[Cite as *In re C.K.*, 2019-Ohio-4167.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE C.K.	:	
	:	No. 108313
A Minor Child	:	
	:	
[Appeal by J.P., Mother]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 10, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD17905110

Appearances:

Timothy R. Sterkel, *for appellant*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Cheryl Rice, and Michael F. Kulcsar, Assistant Prosecuting Attorneys, *for appellee*.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Appellant, J.P. ("Mother"), appeals the decision of the Juvenile Division of the Cuyahoga County Court of Common Pleas (the "juvenile court") terminating her parental rights and granting permanent custody of her child, C.K., to the Cuyahoga County Division of Children and Family Services ("CCDCFS" or "the agency"). Mother claims the following two errors:

1. The trial court committed error when it proceeded with the permanent custody hearing without complying with 25 U.S.C. 1912.

2. The trial court committed error when it denied appellant's request for a continuance.

{¶ 2} We find no merit to the appeal and affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 3} On March 30, 2017, CCDCFS filed a complaint alleging that C.K. was a neglected child due to Mother's failure to meet the child's medical needs. The complaint also alleged that Mother had a substance abuse problem, lacked stable housing, and displayed symptoms of a mental illness. In its prayer for relief, CCDCFS requested that the child be placed in temporary agency custody.

{¶ 4} A magistrate held a hearing on the emergency custody in April 2017. After hearing testimony from four witnesses, the magistrate asked Mother whether C.K. had any Native American ancestry. Mother informed the court that although her great-great grandmother was Native American, no relatives were registered with any tribe. (Apr. 3, 2017, tr. 82.) At the conclusion of the hearing, the magistrate found probable cause to remove C.K. from Mother's custody and placed the child in emergency custody. (Apr. 3, 2017, tr. at 84.) In her findings of fact, journalized on April 3, 2017, the magistrate found, among other things, that C.K. "is not a member of a federally recognized Indian tribe and is not eligible for membership in a federally recognized Indian tribe as the biological child of a member of a federally recognized tribe."

{¶ 5} The trial court later adjudicated C.K. a neglected child on July 12, 2017, and placed her in the temporary custody of CCDCFS. Six months later, in January 2018, CCDCFS filed a motion to modify temporary custody to permanent custody.[1] After multiple continuances at the request of both parties as well as the court's own motion, the court held a hearing on the motion for permanent custody in February 2019. Mother failed to appear for the hearing, and her trial counsel moved for a continuance. The trial court denied the request and proceeded with the trial in her absence.

{¶ 6} Mallory McConnell, an agency caseworker, testified that Mother failed to substantially comply with her case-plan services. According to McConnell, Mother failed to obtain stable housing, complete a substance-abuse program, or engage in mental-health services. (Feb. 7, 2019, tr. 11-14, 18.) Mother also failed to consistently visit the child or participate in services provided to the child. (Feb. 7, 2019, tr. 19, 23.) Although McConnell did not know Mother's current wishes, Mother had previously agreed to relinquish C.K. to the permanent custody of CCDCFS. (Feb. 7, 2019, tr. 27.) Mother also failed to communicate with McConnell. Thus, McConnell believed permanent custody was in the child's best interest under the circumstances. (Feb. 7, 2019, tr. 27.)

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[1] CCDCFS subsequently moved to withdraw its motion for permanent custody and requested legal custody to a maternal cousin. The cousin informed the court that she was unable to take legal custody of the child and the agency's motion for permanent custody was reinstated.

{¶ 7} The guardian ad litem ("GAL") opined that permanent custody was in C.K.'s best interest because Mother failed to complete her case services. The GAL also expressed concern that he was unable to visit Mother at her residence and that he was unable to communicate with her. (Feb. 7, 2019, tr. 31.)

{¶ 8} At the conclusion of the hearing, the juvenile court found that despite the agency's reasonable efforts to prevent removal of C.K. and make it possible for C.K. to return home, C.K. could not be returned to Mother within a reasonable time. The court also found that permanent custody was in C.K.'s best interest and awarded permanent custody to CCDCFS. Mother now appeals the trial court's judgment.

II. Law and Analysis

A. Native American Ancestry

{¶ 9} In the first assignment of error, Mother argues the trial court erred in holding a permanent custody hearing without complying with the Indian Child Welfare Act ("ICWA"), codified in 25 U.S.C. 1912. She contends the court was required by the act to further investigate C.K.'s ancestry to conclusively determine if she was an Indian child before proceeding with a permanent-custody proceeding because the court had "reason to believe" that C.K. "may be an Indian child." (Appellant's brief at 10.)

