NO. 12-17-00114-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE INTEREST OF	***§***	***APPEAL FROM THE***
	§	***COUNTY COURT AT LAW NO. 2***
C.C. AND Z.C., CHILDREN	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION AND ABATEMENT ORDER

R.A. appeals the termination of her parental rights. Her counsel filed a brief in compliance with ***Anders v. California***, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967), and ***Gainous v. State***, 436 S.W.2d 137 (Tex. Crim. App. 1969). We abate this appeal and remand the case to the trial court with instructions.

BACKGROUND

R.A. is the mother and B.C. is the father of C.C. and Z.C.[1] On October 7, 2015, the Department of Family and Protective Services (the Department) filed an original petition for protection of C.C. and Z.C., for conservatorship, and for termination of R.A.'s and B.C.'s parental rights. The Department was appointed temporary managing conservator of the children, and both parents were granted supervised visitation with the children.

At the conclusion of the trial on the merits, the jury found, by clear and convincing evidence, that R.A. had engaged in one or more of the acts or omissions necessary to support termination of her parental rights under subsections (D), (E), (N), and (O) of Texas Family Code Section 161.001(b)(1). The jury also found that termination of the parent-child relationship between R.A., C.C., and Z.C. is in the children's best interest. Based on these findings, the trial

[1] B.C.'s appeal of the termination of his parental rights has been delivered by this Court in a separate opinion.

court ordered that the parent-child relationship between R.A., C.C., and Z.C. be terminated. This appeal followed.

ANALYSIS PURSUANT TO *ANDERS V. CALIFORNIA*

Appellant's counsel filed a brief in compliance with ***Anders*** and ***Gainous***, stating that she has diligently reviewed the appellate record and is of the opinion that the record reflects no reversible error and that there is no error upon which an appeal can be predicated. This court has previously held that ***Anders*** procedures apply in parental rights termination cases when the Department has moved for termination. *See* ***In re K.S.M.***, 61 S.W.3d 632, 634 (Tex. App.—Tyler 2001, no pet.). From our review of counsel's brief, it is apparent that she is well acquainted with the facts in this case. In compliance with ***Anders***, ***Gainous***, and ***High v. State***, 573 S.W.2d 807, 812 (Tex. Crim. App. 1978), counsel's brief presents a chronological summation of the procedural history of the case and further states that counsel is unable to raise any meritorious issues for appeal. After reviewing the record, we conclude that it contains at least one arguable issue for appeal.

Indian Child Welfare Act

In our review of the record, we observed that at an adversary hearing on October 19, 2015, B.C. reported that he had "Indian blood," but that he was not an active member of a tribe. R.A. agreed. B.C. also stated that he knew that his family was "part of a reservation, the Azteca," but he believed that it was "probably about four generations or – two or three generations of being part of the reservation." In a status report from the Department to the trial court dated November 19, 2015, the "box" indicating each child's Native American status was checked. The report explained that each "Child's possible American Indian child status reported by [R.A.], and is yet to be determined." The permanency reports to the trial court dated March 10, 2016, July 15, 2016, and December 30, 2016, however, indicated that both parents denied the children's American Indian status. The record does not show the basis for the subsequent denial by both parents of the children's American Indian status, or that the children's American Indian status was determined prior to trial, and the order of termination makes no reference to the issue.

Congress passed the Indian Child Welfare Act (ICWA) in response to the "rising concern in the mid–1970's 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." ***Miss. Band of Choctaw Indians v. Holyfield***, 490 U.S. 30, 32, 109 S. Ct. 1597, 1599–1600, 104 L. Ed. 2d 29 (1989); *see also* ***In re W.D.H.***, 43 S.W.3d 30, 34 (Tex. App—Houston [14th Dist.] 2001, pet. denied). The ICWA applies to all state child custody proceedings involving an Indian child when the court knows or has reason to know an Indian child is involved. 25 U.S.C.A. § 1912(a) (Westlaw current through PL 115-40); ***In re R.R., Jr.***, 294 S.W.3d 213, 217 (Tex. App.—Fort Worth 2009, no pet.). "Child custody proceeding" means, and includes, foster care placement, termination of parental rights, preadoptive placement, and adoptive placement. 25 U.S.C.A. § 1903(1) (Westlaw current through PL 115-40). An Indian child is defined by the ICWA as an "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.A. § 1903(4) (Westlaw current through PL 115-40). The ICWA, however, does not define what constitutes being a "member" or "being eligible for membership." *See* 25 U.S.C.A. § 1903(4). Each tribe has its own criteria for determining tribe membership. *See* ***In re R.R., Jr.***, 294 S.W.3d at 217-18.

