton, Oklahoma, for Appellants.

Kara Bacon, Lead Prosecutor, Hillary McKinney, Assistant Prosecutor, Cory Ortega, Assistant Prosecutor, Durant, Oklahoma , for Appellee Department of Children and Family Services

Alan M. Perry, Hugo, Oklahoma, for Appellee Rusty and Faith Hayes.

Charlie Rowland, Antlers, Oklahoma , Guardian ad Litem for Juvenile.

OPINION BY GOTCHER, J.

This is an appeal from an order of the Choctaw Nation District Court overruling the objection made by Appellants to the transfer of J.D., a minor. The request for the transfer from one foster home to another foster home was made at the request of the Appellee, The Department of Children and Family Services/Indian Child Welfare of Choctaw Nation of Oklahoma, hereinafter called Department. The record indicates that J.D., a minor, was born on the [redacted] day of November, 2016, and became the subject of an Oklahoma District Court deprived case, filed on the 1st day of December, 2016. The child pursuant to that deprived case was placed with Appellees, Rusty and Faith Hayes, hereinafter referred to as "Hays". Thereafter the minor was removed from the foster home of the Hayes and, ultimately, while in the Oklahoma juvenile system, placed with Appellants Daniel and Randi Ragle on September 29, 2017. The minor remained with Appellants until the present court proceedings. The Nation filed a petition to accept jurisdiction of the minor in Tribal Court on October 25, 2018. A formal order accepting jurisdiction was filed February 5, 2019. The Department filed its first notice of removal of the minor from the Appellants' home February 5, 2019. The Appellants filed their first objection to removal on February 6, 2019. The Department filed its second notice of removal on March 5, 2019 with Appellants filing their second objection to removal on March 6, 2019. The Tribal Court held the hearing on the notice and objection to removal on November 4, 2019, The Honorable Richard Branam, District Judge presiding.[1] Judge Branam entered his order on

[1]The Statute calls for a hearing within fifteen days. We are cognizant of the fact that reasonable delays are necessary in order to be fully prepared, employ experts, exchange discovery, comply with the schedules of the court, parties and witnesses and other matters, including attempts to resolve the matter out of court or through our Peace Makers Court. In the case at bar, there was no objection that is on the record to the delay by any party and no prejudice raised or argued by any party. We are not finding that this was an improper delay, but our courts should honor, as best as they can, our tribal code's requirements in setting these matters

December 11, 2019, placing the Minor with Hayes pursuant to the Department's notice of removal. Journal Entry of Judgment was filed on April 24, 2020. The present record on appeal was filed prematurely, however, by the filing of the Nunc Pro Tunc Journal Entry of Judgement, the premature record on appeal, including the respective briefs of the parties, will be deemed adopted as the amended current record on this expedited juvenile appeal. No party has filed any objection to this procedure. From these proceedings this appeal has commenced.

Appellants complain of errors in the proceedings that has prejudiced the rights of Appellants. Appellants claim that the errors warrant reversal of the order of the Choctaw Nation District Court. This Court reviews statutory interpretation de novo. *State ex re. Edmondson, v. Native Wholesale Supply*, 2010 OK 58, 237 P.3d 199. When reviewing a court's legal rulings, the standard of appellate review is that the Appellate Court exercises plenary, independent and non-deferential review. *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, 859 P.2d 1081. This court uses a standard of de novo review when reviewing errors of law. *Sanders v. Cole*, 454 P.3d 761, (Ok. Civ. App. 2019).

Appellants complain that the Court erred in requiring the Appellant to have the burden of proof. When a child is placed in the Custody of the Department, the Department shall have discretion to determine an appropriate foster placement for the child. *Choctaw Nation's Children Code, Section 1-4-805(B).* The Choctaw Tribal Code provides that the Department shall not change the foster home placement of a child without the approval of the court when a foster parent, whom has had the child reside with them for more than 6 months, objects to the removal. *Choctaw Nation Children's Code, Section 1-4-805(C).* If an objection is made, the court shall conduct an informal placement review within 15 days on any objection filed by a

party. To stay the new proposed placement or to order the child returned to the previous foster home, the court must sustain the objections of the foster parents by finding that the new placement of the minor by the Department is either arbitrary, inconsistent with the child's permanency plan or not in the best interests of the child. *Choctaw Nation's Children's Code, Section 1-4-805(C)(4).* The District Court correctly placed the burden of proof on the objecting party. *In re: Alexander P.*, 228 Cal App. 4th 1322, 176 Cal. Rptr. 3rd 468. That assignment of error is not meritorious.

