AFFIRM; and Opinion Filed October 20, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00425-CV

IN THE INTEREST OF A.E., A CHILD

On Appeal from the 304th Judicial District Court
Dallas County, Texas
Trial Court Cause No. JC-16-433-W

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Evans
Opinion by Justice Lang-Miers

The mother of A.E. ("Mother") appeals the termination of her parental rights. In one issue, she contends the trial court erred by failing to apply the Indian Child Welfare Act when evidence was presented that A.E. was of Indian heritage. We affirm the trial court's judgment.

BACKGROUND

A.E. was born to Mother and an unknown father in March, 2016. On April 21, 2016, the Texas Department of Family and Protective Services (the "Department") received a referral alleging neglectful supervision of A.E. The following day, Mother was arrested during a traffic stop when methamphetamines were found in the vehicle. A.E. was in the vehicle at the time and was placed into foster care.

On April 25, 2016, the Department filed an original petition for protection of a child, for conservatorship, and for termination of Mother's parental rights to A.E. The petition was

supported by the affidavit of Department caseworker Kimberly Bell. Bell's affidavit included allegations that A.E. tested positive for opiates at birth; Mother was investigated by the Department on numerous occasions before A.E.'s birth for neglectful supervision of her two older children; and Mother has a history of drug abuse and domestic violence. On April 26, 2016, the trial court rendered an ex parte order for emergency care of A.E. and temporary custody, appointing the Department as temporary managing conservator.

On May 18, 2016, A.E.'s maternal grandmother ("Grandmother") intervened in the suit and requested appointment as A.E.'s sole managing conservator. In her petition, Grandmother alleged that Mother "has a history or pattern of child neglect and use of controlled substance during the two-year period preceding the date of filing of this suit," and stated that Mother was currently incarcerated. Grandmother did not allege that Mother's parental rights should be terminated, but requested that Mother's visitation with A.E. be supervised. The Department conducted a "home assessment" to evaluate Grandmother's home as a possible placement for A.E., but concluded there were safety and well-being concerns that precluded A.E.'s placement there. Grandmother filed a motion for placement and request for hearing, challenging the Department's conclusions in its home assessment. None of Grandmother's pleadings or motions alleged that she, Mother, or A.E. were of Native American heritage.

On June 27, 2016, the Department filed a status report with the court. The report contained a box entitled "Native American Child Status," with four possible responses. The third possible response, "Child's American Indian child status denied by [Mother's name], mother" was checked. In a report by the Department entitled "Kinship Caregiver Home Assessment" of Grandmother's home, filed with the trial court on June 30, 2016, Grandmother gave her ethnicity as "Caucasian/White." The same assessment reported the ethnicity of Grandmother's mother, another member of the household, as "Caucasian/White." Again in its

"Permanency Report to the Court—Temporary Managing Conservatorship," filed on September 29, 2016, the Department reported that "Child's American Indian child status denied by [Mother's name], mother."

On January 23, 2017, Mother, Grandmother, and the Department entered into a mediated settlement agreement ("MSA"). The parties agreed that Grandmother's motion for placement would be set for hearing by the trial court. If the trial court determined that A.E. should be placed with Grandmother, then the parties agreed that Grandmother would be appointed permanent managing conservator of the child, and Mother would be appointed permanent possessory conservator of A.E. If, at the conclusion of the hearing, A.E. was not placed in Grandmother's home, then Mother agreed that her parental rights would be terminated "on 'O' grounds for failure to complete court ordered services and best interest only."[1] The Department agreed "to forego any other grounds for termination, including endangerment grounds."

The trial court signed a "Permanency Hearing Order Before Final Order" dated February 3, 2017. The order recites that counsel for Mother appeared at the hearing and announced ready. Paragraph 2.8 of this order provided, "The Court has inquired whether the child or the child's family has Native American heritage and identified any Native American tribe with which the child may be associated."

The case proceeded to trial on March 29, 2017. The reporter's record reflects that Mother's counsel appeared and participated in the proceedings. Grandmother and others testified. The record does not reflect any argument, allegation, evidence, or mention of the family's Native American descent. The trial court denied placement with Grandmother, and set the case for a hearing on termination of Mother's parental rights.

