2018 IL App (1st) 180870

THIRD DIVISION
September 28, 2018

No. 1-18-0870

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re C.W., a Minor	)	Appeal from the
	)	Circuit Court of
(THE PEOPLE OF THE STATE OF ILLINOIS	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 17 JA 565
	)	
AUSTIN D.,	)	Honorable
	)	John Leonard Huff,
Respondent-Appellant).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1. *Held*: Where respondent told the trial court at a hearing that his grandfather may have been a member of a Native American tribe and the trial court did not make a factual determination of whether the Indian Child Welfare Act applied before entering an adjudication order finding the child is abused and neglected and a dispositional order making the child a ward of the court, the orders of the circuit court of Cook County are vacated and the cause is remanded with instructions to make a determination of whether the Act applied.

¶ 2. Respondent, Austin D., is the father of C.W., a ward of the court. On appeal respondent does not argue that the trial court's adjudication and dispositional orders were against the manifest weight of the evidence. Respondent's only argument on appeal is that the trial court's

order should be vacated because the court was provided with reason to believe C.W. may be an Indian child and the trial court failed to make a determination of whether the Indian Child Welfare Act (Act) applied to the proceedings. 25 U.S.C. §§ 1901-1963 (1978). For the reasons that follow we vacate the judgment of the trial court and remand the cause with instructions for the trial court to make a factual determination on whether C.W. is an Indian Child under the Act.

¶ 3. BACKGROUND

¶ 4. On June 16, 2017, the State filed a petition for adjudication of wardship of C.W., born May 9, 2013. The State alleged C.W. was neglected, abused, and dependent. The petition stated C.W. "is not the subject of another child custody proceeding or visitation order or has possible Indian Tribal affiliation," and that C.W.'s mother was Chantay W., and respondent is his father. The State presented the testimony of Priscilla Cash, a DCP Investigator, at the June 16 hearing on its petition. The investigator testified she was unable to give notice of the hearing to C.W.'s mother or father because his mother was then hospitalized and respondent was incarcerated. At the close of the hearing, the court entered a temporary custody order and appointed a temporary custodian for C.W.

¶ 5. A subsequent hearing was held on June 28, 2017 and respondent was ordered to be brought to court. Respondent and C.W.'s mother were both present at the June 28 hearing. The court found that both parents qualified for appointed counsel and admonished them concerning juvenile court proceedings. Respondent testified he believed he was C.W.'s father and submitted to a paternity test. The State asked respondent:

> "Q: Are you aware of any family member that is a member or could be a member of any Native American tribe?
>
> A: Yeah, my deceased grandfather may be a member of a native tribe. I'm

not sure which one.

Q: Okay. And what's your grandfather's name?

A: His name was John D*** how mine is spelled.

Q: Okay. And do you know his date of birth?

A: November 5th, 19-something.

Q: Approximately how old?

A: He passed away when he was, I believe, 87. That was in 2011."

No party questioned respondent about the matter and no party investigated the claim. Chantay testified that she was not a member of any Native American tribe, none of her family members are members of any Native American tribe, and that she had no reason to know that C.W. is a Indian child or a member of a Native American tribe. Both parents agreed to stipulate to the temporary custody order with prejudice.

¶ 6. The court found there was "probable cause to believe the child may be abused, neglected, or dependent; that there is immediate and urgent necessity for the protection of the minor and his well-being that he be placed in substitute care." The court appointed a temporary custodian of C.W. and set a date for mediation.

¶ 7. On October 12, 2017, the court entered an order of paternity finding respondent was C.W.'s father based on the results of DNA tests.

¶ 8. On January 23, 2018, the court held an adjudication hearing. The parties stipulated that on November 11, 2017, C.W.'s mother, Chantay died. The parties also stipulated that Priscilla Cash, a DCFS investigator, if called, would testify to the findings of her investigation into allegations of abuse and neglect of C.W. Cash would testify that Chantay displayed erratic and manic behavior, and that Chantay was hospitalized at a mental health center on May 31, 2017.

The parties further stipulated that if called to testify, Errol Taylor-Payne would testify that he had dated Chantay for 15 years, had two children with Chantay, and that Chantay's behavior began to change and grew progressively worse to the point that he felt afraid to leave his children alone with her. If called to testify, Dr. Fhyumar Hla would testify that he was Chantay's attending psychiatrist and that C.W. would be at risk if left unsupervised with Chantay until she became more mentally stable.