The Appellants further assert that the court erred by not finding that the extended family member definition includes cousins of the second degree and/or traditional custodians. Traditional Custodians are defined in the *Choctaw Nation Children's Code*. The definition is found at *Section 1-1-105(72)* and provides as follows; "Traditional custodians means those relatives and friends of the child other than the parent, who, based on the traditions, customs, and common law of the Choctaw Nation or of the family, have accepted the rights, duties, and responsibilities of assisting the parents in rearing the child and providing for its support." This child was officially taken from the mother some two days after birth. There is no evidence that the Ragles or Hayes by traditions, customs or the common law of the Choctaw Nation accepted duties related to rearing the minor in question. The evidence is conclusive that the Ragles and Hayes accepted the responsibilities of rearing the child pursuant to the foster care laws of the State of Oklahoma. While these actions are commendable, these actions do not fall within the definition of traditional custodians. The definition of extended family member is set out in the *Choctaw Nation Children's Code, Section 1-1-105(26)* . The Code defines "Extended family member as a person at least eighteen years of age and who is related to the child by either blood

or marriage and is the child's grandparent, aunt or uncle, brother or sister, niece or nephew, or cousin. **This may extend beyond first degree relatives** and may include traditional custodians."[2] The *Indian Child Welfare Act* (*ICWA*) defines extended family. *25 U.S.C.1903(2)*. Congress by *ICWA* allowed the various tribes to enact laws as to the definition of extended family or leave it to the tribe's customs. In absence of the tribes enacting its own definition or having a recognized tribal custom, the ICWA definition applies. Statutory construction is reviewed de novo and is an issue of law for the court. The primary goal of statutory construction is to determine the intent of the legislature. *ICWA* lists second cousins as part of the extended family. Our Tribal Council, instead of relying on the *ICWA* definition, enacted its own definition. In doing so, the Tribal Council specifically omitted second cousins. Obviously the definition is explicit, but by our Council's enactment some discretion is given to the department to include second cousins, other distant relatives and traditional custodians when factually appropriate and necessary. All cousins are not equal under *Section 1-1-105(26)* which is contrary to the Department's reasoning. Only after some exercise of reasonable discretion may the department include second cousins as extended family members. The record does not contain any such exercise of discretion by the Department. To include second cousins in the definition of extended family as a matter of course and without some connection other than being a distant relative is

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[2]The deprived case was commenced in Oklahoma District Court. Oklahoma does not have the preferences listed in Section *1-1-102(G)*. The Indian Child Welfare Act (*ICWA*) does provide for the preferences listed in Section *1-1-102(G)*. *25 U.S.C. 1915(b)*. *ICWA* was passed in 1978. *ICWA* also has a definition of extended family. That definition is "extended family member is **defined by the law or custom of the Indian child's Tribe**, or in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or **second cousin**, or stepparent. *25 U.S.C. 1903(2)* (emphasis ours).

not consistent with our Tribal Council's enactments and therefore is error.

