2017 IL App (2d) 170592-U
Nos. 2-17-0592 & 17-0593 cons.
Order filed December 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re JAYDEN B-H., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 15-JA-391
	)	
(The People of the State of Illinois, Petitioner-Appellee v. Andrea B. and Gregory H., Respondents-Appellants).	)	Honorable Francis M. Martinez, Judge, Presiding.

In re DEMETRIUS B-H., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 15-JA-392
	)	
(The People of the State of Illinois, Petitioner-Appellee v. Andrea B. and Gregory H., Respondents-Appellants).	)	Honorable Francis M. Martinez, Judge, Presiding.

In re DESTIN B-H., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 15-JA-393
	)	
(The People of the State of Illinois, Petitioner-Appellee v. Andrea B. and Gregory H., Respondents-Appellants).	)	Honorable Francis M. Martinez, Judge, Presiding.

In re ANTHONY B., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 15-JA-394
	)	
(The People of the State of Illinois, Petitioner-Appellee v. Andrea B., Respondent-Appellant, and Ernest A/K/A Earnest Carter, Respondent).	)	Honorable Francis M. Martinez, Judge, Presiding.

In re JORDAN B-H., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 15-JA-397
	)	
(The People of the State of Illinois, Petitioner-Appellee v. Andrea B. and Gregory H., Respondents-Appellants).	)	Honorable Francis M. Martinez, Judge, Presiding.

In re CRAIG B-H., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 15-JA-398
	)	
(The People of the State of Illinois, Petitioner-Appellee v. Andrea B. and Gregory H., Respondents-Appellants).	)	Honorable Francis M. Martinez, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The orders terminating the respondents' parental rights were vacated. The cases were remanded to the trial court with directions to make factual determinations as to whether the minors are "Indian children" for purposes of the Indian Child Welfare Act (25 U.S.C. § 1901 *et seq.* (2012)).

¶ 2 Respondents, Andrea B. and Gregory H., have five children together: Jayden, Demetrius, Destin, Jordan, and Craig. Andrea has another child, Anthony,[1] from a different putative father,

[1] Andrea's notice of appeal identifies Anthony as "Anthony H[.]" However, as the State

Ernest a/k/a Earnest Carter, who is not a party to these consolidated appeals. Andrea and Gregory separately appealed the orders entered in the circuit court of Winnebago County terminating their parental rights. Gregory's original and amended notices of appeal included Anthony's case, even though Gregory was not a party to those termination proceedings. For the reasons that follow, we dismiss Gregory's appeal for lack of standing insofar as he challenges the orders entered in Anthony's case. With respect to Andrea's appeal and the remaining aspects of Gregory's appeal, we vacate the challenged judgments and remand the matters to the circuit court with directions as set forth in ¶ 31 of this order.

¶ 3 I. BACKGROUND

¶ 4 The only issue on appeal is the potential applicability of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 *et seq.* (2012)). We limit our discussion to the facts necessary to understand that issue.

¶ 5 In February 2015, the State filed petitions in the circuit court of Kane County alleging that all six children were neglected minors. The court orders entered on February 20, 2015, included the following language:

> "Mother indicates that she may have native american ancestry through her maternal grandmother ***, through the Cherokee tribe.
>
> * * *

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points out in its "motion to consider jurisdiction and to correct caption," the child was identified as "Anthony B[.]" in the trial court. For the sake of clarity and consistency, we grant the State's motion and we refer to Anthony in the caption of this order as "Anthony B." The State acknowledges that Andrea's notice of appeal was sufficient to confer appellate jurisdiction. We agree that we have jurisdiction over Andrea's appeal of the case involving Anthony.

> Agency is ordered to complete ICWA inquiry on behalf of Mother ***, who indicates that her maternal grandmother *** has native american ancestry, specifically with the Cherokee tribe. Agency is also ordered to complete ICWA inquiry as to [Gregory], who indicates that his Grandfather *** has native american ancestry, specifically with the Cherokee tribe as well."