¶ 9. The State proceeded to make its argument seeking a finding of neglect, environment injurious, and dependency. The court found C.W. a dependent minor because he was without proper care due to his mother's disability. The court also found C.W. was neglected and in an injurious environment. Respondent had been incarcerated, but was at the time released.

¶ 10. On March 26, 2018, the trial court held a dispositional hearing. Respondent was brought in to the court for the hearing. C.W.'s foster mother, his maternal aunt, testified that C.W. was doing well in school and in his therapy. C.W. had communicated with respondent by phone, had a visit with him, and was making progress in his therapy. Kelly Spencer, C.W.'s caseworker assigned by the state, testified that the home C.W. was currently placed in was safe and appropriate, and that she witnessed no signs of abuse or neglect or signs of risk of harm or corporal punishment. Spencer testified that there is a great bond between C.W. and his foster mother. She testified that moving forward further grief counseling could be helpful, but that C.W. had no need of other outside services. Spencer did not assess whether respondent was in need of services because his whereabouts had been unknown to her when she came on to the case. Respondent had been released from incarceration in October 2017, but was again incarcerated in December 2017. Spencer believed that C.W. should be adjudged a ward of the court. She testified that respondent was "in agreement with guardianship. He agrees to it."

¶ 11. On March 26, 2018, the trial court "enter[ed] a finding that it is in C.W.'s best interest to be made a Ward of the Court." The court found "reasonable efforts were made with regard to the mother before she passed away, and those services were unsuccessful for reunification." The court then entered an order appointing a temporary guardian with power to approve C.W.'s placement and necessary medical care.

¶ 12. Respondent informed the court he wanted the opportunity to speak with a caseworker to determine what services would be needed because he wanted to eventually have C.W. returned to his custody and care. Respondent stated "I never actually agreed to anything." The court entered "a goal of return home pending status." The court found "father needs to be assessed for services. I find that the placement with *** is necessary and appropriate and that all services that C.W. needs are being provided." The court set a permanency planning hearing and "a status hearing regarding services as well as father's criminal case." The court entered a permanency order for return home pending status hearing.

¶ 13. Respondent filed his notice of appeal on April 23, 2018. He did not contest the factual or legal basis of the trial court's order, but instead claimed the trial court did not have jurisdiction to enter the order because the court should first have found whether C.W. is an Indian child under the Act.

¶ 14. ANALYSIS

¶ 15. On appeal respondent claims the trial court did not have jurisdiction to enter its orders finding C.W. was abused and neglected and making him a ward of the court, and transferring custody to a DCFS guardianship administrator with right to place C.W., because the trial court failed to comply with the Act by not determining whether C.W. belonged to a Native American tribe and complying with the notice provisions of the Act. Respondent argues the trial court's

order should be vacated pending the trial court determining whether C.W. is an Indian child.

¶ 16. The State maintains the court complied with the Act because respondent failed to provide the court with a reason to believe that C.W. is an Indian child, and that therefore the trial court had jurisdiction to enter its order. Whether the trial court was required to make a determination if the Act is applicable to this case "is a legal issue which we review *de novo*." *In re C.N.*, 196 Ill. 2d 181, 203 (2001).

¶ 17. Indian Child Welfare Act

¶ 18. The Act was enacted by Congress in response to the problem of Native American children being removed from their tribes and placed in the custody of non-native, usually white, persons. The Act attempts to alleviate destruction of Native American cultures by vesting exclusive jurisdiction over child custody proceedings with the tribe to which the Indian child belongs, provided that the tribe does not decline to exercise jurisdiction.

> "(a) Exclusive jurisdiction
>
> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
>
> (b) Transfer of proceedings; declination by tribal court
>
> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary,

> shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe." 25 U.S.C. § 1911 (1978).

To ensure that the tribe to which the Indian child belongs can exercise its jurisdiction over the proceedings, the Act provides notification requirements for State court proceedings where the court knows or has reason to know that an Indian child is involved.

> "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding." 25 U.S.C. § 1912 (a) (1978).

The Act defines an "Indian child" as:

> "(3) 'Indian' means any person who is a member of an Indian tribe, or who is an

> Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43;
>
> (4) 'Indian child' means 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;
>
> (5) 'Indian child's tribe' means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts." 25 U.S.C. § 1903 (1978).