{¶ 10} The ICWA was enacted in 1978 because a large number of Native American children were being placed in non-Native American foster and adoptive homes. *See* 25 U.S.C. 1901(4). Congress enacted the ICWA

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture[.]

25 U.S.C. 1902. The act accomplishes these goals by providing certain procedural safeguards in child-custody proceedings when the subject child is an Indian child. However, the ICWA only requires that a tribe be notified of permanent-custody proceedings when the court "knows or has reason to know that an Indian child is involved." 25 U.S.C. 1912(a). Therefore, in order to invoke the provisions of the ICWA, there must be a preliminary showing that a custody proceeding involves an "Indian child." *In re L.R.D.*, 2019-Ohio-178, 128 N.E.3d 926, ¶ 19 (8th Dist.), citing *In re S.F.*, 8th Dist. Cuyahoga No. 106738, 2018-Ohio-2404, ¶ 18, citing *In re A.C.*, 8th Dist. Cuyahoga No. 99057, 2013-Ohio-1802, ¶ 41, citing *In re Williams*, 9th Dist. Summit Nos. 20773 and 20786, 2002-Ohio-321, ¶ 22.

{¶ 11} Mother argues that because she informed the court that she has Native American ancestry, the trial court had "a reason to know" that the child may be an Indian child and, therefore, the trial court had a duty to further investigate whether the child was an "Indian child" under the ICWA. She cites the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, B.1(c), 44 Fed.Reg. 67584, 67586 (Nov. 26, 1979), in support of her argument. The "Guidelines for State Courts" provide that a court may have "reason to know" that a child may be an "Indian child" if:

> (i) Any party to the case, Indian tribe, Indian organization, or public or private agency 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.
>
> (iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.
>
> (iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
>
> (v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, B.1(c), 44 Fed.Reg. 67584, 67586 (Nov. 26, 1979).

{¶ 12} If the court has reason to believe that the child may be an "Indian child" but does not have sufficient evidence to determine that the child is in fact an "Indian child," the court must:

> (1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and
>
> (2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

25 C.F.R. 23.107. Mother contends there is nothing in the record establishing that the trial court verified whether either Mother or her child was a member of a tribe.

{¶ 13} However, an "Indian child" is defined as "any unmarried person who is under age [18] 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). Multiple courts, including this court, have held that the party invoking the ICWA bears the burden of establishing that the ICWA is implicated. *See, e.g., In re L.R.D.*, 2019-Ohio-178, 128 N.E.3d 926, ¶ 20; *In re A.C.*, 8th Dist. Cuyahoga No. 99057, 2013-Ohio-1802, ¶ 41; *Geouge v. Traylor*, 68 Va.App. 343, 808 S.E.2d 541 (Va.2017); *In re Trever I*, 2009 ME 59, 973 A.2d 752, 759 (Me. 2009); *People v. Diane N.*, 196 Ill.2d 181, 752 N.E.2d 1030, 1044, 256 Ill. Dec. 788 (Ill. 2001); *In re A.S.*, 2000 SD 94, 614 N.W.2d 383, 385-386 (S.D. 2000); *In re Interest of J.L.M.*, 234 Neb. 381, 451 N.W.2d 377, 387 (Neb. 1990).

{¶ 14} To meet this burden, the party asserting the applicability of the ICWA must do more than simply raise the possibility that a child has Native American ancestry. *Id., see also In re B.S.*, 184 Ohio App.3d 463, 2009-Ohio-5497, 921 N.E.2d 320, ¶ 63 (8th Dist.). Having Native American ancestry, by itself, does not make one an "Indian child" for purposes of the ICWA. *Geouge* at 361. Rather, the party invoking the act must demonstrate that the child meets the definition of an "Indian child" under the act.

{¶ 15} The identity of C.K.'s father is unknown. (Apr. 3, 2017, tr. 13; Feb. 7, 2019, tr. 10.) Therefore, there is nothing in the record to establish that C.K.'s father was a member of an Indian tribe. When the trial court asked Mother if she had any Native American ancestry, she replied:

[MOTHER]: We do. Yes. My grandmother's mom's mother. So my great[-]great grandmother was —

THE COURT: But it's not —

[MOTHER]: Yeah, it's far, it's far in. It's not current.

THE COURT: So no registration?

[MOTHER]: No.

(Apr. 3, 2017, tr. at 82.) Thus, there was nothing to suggest that either Mother or C.K. was a member of any tribe. Although Mother alleged that her great-great grandmother was Native American, Mother admitted that the ancestry was remote and that there were no relatives who were currently registered members of a tribe. Moreover, Mother was not a registered member of any tribe. Therefore, the court made sufficient inquiry to determine whether C.K. was an "Indian child," and properly concluded that she did not meet the definition of an "Indian child" under the ICWA.