The record on appeal does not contain a transcript of the February 20, 2015, proceedings.

¶ 6 On March 6, 2015, the court reminded the parties that "there are the Indian child welfare issues that are outstanding."

¶ 7 On April 24, 2015, the Assistant State's Attorney informed the Kane County court that "[t]he agency did complete the ICWA referral form and contacted the Indian Child and Welfare Advocacy Program." He explained that the Indian Child and Welfare Advocacy Program "contacted the caseworker back asking for additional information from the parents." According to the Assistant State's Attorney, the caseworker met with Andrea and Gregory "and received whatever information they had." The court then confirmed with the caseworker, Susan McHale, who worked for Lutheran Child and Family Services of Illinois (LCFS), that she had given her "ICWA person" all of the information that Andrea and Gregory had, but that "they [the ICWA person] were still seeking more information." McHale assured the court that she was "going to be speaking with the maternal great-grandmother on Tuesday of this coming week to see if there is even more information." The court responded: "So okay. That's fine. Just that you are following up." The court orders entered that day included the following language: "State proffers that the agency has completed the ICWA referral and that the caseworker was contacted back[,] with that agency requesting additional information from the parents. Agency to follow up with parents and to provide any additional information obtained to respective tribes."

¶ 8 The record does not reflect what, if anything, became of the ICWA inquiry after that date. The trial court never made any findings as to whether the minors are "Indian children," as defined under the ICWA. The applicable service plans repeatedly, but without explanation, asserted that "[t]he child or youth is not an Indian child as defined in *Rule 307, Indian Child Welfare Services*."

¶ 9 The six minors' cases were subsequently transferred to the circuit court of Winnebago County, where the State filed petitions to terminate Andrea's and Gregory's parental rights. In the State's original petition in connection with Anthony's case, the State alleged that Gregory was Anthony's putative father and sought to terminate Gregory's parental rights. The State later amended its petition to allege that Carter was Anthony's putative father. The State clarified in its amended petition that Gregory "is not the father of the minor and is not a party to the case."

¶ 10 Andrea stipulated that she was unfit for having failed to make reasonable progress toward the return of the children during one particular nine-month period. See 750 ILCS 50/1(D)(m)(ii) (West 2016). Following an evidentiary hearing on July 14, 2017, the court found that Gregory was unfit for failing to maintain a reasonable degree of interest, concern, or responsibility as to the children's welfare (see 750 ILCS 50/1(D)(b) (West 2016)); failing to protect them from conditions that were injurious to their welfare (see 750 ILCS 50/1(D)(g) (West 2016)); and failing to make reasonable efforts (see 750 ILCS 50/1(D)(m)(i) (West 2016)) or reasonable progress (see 750 ILCS 50/1(D)(m)(ii) (West 2016)). The court determined that it was in the children's best interests to terminate parental rights. Andrea and Gregory both timely appealed and were appointed separate counsel.

¶ 11 II. ANALYSIS

¶ 12 Andrea contends that her various court-appointed attorneys provided ineffective assistance by failing to invite the court to rule on the applicability of the ICWA. In her view, although the prosecution initiated a "diligent investigation" regarding that issue while the case was pending in Kane County, the matter was not pursued once the case was transferred to Winnebago County. Such inaction on the part of her attorneys, she proposes, was not sound trial strategy. Instead, had the case proceeded in accordance with the ICWA, she notes that she "would have been given procedural protections that would inure to her benefit." One such protection would have been the State's burden to prove unfitness beyond a reasonable doubt, rather than by clear and convincing evidence. See 25 U.S.C. § 1912(f) (2012). Andrea asks us to thus reverse the orders terminating her parental rights and to remand the matters to the trial court for a determination as to the applicability of the ICWA.