The Appellants also assert the Court erred when it ruled that Hays second placement was a preferential placement under the *Choctaw Nation Children's Code*. The gist of this argument is found in the phrase testified to by Sheila Watson, wherein she stated that "Well, culturally, cousins are cousins..." Tr. Page 249, L. 8. The department in its brief likewise gives great importance to the Watson statement. Judge Branam in his written decision quotes "Cousins are cousins". Judge Branam through expert testimony found that family is most important. Our tribal courts are guided and controlled in the reception of evidence by our evidence code. Expert testimony and opinion evidence are allowed under the *Choctaw Nation Code of Civil Procedure, Sections 2701 et seq.* It appears that the statutory provisions of the Choctaw Nation Evidence Code originated from the Federal Code of Evidence, promulgated in 1975, and the Oklahoma Code of Evidence, first passed into law in 1978. While there are a few differences in the written codes, the differences are minor. While not binding upon this court, we can look to the interpretation of those codes by those jurisdictions in interpreting the provisions of our evidence code. In the hearing there were references to "*Daubert*". T. P225, L. 20; T. 226, L. 23; T. 229,L.22. After reviewing the purposes of our code of evidence and the applicability of the various court interpretations, we are satisfied that the Federal interpretations of the evidence code satisfies the purpose and aims of our evidence code. Therefore we herewith adopt the principles and methodology as cited in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. V. Carmichael*, 119 S. Ct. 1167(1999), for guidance for our courts in receiving expert testimony into evidence. Expert witnesses are encouraged under the *Indian Child Welfare Act, 25 U.S.C. 1901 et seq.*; *Guidelines for Implementing the Indian Child Welfare*

Act, issued December 2016 by U.S. Dept. of Interior, Office of Assistant Secretary - Indian Affairs, Bureau of Indian Affairs, Section G2, page 53. Expert testimony, especially as to culture, attachment and neglect, may be helpful to a trier of fact. That being said, the evidence in this case, and more particularly the testimony, "Cousins are cousins" which has become the focal point of this case is somewhat troubling. First there was no objection to the reception of the statement by Appellants, even though in their brief they argue that "Ms. Watson is not a qualified expert on the prevailing standards or norms of the Choctaw culture." Appellants' brief page 6. Errors in reception or exclusion of evidence must be objected to at trial in order to allow the trial court to correct the error. If the complained of reception or exclusion of evidence was not objected by the complaining party, this court may only review for plain error. *Choctaw Code of Civil Procedure, Section 2104(C).* To be entitled to relief under the plain error doctrine, Appellants must show an actual error, which is plain or obvious and which affects their substantial rights. This court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. The record reveals that the Department offered Ms. Watson as an expert in social work. After the witness had testified that she had been an Indian Child Welfare expert in termination proceedings only (T.225, L. 2-15), the Department only offered her as an expert in social work stating on the record "just because she's never been qualified as an expert witness in social work in a different court doesn't mean that this court cannot qualify her as such." T.226, L. 19-21. When Judge Branam did accept her as an expert witness, the judge stated, "...I will recognize her as an expert - - You're asking for Indian Child Welfare? " T.229, L.24-25. The Department responded "child welfare and social work", specifically omitting Indian. The court thereafter

responded "Okay, and social work." T. 230, L.1-3. The Department on the record did not request that Ms. Watson be an Indian child welfare expert. Thus whether or not the court accepted Ms. Watson as an Indian Culture expert is at best unclear. A witness can give an opinion even if the witness is not an expert if the opinion is rationally based upon the perception of the witness. *Choctaw Nation Code of Civil Procedure, Section 2701(1).* The witness's perceptions appear to be boarding school stories and adopted children leaving for their parents. As far as the cousins are cousins statement, the witness could not relate any literature, just personal experience that had to do with boarding schools in her family history. Thus the questions abound if this witness was qualified to testify as an expert about the cultural traditions of the Nation or that she had the rational perception to be a lay witness. Since no objection was made, we would have to apply the plain error rule to this asserted error. Because of our disposition below, we decline to rule on this claimed error.

As the Department asserts, our Tribal Council has by our tribal code set out preferences for foster care or pre adoptive placements. Those preferences, absent good cause to the contrary, are a. a biological parent; b. member of the child's extended family; c. A foster home licensed by the Choctaw Nation; d. a foster home licensed or approved by another Indian Tribe; e. an Indian foster home licensed or approved by a non-Indian licensing authority. *Choctaw Nation Children's Code, Section 1-1-102(G)(2).* The aforesaid statute specifically states "It is the intent of the Tribal Council that the Choctaw Nation's placement preferences be followed in any foster placements or pre adoptive placements. Further this preference is for children ACCEPTED for foster care or pre adoptive placement." (Emphasis ours) This case was originally filed in the Oklahoma Juvenile system where the child was accepted for foster care. When a juvenile case is

