Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00326-CV

IN THE INTEREST OF D.M.C., a Child

From the 37th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-PA-01427
Honorable Barbara Hanson Nellermoe, Judge Presiding

Opinion by: Jason Pulliam, Justice

Sitting: Marialyn Barnard, Justice
Patricia O. Alvarez, Justice
Jason Pulliam, Justice

Delivered and Filed: October 12, 2016

AFFIRMED

David C. appeals the trial court's order terminating his parental rights to D.M.C. The sole issue presented on appeal is whether the trial court erred in failing to comply with the notice requirements of the Indian Child Welfare Act ("ICWA"). Because the record contains evidence the notice requirements were satisfied, we affirm the trial court's order.

BACKGROUND

On July 9, 2015, the Texas Department of Family and Protective Services filed an original petition to terminate the parental rights of D.M.C.'s parents, David C. and Endia S.[1] When the petition was filed, the Department was on notice that both parents claimed Native American status because that information was reported in the affidavit accompanying the petition.

[1] Endia S. did not appeal the order terminating her parental rights and is not a party to this appeal.

At the initial chapter 262 hearing held on July 20, 2015, David C.'s attorney informed the trial court on the record that the child may be of Native American descent. In response, the Department's attorney stated the proper forms had been filled out and sent off to the tribe, and the Department was awaiting a response.

At a status and pretrial conference hearing held on September 3, 2015, the trial court first requested an update on the ICWA claim. The Department's attorney responded as follows:

> So there was a claim made. The Department sent certified mail to the Secretary of the Interior in Washington, D.C., to the Bureau of Indian Affairs out of Oklahoma, to the Cherokee Nation of Oklahoma, to the Eastern Band of Cherokee Indians, and to the United Keetoowah Band of Cherokee Indians.
>
> We have responses from four of the five indicating they have no records of these children being registered members of the tribe. So at this point we don't see anything that would indicate intervention by the nation.

No objection or reply was made with regard to the Department's response, and the trial court proceeded with the hearing. The Department's case worker, who was called as a witness at the hearing, was asked whether he had received any information contrary to what the Department's attorney told the trial court about the ICWA issues in the case, and the case worker responded that he had not.

A trial on the merits was held on May 5, 2016 which was over nine months after the Department sent the ICWA notices. No Indian tribe filed an intervention. After hearing the evidence, the trial court terminated David C.'s parental rights. David C. appeals.

STANDARD OF REVIEW AND ICWA REQUIREMENTS

A trial court's application of the ICWA is reviewed de novo. *In re T.R.*, 491 S.W.3d 847, 850 (Tex. App.—San Antonio 2016, no pet.); *In re J.J.C.*, 302 S.W.3d 896, 902 (Tex. App.—Waco 2009, order). Under the ICWA, an Indian tribe is entitled to notice of a pending child custody proceeding involving an Indian child if the trial court "knows or has reason to know that an Indian child is involved." 25 U.S.C. § 1912(a); *see also In re T.R.*, 491 S.W.3d at 850. The

term "child custody proceeding" is defined to include parental termination suits. 25 U.S.C. § 1903(1)(ii); *see also In re T.R.*, 491 S.W.3d at 850. When the notice provisions of the ICWA are triggered, they are mandatory, and strict compliance is required. *See In re T.R.*, 491 S.W.3d at 851; *In re J.J.C.*, 302 S.W.3d at 901. "A violation of the ICWA notice provisions may be a cause for invalidating the termination proceedings at some future point in time." *In re J.J.C.*, 302 S.W.3d at 902; *see also* 25 U.S.C. § 1914.

DISCUSSION

As previously noted, the Department's attorney stated at the status and pretrial conference hearing that notice was provided in accordance with the ICWA's notice provisions.[2] *See Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (holding attorney's unsworn factual statements constitute evidence if opposing counsel does not object to absence of oath). Therefore, the record contains evidence from which the trial court properly determined the ICWA's notice provisions were satisfied.[3]

The Department's attorney also stated the responses to the ICWA notices indicated no record existed that D.C.M. was a member of an Indian tribe. *See id*. In addition, no Indian tribe sought to intervene in the nine months between the date the notices were sent and the date of trial from which the trial court could infer the Indian tribes determined D.C.M. was not an Indian child. *See In re R.R., Jr.*, 294 S.W.3d 213, 219 (Tex. App.—Fort Worth 2009, order) (noting membership is to be determined by the tribe); 25 U.S.C. § 1912(a) (providing Indian tribes have right to intervene). Accordingly, based on the evidence presented, the trial court properly determined

[2] In its brief, the Department refers to additional documents attached as appendices to its brief. The Department concedes, however, that these documents are not contained within the appellate record. This court may only consider documents contained within the appellate record. *See Myer v. Cuevas*, 119 S.W.3d 830, 836 (Tex. App.—San Antonio 2003, no pet.). Accordingly, we do not consider the documents attached as appendices to the Department's brief.

[3] The reporter's record of the status and pretrial conference hearing was filed after David C.'s appellant's brief was filed. Accordingly, the appellant's brief does not address the statements made at this hearing, and no reply brief was filed.

D.C.M. was not an Indian child; therefore, the other provisions of the ICWA were not applicable to the proceeding.

CONCLUSION

The trial court's order is affirmed.

Jason Pulliam, Justice