[1] *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O) (West Supp. 2016) (one of grounds for involuntary termination of parent-child relationship).

On April 10, 2017, Mother moved for a continuance of the April 11 hearing date. Mother alleged:

> Respondent mother and maternal grandmother are of Native American descent. They have ties to the Choctaw, Cherokee, and Sioux tribes. They are attempting to find documentation of tribal membership. Movant is seeking additional time so the family obtain [sic] documents and contact the appropriate tribes. Under the Indian Child Welfare Act, the tribe must be given notice of such proceedings.

The hearing addressing termination of Mother's parental rights commenced on the following day. The trial court heard Mother's motion for continuance before hearing any evidence. The record reflects the following arguments and ruling:

> MS. TIMBERLAKE [Mother's counsel]: Your Honor, I—my client recently—I found out some information that there is some Indian heritage that the grandmother had indicated to [the Department] early on, but there was never any documentation provided. So when I found that out I let everybody know that this was an issue. This was after our placement hearing. They are in the process of trying to track down their documentation for the Indian heritage. There's actually possibly maternal and paternal side. However, they haven't been able to get that and that's why I filed a motion for continuance because I was trying to give them additional time to find that information so that we are in compliance with ICWA [the federal Indian Child Welfare Act].
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> MR. MA [counsel for the Department]: May I respond, Your Honor?
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> THE COURT: Yes.
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> MR. MA: Based on my conversations with the caseworker and [the Department] I think grandmother and the mother indicated that they might have Indian blood some time last year. [The Department] asked for more information because just kind of a general statement like that doesn't help to indicate what tribe or if they are eligible for membership or if they are a member. And so we have waited I think since towards the end of last year and there still hasn't been any documentation received. There hasn't been any follow up received or given to those relatives or from the mother in this case. That's all the information we have, Judge, just that possibly there's Indian blood.
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> THE COURT: Mr. Herrera.
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> MR. HERRERA [ad litem for A.E.]: Judge, the grandmother called me Friday after the placement hearing to inform me that she believed there was some Indian heritage. I asked her if they were registered members of any tribe and she said no, they weren't, but they were going to look into it. That's the extent of the information I have.

> MR. WYATT [Grandmother's counsel]: That is the extent of the information I have also, Your Honor.
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> THE COURT: All right. The motion for continuance is denied.

At the conclusion of the hearing, the trial court made findings supporting its ruling that Mother's parental rights should be terminated. The trial court rendered a final decree terminating Mother's parental rights on April 21, 2017. This appeal followed.

DISCUSSION

In her single issue, Mother contends that the trial court erred by failing to apply the protections of the Indian Child Welfare Act, 25 U.S.C. §§ 1901–63 (West, Westlaw through Pub. L. No. 115-61) ("ICWA") when terminating her parental rights. We review the trial court's application of the ICWA de novo. *In re T.R.*, 491 S.W.3d 847, 850 (Tex. App.—San Antonio 2016, no pet.).

In 1978, Congress passed the ICWA to address the '"rising concern . . . over the consequences to Indian children, Indian families, and Indian tribes 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 E.G.L.*, 378 S.W.3d 542, 545 (Tex. App.—Dallas 2012, pet. denied) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). The ICWA "articulates a federal policy that, where possible, an Indian child should remain in the Indian community." *In re T.R.*, 491 S.W.3d at 850 (citing *Miss. Band of Choctaw Indians*, 490 U.S. at 36–37). Under the ICWA, an Indian tribe is entitled to notice of a custody proceeding involving an Indian child. *In re D.D.*, No. 12-15-00192-CV, 2016 WL 1082477, at *7 (Tex. App.—Tyler Feb. 29, 2016, no pet.) (mem. op. & abatement order) (citing 25 U.S.C. § 1912(a)).

The ICWA applies to an involuntary child custody proceeding pending in state court when "the court knows or has reason to know that an Indian child is involved" in a child custody

proceeding. 25 U.S.C. § 1921(a); *Doty-Jabbaar v. Dallas Cty. Child Protective Servs.*, 19 S.W.3d 870, 874 (Tex. App.—Dallas 2000, pet. denied). An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). "Reason to know," however, is not defined in the statute.