The Bureau of Indian Affairs created guidelines for state courts to use in Indian child custody proceedings to assist with the interpretation of the ICWA. *See* BUREAU OF INDIAN AFFAIRS GUIDELINES FOR STATE COURTS; INDIAN CHILD CUSTODY PROCEEDINGS (BIA GUIDELINES), 44 FED. REG. 67,584 (Nov. 26, 1979). The Guidelines state that "[p]roceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences." BIA GUIDELINES, 44 FED. REG. at 67,586. Specific instructions are provided in the Guidelines for the determination of the status of an alleged Indian child. *See* ***In re J.J.C.***, 302 S.W.3d 896, 900 (Tex. App.—Waco 2009, no pet.). The burden is placed on the trial court to seek verification of the child's status through either the Bureau of Indian Affairs or the child's tribe. BIA GUIDELINES, 44 FED. REG. at 67,586 (stating that "the court shall seek verification of the child's status"). Further, the Guidelines provide that "[c]ircumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include [when] ... (i) Any party to the case ... informs the court that the child is an Indian child .... (ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child." ***Id.***

Under the ICWA, an Indian tribe is entitled to notice of a custody proceeding involving an Indian child. *See* 25 U.S.C.A. § 1912(a). It is the duty of the trial court and the Department to send notice in any involuntary proceeding "where the court knows or has reason to know that an Indian child is involved." 25 C.F.R. § 23.11 (Westlaw current through June 22, 2017 issue). Section 23.11 also requires that the notice be sent to the "appropriate Regional Director" and the Secretary of the Interior. ***Id***. § 23.11(a), (b), (c). Upon receiving the notice, the Secretary of the Interior or his designee is obliged to make reasonable documented efforts to locate and notify the tribe and the child's Indian parent or custodians within fifteen days or to notify the trial court how much time is needed to complete the search for the child's tribe. ***Id***. § 23.11(c).

A violation of the ICWA notice provisions may be cause for invalidation of the termination proceedings at some later, distant point in time. *See* 25 U.S.C.A. § 1914 (Westlaw current through PL 115-40) (providing that "[a]ny Indian child who is the subject of any action for ... termination of parental rights under State law, any parent ... 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"); *see also* ***In re W.D.H.***, 43 S.W.3d 30, 38-39 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (recognizing parent of Indian child has standing to challenge adequacy of notice even though tribe declined to join suit). Consequently, because the termination proceeding here will likely result ultimately in the adoption of C.C. and Z.C., strict compliance with the notice provisions of the ICWA and the regulations implementing it in the Code of Federal Regulations is especially important, or "the State could offer prospective adoptive parents no assurance this termination and a subsequent adoption would not be invalidated." *See* ***In re J.W.***, 498 N.W.2d 417, 419-22 (Iowa Ct. App. 1993), *disapproved on other grounds by* ***In re N.N.E.***, 752 N.E.2d 1 (Iowa 2008) (recognizing that notice provisions of the ICWA are to be strictly construed and reversing order terminating parental rights because of inadequate notice and remanding for new hearing after proper notice).