¶ 13 In its response to Andrea's brief, the State directs our attention to case law indicating that isolated and unsubstantiated references to Native American heritage are generally insufficient to implicate the ICWA. According to the State, the record here "failed to demonstrate enough evidence of [tribal] membership or eligibility to pursue a ruling on the ICWA issue." Therefore, the State urges, Andrea's attorneys did not provide deficient representation. The State draws an analogy to criminal cases where courts have held that attorneys do not provide ineffective assistance by declining to file futile motions. The State advances similar arguments with respect to Andrea's inability to demonstrate prejudice, again insisting that there was insufficient evidence in the record to support that the minors are actually Indian children.

¶ 14 Gregory's counsel originally filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). We denied that motion and directed counsel to file a brief on Gregory's behalf addressing the potential applicability of the ICWA to these proceedings. We gave

Gregory's counsel and the State the option of adopting the arguments that were made in the briefs filed in Andrea's appeal. On our own motion, we consolidated Andrea's and Gregory's appeals for purposes of decision only.

¶ 15 Pursuant to our order, Gregory's counsel filed a supplemental memorandum on Gregory's behalf.[2] Gregory acknowledges that the record in this case is sparse concerning the applicability of the ICWA. However, he notes a number of possible impacts that the ICWA could have on this case. According to Gregory, "[i]n the absence of a record to review on these possible impacts, the legal question revolves around how far this court can or should go until the jurisdictional questions are definitively answered." Gregory argues as follows:

> "To the extent that this court may decide that it was reversible error not to affirmatively rule on the applicability of the ICWA, reversal and remand should not be denied because of trial counsel's failure to continue to raise if [*sic*] after transfer of the case to Winnebago County.
>
> On this issue, counsel for the Respondent Father adopts the arguments of Respondent Mother's counsel and the cases cited in support of it."

Gregory ultimately asks us to reverse the trial court and to remand the cases for a determination as to whether the ICWA applies.

[2] The State has moved to strike Gregory's citation in his supplemental memorandum to *In re A.C.*, 2016 IL App (4th) 160517-U, an unpublished order. We grant the State's motion to strike. See Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011) (unpublished orders are non-precedential and may only be cited in limited circumstances, which do not apply here).

¶ 16 The State filed a response brief in connection with Gregory's appeal.[3] The State's arguments regarding the substance of the ICWA issue are substantially similar to what it argued in connection with Andrea's appeal. However, the State raises two additional procedural issues. The State first argues that, because Gregory was not a party to the amended petition to terminate parental rights in Anthony's case, Gregory lacks standing to challenge the proceedings with respect to Anthony.

¶ 17 In its original petition to terminate parental rights with respect to Anthony, the State designated Gregory as the putative father. The State subsequently discovered that Carter had previously been identified as the putative father. The State thus filed an amended petition listing Carter, rather than Gregory, as Anthony's putative father. The State clarified in its amended petition that Gregory "is not the father of the minor and is not a party to the case." The order terminating parental rights in Anthony's case did not mention Gregory. Nevertheless, Gregory purports to appeal from Anthony's case. We agree with the State that Gregory lacks standing to challenge the termination order entered in Anthony's case. "To have standing to bring an appeal, a nonparty must have a 'direct, immediate, and substantial interest in the subject matter, which would be prejudiced by the judgment or benefited by its reversal.' " *Success National Bank v.*

[3] The State asserts that Gregory's supplemental memorandum is internally inconsistent in certain respects. The State also submits that Gregory raises a question as to the application of the ICWA without actually adopting a position to answer that question. As the State correctly notes, appellants can forfeit their arguments by failing to clearly set forth their contentions. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). However, we interpret Gregory's supplemental memorandum as adopting the arguments advanced in Andrea's brief. Accordingly, we decline to find Gregory's arguments forfeited.

Specialist Eye Care Center, S.C., 304 Ill. App. 3d 74, 76 (1999) (quoting *In re Special Prosecutor*, 164 Ill. App. 3d 183, 187 (1987)). Gregory does not argue that he meets that standard. Accordingly, we dismiss Gregory's appeal for lack of standing insofar as he challenges the orders entered in case no. 15-JA-394, which pertains to Anthony.

