In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00145-CV

IN THE INTEREST OF E.A.C., A CHILD

On Appeal from the 316th District Court
Hutchinson County, Texas
Trial Court No. 44,023; Honorable Curt Brancheau, Presiding

November 16, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

J.K. appeals the trial court's final order terminating her parental rights to E.A.C. Her sole issue implicates the doctrine of preemption. She argues that the Indian Child Welfare Act, 25 U.S.C. § 1911 *et. seq.* (ICWA), preempts Texas statute when terminating the parental relationship between a Native American and his or her child. We affirm.

In short, J.K. posits that the ICWA preempts § 161.001 of the Texas Family Code because "Anglos" cannot accurately assess what is in the "best interests" of an Indian child. "[T]he term 'best interests of Indian children,' as found in the ICWA, is different than

the general Anglo American 'best interest of the child' standard used in cases involving non-Indian children," in her view. Purportedly, "[u]nder the ICWA, what is best for an Indian child is to maintain ties with the Indian Tribe, culture, and family.'" On the other hand, the best interest of a child under § 161.001 is derived from an "Anglo" perspective; that is, when Texas courts "make a determination . . . 'they obviously consider the factors from their own perspective, that is, an Anglo-American point of view.'" This, J.K. continues, makes it "not possible to comply with both the two-prong test of the Family Code, which requires a determination of the best interest of the child under the 'Anglo' standard, and the ICWA, which views the best interest of the Indian child in the context of maintaining the child's relationship with the Indian Tribe, culture, and family." Given this purported conflict the ICWA supposedly preempts that aspect of the Family Code pertaining to the child's best interests and "the trial court [at bar] erred in making any determination regarding the best interest of the child under state law." We overrule the contention for several reasons.

First, our review of the record failed to illustrate that J.K. broached the topic of preemption in the trial court or otherwise asserted it through a live pleading or post-judgment motion. Nor did she cite us to any particular part of the record indicating that the contention was so raised. Furthermore, in urging her position, she does not suggest that a Texas trial court cannot adjudicate a petition to terminate the parental rights of a Indian child, rather, only that the ICWA controls. The absence of an objection or complaint being uttered to the trial court is problematic.

When a preemption claim does not deny the trial court subject-matter jurisdiction then it is an affirmative defense, and, if the latter, it must be raised in the trial court to

avoid waiver. *Toyota Motor Sales, U.S.A., Inc. v. Reavis*, No. 05-19-00075-CV, 2021 Tex. App. LEXIS 4378, at *8 (Tex. App.—Dallas June 3, 2021, pet. filed) (mem. op.); *accord Gorman v. Life Ins. Co. of N. Am.,* 811 S.W.2d 542, 545–46 (Tex. 1991) (op. on reh'g) (stating that a "preemption argument that affects the choice of forum rather than the choice of law is not waivable and can be raised for the first time on appeal"). Again, J.K. is not asserting that preemption affects the forum (i.e., the ability of a Texas court to adjudicate the termination suit), but rather affects the applicable body of law (i.e., the ICWA supplants aspects of § 161.001 of the Texas Family Code). Thus, the argument does not implicate the trial court's subject-matter jurisdiction. This means she was obliged to first broach it with the trial court under *Gorman* and *Reavis*. Having failed to do that, she waived her preemption complaint.

Yet, even if it were preserved, the argument lacks foundation. One prerequisite to termination under the Texas Family Code requires the factfinder to determine if severing the relationship is in the child's best interest. TEX. FAM. CODE ANN. § 161.001(b)(2). Though the phrase "best interest of the child" is mentioned in the ICWA, it pertains to the appointment of counsel. *See* 25 U.S.C. § 1912 (b) (stating that "[t]he court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child"). Nothing in the ICWA itself conditions termination upon a court finding that the child's best interests favor that result. Such is a creature of state law without a federal counterpart upon which to base preemption.

Furthermore, the authority upon which J.K. relies is inapposite. In discussing a child's best interests, the court in *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. App.—Houston [14th] Dist.1995, no pet.), addressed whether they were a factor is

deciding if "good cause" existed to deny transfer of the proceeding to a tribal court. *Id.* at 168 (noting that "[w]hether the 'Anglo' best interest of the child test should be an element of the good cause test is a difficult question"). Here, we review the trial court's decision regarding termination of the parental relationship, not whether to transfer the cause elsewhere.

Finally, whether the ICWA preempts aspects of the Family Code has been answered by two sister courts. They held that the trial court did not err in applying both bodies of law. *See In re G.C.,* 2015 Tex. App. LEXIS 8527, at *3–4 (Tex. App.—Waco Aug. 13, 2015, no pet.) (mem. op.); *In re K. S*., 448 S.W.3d 521, 533 (Tex. App.—Tyler 2014, pet. denied). As said in *K.S.*, "both the ICWA and the Texas Family Code grounds for termination must be satisfied." *In re K.S.*, 448 S.W.3d at 533. And we agree.

We overrule J.K.'s sole issue and affirm the order of termination.

Brian Quinn
Chief Justice