In 1979, 2015, and 2016, the federal Bureau of Indian Affairs ("BIA") published guidelines to assist state courts in their implementation of the ICWA. Texas courts have looked to these non-binding guidelines ("BIA Guidelines") in construing the ICWA. *See, e.g., In re R.R., Jr.*, 294 S.W.3d 213, 218–19 (Tex. App.—Fort Worth 2009, no pet.) (discussing courts' use of BIA Guidelines); *Doty-Jabbaar*, 19 S.W.3d at 876–77 (considering BIA Guidelines in determining qualifications of expert witness required by ICWA); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 164 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding) (BIA Guidelines "not intended to have binding legislative effect" but "should be given important significance" in interpreting ICWA).[2] And recently, the Department of the Interior has promulgated regulations governing cases involving the ICWA. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,864 (June 14, 2016) (codified at 25 C.F.R. pt. 23) ("2016 Regulations").[3]

The 2016 BIA Guidelines and 2016 Regulations discuss the phrase "reason to know" in section 1921(a) of the ICWA. Only one of the six factors listed in the 2016 Regulations is pertinent here:

[2] We reference the 2016 BIA Guidelines in this opinion. *See* Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* (Dec. 2016), https://perma.cc/3TCH-8HQM ("2016 BIA Guidelines"). Although Mother has attached the 2015 BIA Guidelines to her appellate brief, and this case was filed before the effective date of the 2016 BIA Guidelines, the 2016 BIA Guidelines updated and replaced the 2015 BIA Guidelines in an attempt to "promote the consistent application of ICWA across the United States." *See id.* at 4, 6. Because the BIA Guidelines are advisory and the status of the 2015 Guidelines is uncertain, we look to the 2016 Guidelines even though this case was filed before their effective date. *See, e.g., People ex rel. L.L.*, 395 P.3d 1209, 1212 (Colo. App. 2017) (discussing 2015 and 2016 BIA Guidelines).

[3] Like the 2016 BIA Guidelines, the 2016 Regulations apply to proceedings initiated after December 12, 2016. *See* 25 C.F.R. § 23.143 (2016 Regulations apply to proceedings under State law for termination of parental rights proceedings initiated after December 12, 2016). Similarly, although the 2016 Regulations do not apply to this appeal, we refer to them for guidance.

> (c) A court . . . has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if: . . .
>
> > (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child; . . .

25 C.F.R. § 23.107(c).[4] The 2016 BIA Guidelines advise that "State courts and agencies are encouraged to interpret these factors expansively. When in doubt, it is better to conduct further investigation into a child's status early in the case; this establishes which laws will apply to the case and minimizes the potential for delays or disrupted placements in the future." 2016 BIA Guidelines at 11. "A violation of the ICWA notice provisions may be cause for invalidation of the termination proceedings at some later, distant point in time." *In re D.D.*, 2016 WL 1082477, at *7 (citing 25 U.S.C. § 1914, providing, "Any Indian child who is the subject of any action for . . . 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.").

Because of Mother's denials of Indian heritage, however, no investigation was undertaken "early in the case" here. After the parties filed their briefs, on August 23, 2017, we abated this appeal for thirty days and ordered the Department to (1) investigate whether A.E. is an "Indian child" as defined by the ICWA, and (2) report the results of its investigation to the trial court. Further, we ordered the trial court to (1) consider the Department's report and conduct a hearing on A.E.'s status as an "Indian child," and (2) transmit to this Court a reporter's record

[4] None of the other factors is implicated in this case. *See id.* § 23.107(c)(1) (court is informed "that the child is an Indian child"); *id.* § 23.107(c)(3) (child gives court reason to know he or she is Indian child); *id.* § 23.107(c)(4) (child's, parent's, or Indian custodian's residence is on Indian reservation); *id.* § 23.107(c)(5) (child is or was ward of tribal court); *id.* § 23.107(c)(6) (parent or child possesses identification card indicating membership in Indian tribe).

of the hearing and a supplemental clerk's record containing the trial court's docket sheet, the trial court's written findings, and any supporting documentation.