¶ 18 The State identifies a second procedural issue in the response brief that it submitted in connection with Gregory's appeal. The State notes a potential defect in the original notice of appeal that Gregory filed on August 4, 2017. Specifically, Gregory listed all six minors' case numbers in that notice of appeal but failed to include Destin's name in the caption. Despite this purported irregularity, the State agrees that, "liberally construed, the notice is sufficient to confer appellate jurisdiction" over Gregory's appeal of Destin's case. We need not decide the sufficiency of Gregory's original notice of appeal. On September 11, 2017, with leave of this court, Gregory filed an amended notice of appeal adding Destin's name to the caption. There is thus no question that we have jurisdiction over Gregory's appeal of Destin's case.

¶ 19 We now turn to the merits. "The ICWA was enacted by Congress in 1978 in response to the growing concern over the consequences to Indian children, families and tribes of abusive welfare practices which separated large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *In re C.N.*, 196 Ill. 2d 181, 203 (2001). The ICWA establishes certain minimum standards that must be met before an Indian child is removed from his or her family. *C.N.*, 196 Ill. 2d at 203. "Indian child" is defined as "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) (2012). "While the definition speaks in terms of the child being a 'member' of a tribe or the biological child of a 'member' of a tribe, the

absence of evidence of the child's or child's parent's enrollment alone may not be determinative of whether the child or parent is a member of a tribe." *In re T.A.*, 378 Ill. App. 3d 1083, 1089 (2008). This is because "[t]ribes use a wide range of membership criteria, and some tribes may automatically include a person as a member if the person is a descendant of a tribe member." *T.A.*, 378 Ill. App. 3d at 1090.

¶ 20 The ICWA has jurisdictional implications. See *In re Adoption of S.S.*, 167 Ill. 2d 250, 257 (1995) ("At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings."). When an Indian child resides on or is domiciled within the reservation of a tribe, that tribe generally has exclusive jurisdiction over any child custody proceedings. 25 U.S.C. § 1911(a) (2012). When an Indian child does not reside on or have a domicile within a reservation, the state court generally must transfer the child custody proceeding to the applicable tribe upon petition, unless there is good cause for not doing so. 25 U.S.C. § 1911(b) (2012). The child's tribe has the right to decline that transfer and may intervene at any point during the state court proceedings. 25 U.S.C. §§ 1911(b), (c) (2012). Of course, "[t]he right of a tribe to intervene would be meaningless without notice." *In re K.T.*, 2013 IL App (3d) 120969, ¶ 12. Accordingly, the ICWA requires notice to the child's tribe "where the court knows or has reason to know that an Indian child is involved." 25 U.S.C. § 1912(a) (2012).

¶ 21 The ICWA also offers substantive protections in cases involving Indian children. *K.T.*, 2013 IL App (3d) 120969, ¶ 11. Relevant to this appeal, the ICWA provides that "[n]o termination of parental rights may be ordered *** in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious

emotional or physical damage to the child." 25 U.S.C. § 1912(f) (2012). This is a higher burden of proof than the State ordinarily faces when seeking to terminate parental rights: *i.e.*, producing clear and convincing evidence of parental unfitness and proving by a preponderance of the evidence that terminating parental rights is in the children's best interests. See *In re Keyon R.*, 2017 IL App (2d) 160657, ¶ 16.

¶ 22 Andrea and Gregory couch their arguments in terms of ineffective assistance of counsel for failing to seek a ruling on the applicability of the ICWA. See *In re Darius G.*, 406 Ill. App. 3d 727, 731 (2010) ("In juvenile proceedings, ineffective-assistance-of-counsel claims are considered under the same standard as that applied in criminal proceedings."). As part of finding ineffective assistance of counsel, we would have to conclude that respondents were prejudiced by their attorneys' actions. Specifically, they would need to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). As the State points out, the problem here is that the record does not contain evidence compelling a conclusion that the ICWA actually applies.[4] Thus, even if Andrea's and Gregory's various attorneys provided deficient representation, we could not conclude that respondents demonstrated prejudice so as to sustain a claim of ineffective assistance of counsel.