Therefore, if a trial court knows or has reason to know that a child in the proceedings is a member of a Native American tribe, or is eligible for membership in a tribe and is the biological child of a member of a tribe, then the court will notify the child's tribe or determine which tribe the child belongs.

¶ 19. The Act allows a parent of an Indian child to petition a court to invalidate the trial court's order if the parent can show that the trial court's order did not comply with the Act.

> "Any Indian child who is the subject of any action for foster care placement or 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." 25 U.S.C. § 1914 (1978).

Respondent claims the trial court violated § 1912 of the Act because the court knew or had

reason to know that C.W. is an Indian child and the court failed to attempt to determine which tribe C.W. may belong to. Whether the trial court's order complied with the Act thus turns on whether the court knew or had reason to know C.W. is an Indian child on the basis of respondent's assertion that his grandfather may have belonged to a Native American tribe.

> "The Bureau of Indian Affairs has promulgated nonbinding guidelines to assist the state courts with applying the Act. [Citation.] These Guidelines provide, in relevant part, as follows: '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 Bureau of Indian Affairs or the child's tribe.' [Citation.] The Guidelines also provide circumstances for when the state court should have reason to believe a child is an Indian child. These circumstances include when (1) a party, tribe, or agency informs the court that the child is an Indian child; (2) a state-licensed agency involved in child-protection services discovers information suggesting the child is an Indian child; (3) the child gives the court reason to believe the child is an Indian child; (4) the residence of the child, biological parent, or Indian custodian is known to be a predominantly Indian community; and (5) an officer of the court involved in the proceeding has knowledge the child may be an Indian child. [Citation.]" *In re T.A.*, 378 Ill. App. 3d 1083, 1090 (2008) (Citing Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed.Reg. 67,584 (1979)).

¶ 20. Compliance with the Act

¶ 21. Respondent claims the court had reason to know that C.W. was an Indian child because respondent informed the court that his "deceased grandfather may [have been] a member of a

Native tribe." As noted above, when a court knows or has reason to know that the minor in termination of parental rights proceedings is an Indian child, then that court must notify the tribe the child is affiliated with. 25 U.S.C. § 1912 (a) (1978). If the child's tribe cannot be determined then the court must attempt to determine which tribe the child is affiliated with and contact that tribe in case the tribe wishes to intervene in the proceedings. *Id.* In this case respondent informed the court his grandfather may have been a member of a Native American tribe, and the court failed to determine whether C.W. is an Indian child under the Act, or whether the Act applied to the proceedings.

¶ 22. The issue presented in this case is whether respondent's statement in open court that his grandfather may have been a member of an Indian tribe is sufficient to require the trial court to make inquiry and determine whether an Indian child is involved in this case. We believe the statement was sufficient to place the trial court on notice that the proceedings may involve an Indian child. Respondent stated his grandfather may have been a member of a tribe, but respondent did not know which tribe. As noted above, because applicability of the Act is a legal issue we review whether the Act was complied with *de novo*. See *supra*, ¶ 16.

¶ 23. The State argues that respondent's one reference to an unsubstantiated statement concerning alleged Native American heritage through respondent's grandfather did not implicate the provisions of the Act in this case, citing *In re C.N.* where our Supreme Court held:

> "We conclude that the brief references in the record to [the father's] unsubstantiated statements concerning his alleged Indian heritage were simply insufficient to implicate the provisions of the ICWA. The circuit court had no reason to believe that C.N. may be an Indian child and no reason to raise the issue. Accordingly, the circuit court did not err in failing to make a determination

> on the record as to the applicability of the act and properly exercised jurisdiction over this matter." *In re C.N.*, 196 Ill. 2d 181, 206 (2001).

The present case is distinguishable from *C.N.* In *C.N.*, the only mention of the child's Native American ancestry was found briefly in reports and the parents never raised the issue in court. The *C.N.* court considered the fact that the father had never raised the applicability of the Act in the circuit court, and the fact that there were only two brief references in the record to the father's alleged Native American heritage. *Id.* at 205. All the evidence of the child's Native American ancestry in *C.N.* was found in obscure reports. *Id.* at 205-06. In contrast, respondent here testified in open court that his grandfather may have been a member of a tribe, though he could not be sure which one. Therefore, *C.N.* can be distinguished.