transferred to the Nation, the Nation shall proceed as if the petition had originally been filed with the Nation or adjudication had been originally been made in the Nation. *Choctaw Nation Children's Code, Section 1-1-103(G).* This preference guides the Nation when first placing children in foster or pre-adoptive care. After a child has been placed in a foster home, the department has discretion to move the child from one home to another. *Choctaw Nation Children's Code, Section 1-4-803.* However that discretion of the Department in placing children becomes limited in situations as in the present case, where the child has been present in a foster home for six months. *Choctaw Nation's Children's Code, Section 1-4-805.* In those limited situations, the court may not order a specific placement but may disprove of a relocation or order a return to the previous placement. *Choctaw Nation Children's Code, Section 1-4-805(C)(1).* The Tribal council has codified that, "**In order to promote stability for foster children and limit repeated movement of such children for one foster placement to another**, the Department or child-placing agency otherwise provide by this section, shall not change the foster home placement of a child without the approval of the court in the following circumstances: . . ., c. a foster parent with whom the child has resided for more than six (6) months objects, in writing pursuant to the provisions of this subsection, after notice of the removal of the child by the Department or the child-placing agency." *Sec 1-4-805(C)((1)(c)* (emphasis ours). After timely objection, the court shall conduct an informal placement review hearing within fifteen (15) judicial days on any objection filed by a party or foster parent pursuant to this section. The court may order that the child remain in or be returned to the home of the objecting foster parent if the court finds that the placement decision of the Department or child-placing agency was **arbitrary, inconsistent with child's permanency plan** OR **not in the best interests of the**

child. *1-4-805(C)(4)* (emphasis ours). An objection to an amended second notice of removal was filed by the Appellants on March 6, 2019. This child had been in foster care since December 1, 2016. The child was born on November [redacted] 2016. The Hayes had been J. D.'s foster parents until the child was removed on August 6, 2017 for neglect. J. D. was placed with the Appellants for foster care on September 29, 2017. At the time of the notice to remove J. D. from the Appellants, this 26 month old child had been in the foster care of Appellants for 16 months. Until this matter was heard, November 4, 2019, the then 35 month old child had been with the Appellants for 25 months, approximately 70% of an almost three year old child's life. The reason given for the removal and placement with the Hayes was it was a kinship placement. See Notice of removal, Record on Appeal, page 5-6. This is consistent with the testimony of Ms. Watson. She testified that the reason for the transfer was to move the child from a non relative placement to a relative placement. T. 230, L.13-16. In response to the question of why the Department was removing the child, the witness replied, "Well, it's set out in the preferences for our tribal code and it's just our experience, that relative placement would be most beneficial for her." T. 230-231, L.24-2. This case was started in the Oklahoma Courts. The placement to the Appellants was made in the Oklahoma District Court after the child had been removed from the Hayes home for neglect. The Oklahoma Courts did not place the child again with the Hayes after the removal There are no DHS records in the court record, but there was testimony that ultimately the allegations of neglect were unsubstantiated.[3]

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[3]The expert for the Department, Ms. Watson, did not know what unsubstantiated meant. T. 232-235. It is noted that the Department for which the Ms. Watson now works also has the same definition of unsubstantiated. *Choctaw Nation Children's Code, Section 1-1-105(65)(3).* Unsubstantiated means that there is insufficient evidence to fully determine whether child abuse or neglect has occurred, not that there was no child abuse or neglect.