{¶ 16} The first assignment of error is overruled.

B. Motion for Continuance

{¶ 17} In the second assignment of error, Mother argues the trial court erred in denying her request for a continuance of the permanent custody hearing. She contends the denial of the requested continuance violated her right to Due Process.

{¶ 18} The decision to grant or deny a motion for a continuance rests in the sound discretion of the trial court. *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981). An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *State ex rel. DiFranco v. S. Euclid*, 144 Ohio St.3d 571,

2015-Ohio-4915, 45 N.E.3d 987, ¶ 13. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Vannucci v. Schneider*, 2018-Ohio-1294, 110 N.E.3d 716, ¶ 22 (8th Dist.).

{¶ 19} The right to parent one's children is a fundamental right protected by the Due Process Clause of the United States and Ohio Constitutions. *In re M.W.*, 8th Dist. Cuyahoga No. 103705, 2016-Ohio-2948, ¶ 9. A fundamental requirement of due process is notice and the opportunity to be heard. *Id*.

{¶ 20} However, a parent's right to be present at a custody hearing is not absolute. *Id*. at ¶ 10, citing *In re C.G.*, 9th Dist. Summit No. 26506, 2012-Ohio-5999, ¶ 19. While courts must ensure that due process is provided in parental termination proceedings, "a parent facing termination of parental rights must exhibit cooperation and must communicate with counsel and with the court in order to have standing to argue that due process was not followed in a termination proceeding." *In re Q.G.*, 170 Ohio App.3d 609, 2007-Ohio-1312, 868 N.E.2d 713, ¶ 12 (8th Dist.). Any potential prejudice to a party denied a continuance is weighed against a trial court's "right to control its own docket and the public's interest in the prompt and efficient dispatch of justice." *Unger* at 67. Furthermore, R.C. 2151.414(A)(2) requires that a juvenile court hold a hearing on a public children services agency's motion for permanent custody no later than 120 days after the agency files a motion for permanent custody, though a reasonable continuance may be granted "for good cause shown."

{¶ 21} In *Unger*, the Ohio Supreme Court noted that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Unger*, 67 Ohio St.2d at 67, 423 N.E.2d 1078. In *Unger*, the court identified certain factors a court should consider in evaluating a motion for a continuance. These factors include:

> the length of the delay requested; whether other continuances have been requested and received, the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Id. at 67-68.

{¶ 22} Juv.R. 23 is also instructive and provides that "[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties." Loc.R. 49(C) of the Cuyahoga County Court of Common Pleas, Juvenile Division, further provides:

> No case will be continued on the day of trial or hearing except for good cause shown, which cause was not known to the party or counsel prior to the date of trial or hearing, and provided that the party and/or counsel have used diligence to be ready for trial and have notified or made diligent efforts to notify the opposing party or counsel as soon as he/she became aware of the necessity to request a postponement. This rule may not be waived by consent of counsel.

{¶ 23} Counsel requested a continuance on the day of trial because Mother failed to appear. The court noted that there had already been several continuances

and that Mother failed to appear the last time she was supposed to come to court. (Feb. 7, 2019, tr. at 5.) When the court inquired of counsel as to whether he had any contact with Mother, counsel replied that he had been unable to contact Mother since she failed to appear in court the last time. Counsel explained that the phone number he tries calling to reach Mother may be inoperable because it goes busy after ringing seven or eight times, and the caseworker informed counsel that Mother may have moved to a different location. (Feb. 7, 2019, tr. at 6.) Apparently counsel had no way of contacting Mother, and Mother had not contacted him even though the case was scheduled for trial. Therefore, the court denied the motion for continuance, stating:

> Okay. Based on the number of hearings we had and her failure to show last time and/or have any contact with you when she knows where you're at, I'm going to deny your request for a continuance and we're going forward.

(Feb. 7, 2019, tr. at 6.)

{¶ 24} There was no explanation for Mother's failure to appear for trial. Therefore, no cause, much less good cause, was shown to justify the need for the requested continuance. The continuance was requested as a result of Mother's unexplained failure to appear in court and communicate with counsel prior to the permanent custody hearing. Moreover, a continuance would have caused inconvenience to the agency witness, opposing counsel, the guardian ad litem, and court personnel, who were present and ready to proceed with the hearing. We find no abuse of discretion in the trial court's ruling under these circumstances.

{¶ 25} The second assignment of error is overruled.

{¶ 26} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
MICHELLE J. SHEEHAN, J., CONCUR