¶ 24. Similarly, the State also relies on *In re T.A.*, 378 Ill. App. 3d 1083, 1094 (2008) to argue there was no reason to believe here that C.W. is an Indian child. We find *T.A.* inapposite to the present case. In *T.A.*, the only evidence of Native American ancestry consisted of statements made by the mother "to the caseworker that she was of Native American descent and her statements that, to her knowledge, none of her family members were registered with any tribes." *In re T.A.*, 378 Ill. App. 3d 1083, 1093 (2008). It was significant that although the mother asserted she had Native American ancestry, she stated that neither she nor any of her family members were members of a tribe *or possibly eligible for membership in a tribe*. This court found the statements by the mother "did not give the trial court reason to know that [the minor] was an 'Indian child' as that term is defined in the Act." *Id.*

¶ 25. *T.A.* can be distinguished from this case because: 1) the evidence in this case consisted of the father's statement of Native American ancestry made to the trial judge in open court, not simply statements made to a caseworker, as in *T.A.*; and, 2) the mother in *T.A.* affirmatively

denied that she or any of her family members were eligible for membership in any Native American tribe. *Id.* Here, respondent asserted his grandfather may have been a member of a tribe and never disclaimed any of his or his family's eligibility for membership in a tribe. The State claims *In re Anaya J.G.*, 403 Ill. App. 3d 875 (2010) presented a similar factual scenario where the trial court was found to not have had reason to know the minor was an Indian child. We find *Anaya J.G.* distinguishable from the present case. *In re Anaya J.G.*, 403 Ill. App. 3d 875, 882 (2010). In *Anaya J.G.*, the child's mother stated in a temporary custody hearing that her mother's side of the family had Cherokee blood, and that she herself was not a registered member of any Native American tribe, did not know what band of Cherokee her mother may have belonged to, and did not know if any of her relatives were registered members of a tribe. *Id.* at 879. The minor's father testified under oath that he was not a member of a Native American tribe. *Id.* The trial court "allowed all of the parties to question [the father] about Anaya's Indian heritage. All of the parties seemingly agreed that there was no reason to know that Anaya was an Indian child so as to trigger the notification provisions of the Act." *Id.* at 893. In the present case respondent informed the court that his grandfather may have belonged to a Native American tribe, though he did not know which one. Unlike the *Anaya J.G.* court, the trial court here made no further inquiries about whether C.W. was an Indian child after hearing respondent's testimony. No one stated C.W. was not a member of a tribe. After respondent informed the court C.W. may be an Indian child, the court took no further action, unlike the *Anaya J.G.* court which sought to ascertain from the parties whether the minor was an Indian child and the parties seemed to agree that the minor was not an Indian child. *Id.* at 882. Therefore, *Anaya J.G.* is distinguishable from the present case.

¶ 26. The state argues *In re F.O.*, 2014 IL App (1st) 140954, ¶ 51, supports a finding here that

the Act did not apply and the court did not have reason to know C.W. may be an Indian child. However, in *In re F.O.*, the trial court investigated the minor's mother's claim of Native American heritage in order to determine whether the Act should apply to the proceedings. *In re F.O.*, 2014 IL App (1st) 140954, ¶¶ 12-13. The State in *F.O.* conducted a search to determine whether the minor was an Indian child. *Id.* ¶ 16. The State entered into evidence return receipts from various Native American tribes indicating either they could not establish the heritage of the minor or that the minor was not eligible for membership in the tribe or Nation. *Id.* ¶¶ 18-40. No such effort was made in the present case.

¶ 27. We conclude the court had reason to believe an Indian child may be involved in this case. The trial court here, without determining whether C.W. was an Indian child, adjudged C.W. a ward of the court and entered a permanency order for return home pending status. Having found that the court should have determined whether the minor in this case was an Indian child, both parties agree that the proper remedy is provided in a similar case, *In re H.S.*, 2016 IL App (1st) 161589, ¶ 45. We agree.

¶ 28. Because the trial court here had reason to know that C.W. may be an Indian child under the Act, we vacate the trial court's orders adjudging C.W. a ward of the court and appointing a guardian, and remand with instructions for the trial court to determine whether C.W. is an Indian child under the Act. If the court makes a factual determination that C.W. is not an Indian child then we instruct the trial court to reinstate its orders adjudging C.W. a ward of the court and appointing a guardian. If C.W. is found to be an Indian child then the court is instructed to begin the proceedings anew in compliance with the Act. *Id.*

¶ 29. CONCLUSION

¶ 30. For the foregoing reasons, the judgment of the Circuit Court of Cook County is vacated

and the cause remanded with instructions.

¶ 31. Vacated and remanded with instructions.