The Department subsequently sought additional time to complete its investigation, informing the Court that "[t]here are a total of 20 tribes under the Federal Register that are affiliated" with the three Nations identified by Mother and Grandmother. In an Order dated September 12, 2017, we granted an additional 21 days to comply with our August 23, 2017 Order. In accordance with our Order, the Department completed its investigation, and the trial court held a hearing on October 4, 2017. A reporter's record of that hearing was filed in this Court on October 4, 2017, and a supplemental clerk's record was filed in this Court on October 12, 2017 (together, the "Supplemental Record"). We reinstated this appeal on October 13, 2107.

The Supplemental Record reflects that the Department undertook an investigation to determine whether A.E. is an "Indian child." Chaisity Fridia-Caro, a Department caseworker, testified at the October 4 hearing that Mother indicated possible affiliations with the Cherokee, Choctaw, and Sioux Nations. Fridia-Caro testified that there are twenty recognized tribes listed in the Federal Register for these three nations. Fridia-Caro contacted each of the twenty tribes,[5] giving each tribe A.E.'s name and date of birth, Mother's name and date of birth, Grandmother's name and date of birth, and a paternal grandmother's name and date of birth. Fridia-Caro testified that in response to her inquiries, each of the twenty tribes informed her that A.E. was neither enrolled nor eligible to be enrolled as a member of the tribe.

The Supplemental Record also contains the notice sent by Willis Ma, Assistant District Attorney, to the twenty tribes by registered mail, return receipt requested, and the Department's

[5] Fridia-Caro testified that she contacted the following tribes affiliated with the Cherokee Nation: (1) Eastern Band of Cherokee Indians; (2) United Keetoowah Band of Cherokee Indians, Oklahoma; and (3) Cherokee Nation, Tahlequah, Oklahoma; the following tribes affiliated with the Choctaw Nation: (1) Jena Band of Choctaw Indians; (2) Choctaw Nation of Oklahoma; and (3) Mississippi Band of Choctaw Indians; and the following tribes affiliated with the Sioux Nation: (1) Cheyenne River Sioux Tribe; (2) Shakopee Mdewakanton Sioux Tribe; (3) Crow Creek Sioux Tribe; (4) Flandreau Santee Sioux Tribe; (5) Lower Brule Sioux Tribe; (6) Oglala Sioux Tribe; (7) Rosebud Sioux Tribe; (8) Santee Sioux Tribe; (9) Standing Rock Sioux Tribe; (10) Yankton Sioux Tribe; (11) Lower Sioux Tribe; (12) Prairie Island Sioux Tribe; (13) Upper Sioux Tribe, and (14) Fort Peck Assiniboine & Sioux Tribe.

October 4, 2017 report to the trial court that details the Department's contacts with each tribe. At the close of the hearing, the trial court found:

> The trial court—this Court has considered the Department's report, the hearing today, and makes a finding that the child is not an Indian child as defined by the Indian Child Welfare Act. The Court will make that finding on its docket sheet and—so that will be available for the clerk to the appeals court. In addition, the supporting documentation, the report from the Department as well as the files that are part of the Court's record showing that that Mr. Ma's letters were all to tribes should also be sent to the Court of Appeals as well as the court record.

The Supplemental Record reflects that the trial court did not know or have reason to know that A.E. is an Indian child. *See* 25 U.S.C. § 1921(a); *Doty-Jabbaar*, 19 S.W.3d at 874. Accordingly, the other provisions of the ICWA are not applicable. *See In re T.R.*, 491 S.W.3d at 852 (where court did not know or have reason to know that Indian child, as defined in ICWA, was involved in proceeding, ICWA's notice provisions were inapplicable).

Mother has not raised any issue challenging the trial court's judgment other than its failure to apply the ICWA. We have concluded the trial court did not err in failing to apply the ICWA to the termination of Mother's parental rights. We decide Mother's sole issue against her.

CONCLUSION

We affirm the trial court's judgment.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

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

No. 05-17-00425-CV

On Appeal from the 304th Judicial District Court, Dallas County, Texas
Trial Court Cause No. JC-16-433-W.
Opinion delivered by Justice Lang-Miers; Justices Bridges and Evans, participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 20th day of October, 2017.