Our Tribal Council has decreed whenever it is necessary for a child to be placed outside the home, each child shall be assured the care guidance and supervision that will serve the best interests of child including, but not limited to, the development of the moral, emotional, cultural, spiritual, mental, social, educational, and physical well-being of the child. *Choctaw Nation'sChildrenCode, Section 1-1-102(C)(1).* The Tribal Council has further decreed that the paramount consideration in all proceedings is the best interests of the child. *Choctaw Nation's Children's Code, Section 1-1-102(E).* The kinship preference was made by the Oklahoma Court, though not required, but changed due to allegations of neglect. [4] A non kinship placement was then done that remained in effect until December 11, 2019. The court in its order quoted Ms. Watson that family is most important. The Court found that both sets of foster parents are qualified, but did not find if one was better for the child than the other. The Department cited the preference for extended family placements and stated that relative placement would be most beneficial. If our court was to be a rubber stamp for the decisions of the Department and its extended family preferences, then there would be no need for a hearing as the Tribal council has allowed by our code. The issues for the court are whether or not the decision of the Department was arbitrary, not in accordance in with the permanency plan or in the best interests of the child. *Section 1-4-804(C)(4).* An arbitrary decision is one based without rational thought or in a fixed manner. *Black's Law Dictionary, Forth Edition.* The Oklahoma Court of Civil Appeals in *Winfrey v. State of Oklahoma (In Re: O.R.)* 2019 OK CIV APP 58, in interpreting a statute akin

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[4]The Hayes, pursuant to a similar Oklahoma statute, could have objected to the change in placement in the Oklahoma Courts as the Ragles did herein. *10A O.S. 1-4-805(C)(4).*

to *1-4-805*, stated that "An arbitrary decision is one that is made without consideration, without a determining principle, or in disregard of the facts." As stated previously, we are not bound by the Oklahoma Court's interpretations, but in examining the decision, we find that it is based upon sound reasoning and authority and is therefore persuasive. Ms. Watson when asked, "Is there anything, anything in the world that could exist that would make you say no to that question? (Question being anything that would prevent your recommendation to remove the child from the Appellants to the Hayes) A. No. Q. No evidence, no facts, no science, you feel that is what we are going to do. A. That's my feeling, yes." T. 252, L.8-14. Since the child has already been removed from a kinship placement for almost two years and placed in a non kinship foster home for in excess of six months, the preference is not mandatory, or why else would the court have the power to prevent the removal? Using the above standards for appellate review, the record reveals that the trial court used the wrong legal standard that the preference controlled as the Department urged. The court in its opinion stated that there will not be extraordinary needs or **trauma** caused to the minor child by the transfer. This statement from the court clearly shows that the court was using the wrong standard. Only if the court was following the codified preference would the lack of extraordinary needs or trauma be relevant. While family or kinship placements may factor in the best interests decision, it should not be the only reason after the child has been in foster care for a long period of time, especially with one family. Ms. Watson, the supervisor of the Department, admits that there was no investigation of past allegations. The Hayes did not have any specific training except for foster care. Under our code, the arbitrariness of the decision should be determined by the court. The order of the court should be reversed and remanded for determination as to the arbitrariness of the removal.

As the California Court stated in *In Re: Alexander P.*, supra., a case cited by the Department, we recognize that J.D.'s final placement, including adoption proceedings may be delayed by this decision, but the delay is warranted by the need to insure for J.D. and all other minors similarly situated that the correct standard is employed and that the best interests of the minors are always served. We are also aware that J.D. has been currently placed with the Hayes. The present circumstances that have arisen by the removal from the Appellants' home to the Hayes' home in December, 2019, may be relevant in the decision by the court as to determining what is in the best interests of the child, returning the child to the Ragles or leaving the child with the Hayes. [5] If the court should find the department's decision was arbitrary, the court, should before changing the placement, determine the best interests of the child in either placement before the Court which is always the controlling standard in these type of proceedings. [6]

ACCORDINGLY the decision of the Trial Court is hereby Reversed and Remanded with directions to determine whether or not the decision of the Department in changing the placement was arbitrary, and ultimately, if the decision was arbitrary, what placement now would be in the best interests of the minor.

PHELPS, C,J., RABON, J., CONCUR

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[5]The *Winfrey* court in a statute like our own determined that even though the terms were in the alternative (arbitrary, not in conformity with the permanency plan or in the best interests of the child), the best interests of the child always control which is consistent with our Tribal Code.

[6]By this opinion, this court is not directing the trial court to make any interim or final orders concerning placement. That is the province of the trial court. We are only instructing the court to use the proper standard in determining the matters at bar.