¶ 23 Regardless of how the parties frame their arguments, the broader issue raised is whether the record demands a definitive answer as to whether these six minors are Indian children. We

[4] Furthermore, Andrea stipulated to being an unfit parent, which undermines her argument that she was prejudiced by the application of an incorrect burden of proof on that particular issue. However, we note that she contested whether it was in the minors' best interests to terminate her parental rights.

believe that it does. Whether the circumstances of a given case require the trial court to make a determination as to the applicability of the ICWA is a legal issue that we review *de novo*. *C.N.*, 196 Ill. 2d at 203.

¶ 24 We are aware that if a trial court otherwise has no reason to believe that a given case involves an Indian child, "brief references in the record" to a parent's "unsubstantiated statements concerning his alleged Indian heritage" are insufficient to implicate the ICWA. *C.N.*, 196 Ill. 2d at 206. We also recognize that "[t]he party asserting the applicability of the [ICWA] has the burden of producing sufficient evidence for the court to determine if the child is an Indian child." *T.A.*, 378 Ill. App. 3d at 1090.

¶ 25 In the present case, however, the parties and the trial court had reason to believe that the ICWA might apply. On February 20, 2015, shortly after the State filed the neglect petitions, both Andrea and Gregory reported Native American ancestry to the court. The court in Kane County ordered LCFS, the agency managing the case, to complete an inquiry into those issues. At a subsequent court appearance on March 6, 2015, the court reminded the parties that those issues had not been resolved. On April 24, 2015, the caseworker represented to the court that the inquiry was ongoing. Specifically, she said that her "ICWA person" had asked for more information. The caseworker advised the court that she intended to meet with "the maternal great-grandmother" for that purpose. The court then ordered LCFS to "follow up with [the] parents and to provide any additional information obtained to [the] respective tribes."

¶ 26 There is no confirmation in the record that the meeting with the maternal great-grandmother ever occurred or that any additional information obtained from her was provided to the appropriate tribes. And although the service plans state that the minors are not Indian children, those plans contain no details or explanations to suggest that LCFS's inquiry proceeded

in the manner ordered by the court. Mindful of the importance of the rights at stake, under these unique circumstances, we believe that the record demands a definitive answer as to whether the minors are Indian children.

¶ 27 We find guidance in *In re H.S.*, 2016 IL App (1st) 161589. In that case, during the course of a temporary custody hearing in February 2012, the respondent mother informed the trial court that she was "descended from the 'Cherokee, Creek, Blackfoot, Choctaw and Pawnee' tribes." *H.S.*, 2016 IL App (1st) 161589, ¶ 2. At a hearing in October 2015, the State introduced evidence of certified mail receipts for notices that it had sent to the United Keetoowa Band of Cherokee Indians and the Bureau of Indian Affairs (the State did not introduce the actual copies of the notices). *H.S.*, 2016 IL App (1st) 161589, ¶ 11. The State also introduced the responses that it had received from three tribes: the Cherokee Nation, the United Keetoowa Band of Cherokee Indians, and the Eastern Band of Cherokee Indians. *H.S.*, 2016 IL App (1st) 161589, ¶ 11.[5] The trial court subsequently terminated the mother's parental rights, and she appealed. *H.S.*, 2016 IL App (1st) 161589, ¶¶ 19-20.