As noted above, B.C. reported that he had "Indian blood," but that he was not an active member of a tribe. R.A. agreed. B.C. also stated that he knew that his family was "part of a reservation, the Azteca," but he believed that it was "probably about four generations or – two or three generations of being part of the reservation." In a status report from the Department to the trial court dated November 19, 2015, the "box" indicating each child's Native American status

was checked. The report explained that each "Child's possible American Indian child status reported by [R.A.], and is yet to be determined." This was information discovered by a state licensed agency involved in child protection services that suggested C.C. and Z.C. may be Indian children, and it was sufficient to trigger the ICWA's requirements for notification and determination of Indian status. *See* ***In re J.J.C.***, 302 S.W.3d at 901 (holding that the trial court had reason to believe that the children were Indian because DFPS discovered that their maternal grandmother was alleged to be a member of the Chippewa Indian Nation); ***In re R.R., Jr.***, 294 S.W.3d at 222 (holding that the trial court had reason to believe the children were Indian when mother testified that her grandmother was a registered member of the Kiowa Indian Nation). Therefore, the trial court was obligated to notify the Indian tribe or tribes for an inquiry into the children's Indian status. *See* ***In re R.R., Jr.***, 294 S.W.3d at 219 (noting that the Guidelines listed circumstances that "shall trigger an inquiry by the court and petitioners"). The notice provisions of the ICWA are mandatory. *See* BIA GUIDELINES, 44 FED. REG. at 67,586 (providing that when a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the BIA or the child's tribe).

Conclusion

In accordance with ***In re P.M.***, No. 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016), counsel has not moved to withdraw. ***Id.*** at *3. Because the inquiry required by ICWA is necessary here, we ***abate*** this appeal and ***remand*** the case to the trial court. We ***order*** the trial court to appoint new counsel immediately to represent R.A. for purposes of the ICWA inquiry. We further ***order*** the trial court to inform this court in writing of the identity of R.A.'s new counsel and the date counsel is appointed.

Proper notice that complies with the statutory notice requisites shall be provided, and then the trial court shall conduct a hearing to determine whether C.C. and Z.C. are Indian children under the ICWA. *See* TEX. R. APP. P. 44.4 (providing that appellate court shall not reverse or affirm judgment if trial court can correct erroneous failure to act, and authorizing appellate court to direct trial court to correct erroneous failure to act and to then proceed as if erroneous failure to act had not occurred). The trial court shall cause a record of the proceedings to be prepared and make appropriate findings as to whether C.C. and Z.C. are Indian children. The trial also shall cause a supplemental clerk's record (including any orders and findings

resulting from the ICWA hearing) to be filed with the clerk of the court. After we receive the supplemental clerk's record, this appeal will be reinstated.

DISPOSITION

We ***abate*** this appeal and ***remand*** the case to the trial court so that (1) the trial court shall appoint new counsel immediately to represent R.A. for purposes of the ICWA inquiry, and (2) notice shall be sent in compliance with the ICWA, as outlined above. If, after proper notice and a hearing, the trial court determines that C.C. and Z.C. are not Indian children, the trial court shall appoint new appellate counsel for R.A. Counsel shall then review the record, and file a brief for R.A. in this appeal. *See* ***Guerrero v. State***, 64 S.W.3d 436, 441 (Tex. App.—Waco 2001, no pet.) (*citing* ***Penson v. Ohio***, 488 U.S. 75, 83-84, 109 S. Ct. 346, 351-52, 102 L. Ed. 2d 300, 310-11 (1988)). However, if, after notice and hearing, the trial court determines that C.C. and Z.C. are Indian children, the trial court shall conduct a new trial applying the ICWA. *See* TEX. R. APP. P. 43.2(d); ***R.R., Jr.***, 294 S.W.3d at 238.

BRIAN HOYLE
Justice

Opinion delivered June 30, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

ABATEMENT ORDER

JUNE 30, 2017

NO. 12-17-00114-CV

IN THE INTEREST OF C.C. AND Z.C., CHILDREN

Appeal from the County Court at Law No. 2

of Angelina County, Texas (Tr.Ct.No. CV-00638-15-10)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, because it is the opinion of this Court that there was error in the trial court below, it is ORDERED, ADJUDGED and DECREED by this court that this appeal be **abated** and the cause **remanded** to the trial court with instructions to give proper notification pursuant to the ICWA and determine C.C. and Z.C.'s status as defined by ICWA and for further proceedings in accordance with this opinion; and that this decision be certified to the court below for observance.

It is THEREFORE ORDERED that the appeal be **abated** and administratively removed from this court's docket until the supplemental clerk's record containing the trial court's order and findings is filed with the clerk of this court.

Brian Hoyle, Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.