¶ 28 On appeal, the court agreed with the mother that the record did not demonstrate compliance with the ICWA. *H.S.*, 2016 IL App (1st) 161589, ¶ 37. Given that the mother had informed the trial court early in the proceedings that she was a descendant of certain Indian tribes, the appellate court explained that the proper course of action "would have been for the circuit court to make a determination and enter findings regarding the status of [the minors] as either Indian children or non-Indian children." *H.S.*, 2016 IL App (1st) 161589, ¶ 40. In the

[5] Although it is not explicitly stated in the opinion, presumably, those tribes indicated in their responses to the State's notices that the minors and the mother were not eligible for tribal membership.

absence of such findings, the appellate court identified the issue as whether "the circuit court had reason to know that [the minors] are Indian children." *H.S.*, 2016 IL App (1st) 161589, ¶ 40.

¶ 29 In answering that question in the affirmative, the court emphasized that, in addition to the mother's statements in open court, various documents filed with the court indicated that she reported Native American ancestry. *H.S.*, 2016 IL App (1st) 161589, ¶ 41. Additionally, the court noted:

> "Subsection B.1 of Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67586 (Nov. 26, 1979), states that the circumstances under which a state court has reason to believe that a child in a child custody proceedings [*sic*] is an Indian include when a party to the case informs the court that the child is an Indian child and when an officer of the court involved in the proceedings has knowledge that the child may be an Indian child." *H.S.*, 2016 IL App (1st) 161589, ¶ 42.

The court concluded that "the circuit court had reason to know[] that [the minors] may well be Indian children, triggering the notice requirements of section 1912(a) of the ICWA [25 U.S.C. 1912(a) (2012)]." *H.S.*, 2016 IL App (1st) 161589, ¶ 42. The court further determined that the record did not show that the notice requirements were satisfied, given that "there is no evidence contained in the record that an attempt was ever made to send notices to four of the tribes that [the mother] claimed to be a descendant of." *H.S.*, 2016 IL App (1st) 161589, ¶ 44. Accordingly, the court vacated the orders terminating parental rights and remanded the matters to the trial court with directions to determine whether the minors were Indian children. *H.S.*, 2016 IL App (1st) 161589, ¶ 45. If the trial court determined that the minors were not Indian children, the court was instructed to reinstate the orders terminating parental rights. *H.S.*, 2016 IL App (1st) 161589, ¶ 45. If, however, the trial court determined that the minors were Indian children,

the court was instructed to begin proceedings anew in compliance with the ICWA. *H.S.*, 2016 IL App (1st) 161589, ¶ 45.

¶ 30 Like the mother in *H.S.*, both Andrea and Gregory indicated in open court early in the process that they had Native American ancestry. We agree with the court in *H.S.* that the best course of action in such circumstances would have been for the trial court to have made explicit factual determinations—as early as possible in the proceedings—as to whether the minors are Indian children. Given the importance of the rights at stake, where a trial court orders an agency to investigate the applicability of the ICWA in the wake of reports of Native American ancestry, yet the record does not reflect the results of that investigation or even confirm that such investigation was completed, the unresolved question deserves a definitive answer.

¶ 31 Accordingly, we vacate the orders terminating Andrea's and Gregory's parental rights. We remand each of the minors' cases to the trial court in Winnebago County with directions to make expedited factual determinations as to whether the minors are Indian children for purposes of the ICWA. On remand, "[t]he party asserting the applicability of the [ICWA] has the burden of producing sufficient evidence for the court to determine if the child is an Indian child." *T.A.*, 378 Ill. App. 3d at 1090. If the court determines that the minors are not Indian children, the court is directed to expeditiously reinstate its orders terminating Andrea's and Gregory's parental rights. If the court determines that the minors are Indian children, the court is directed to begin proceedings anew in compliance with the ICWA.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we dismiss Gregory's appeal for lack of standing insofar as he challenges the orders entered in case no. 15-JA-394, which pertains to Anthony. With respect to

Andrea's appeal and the remaining aspects of Gregory's appeal, the judgments of the circuit court of Winnebago County are vacated, and the matters are remanded with directions.

¶ 34 No. 17-0592, vacated and remanded with directions.

¶ 35 No. 17-0593, appeal dismissed in part, vacated and remanded with directions in part.