STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1400
A19-1404
A19-1405
A19-1406

In re the Guardianship of: Tressa M. Retz, (A19-1400),
Kadynce M. Retz, (A19-1404),
Chester A. Retz, (A19-1405),
Leo C. Retz, (A19-1406).

Filed March 23, 2020
Affirmed
Florey, Judge

Becker County District Court
File No. 03-PR-16-1194

MaryJo Wiatrak, ICWA Law Center, Minneapolis, Minnesota; and Michael P. Boulette, Barnes & Thornburg, L.L.P., Minneapolis, Minnesota (for appellant A.B.)

Rebecca McConkey-Greene, McConkey-Greene Law Office, Duluth, Minnesota (for respondent White Earth Band of Chippewa)

Mark D. Fiddler, Fiddler Osband, L.L.C., Edina, Minnesota (for respondents J.G. and A.G.)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Florey, Judge.

U N P U B L I S H E D O P I N I O N

FLOREY, Judge

Appellant-tribe argues that the district court erred by determining that the guardianship proceedings were not subject to the Indian Child Welfare Act (ICWA) and

that notice to the children's tribe was therefore not required. *See* 25 U.S.C. § 1901-63 (2012). Appellant-biological mother argues that the district court erred by denying her motion to intervene, reasserts and supports appellant-tribe's arguments, and raises additional arguments of her own. We affirm.

FACTS

In 2011, appellant White Earth Band of Chippewa (White Earth), via its tribal courts, removed four siblings (the children) from their biological parents—C.R. and appellant A.B. The tribal court "suspended" A.B. and C.R.'s parental rights pursuant to tribal law—an action that appellants assert is distinct from a "termination." Thereafter, the children began living with their grand-aunt, L.R., and her partner, M.G. (collectively, the adoptive parents), who formally adopted the children through the tribal courts in 2015. L.R. passed away one month after the adoption, and M.G. passed away one year thereafter. When M.G. passed away in March 2016, he left a will appointing his nephew, J.G., as the guardian of the children. J.G. was also appointed as the personal representative of the estate and was the sole beneficiary of the will, which expressed M.G.'s desire that J.G. use the homestead and estate to care for the children. M.G.'s will was probated in state district court.

Immediately after M.G.'s death, J.G. and his wife, A.G., (collectively respondents) moved into the home in which the children had been living for the previous several years.[1]

[1] The record is unclear as to when the children moved in with the adoptive parents.

J.G. petitioned the state district court for guardianship of each of the children in May 2016, which were granted in July of that year (the guardianship proceedings).

Nearly three years later, in February 2019, J.G. petitioned the district court to formally adopt the children.[2] In that same month, A.B. requested that the White Earth tribal court reinstate her parental rights. The tribal court granted A.B.'s request and reinstated her rights in February 2019. On May 21, 2019, White Earth filed a petition with the state district court to invalidate the guardianship proceedings, which occurred three years prior. In its petition to invalidate, White Earth argued, in relevant part, that the guardianship proceedings were "foster care placement" proceedings under ICWA and therefore should be invalidated due to respondents' failure to provide the notice required under 25 U.S.C. § 1912(a). At the hearing on White Earth's petition, A.B. appeared through her attorney and moved the district court to intervene and become a party. The district court denied White Earth's petition to invalidate and A.B.'s motion to intervene. Both appealed, whereupon the separate cases for each of the four children were consolidated.

D E C I S I O N

This matter turns on statutory interpretation and therefore presents questions of law, which are subject to de novo review by this court. *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 351 (Minn. App. 2007). The primary aim of statutory interpretation is ascertaining, for the purpose of effectuating, the legislature's intent. Minn. Stat. § 645.16

[2] This adoption proceeding was also challenged by appellants and is at issue in the related appeal, A19-1389.

(2018); *In re Welfare of C.R.M.*, 611 N.W.2d 802, 805 (Minn. 2000). Where the language of the statute is clear and unambiguous, this court must give effect to its plain meaning. *In re Welfare of Child of E.A.C.*, 812 N.W.2d 165, 169-70 (Minn. App. 2012). A statute is ambiguous when its language is susceptible to more than one reasonable interpretation. *In re Welfare of S.R.K.*, 911 N.W.2d 821, 827 (Minn. 2018). Only when the statutory language is ambiguous may we draw on the canons of construction and other interpretive tools. *State v. Nelson*, 842 N.W.2d 433, 436 (Minn. 2014).

While review of the legal issues is de novo, this court "defers to the district court's underlying findings of fact." *Stageberg v. Stageberg*, 695 N.W.2d 609, 613 (Minn. App. 2005), *review denied* (Minn. July 19, 2005). This court will not overturn such factual findings unless they are clearly erroneous. *In re Welfare of Child of T.C.M.*, 758 N.W.2d 340, 344 (Minn. App. 2008).

I. The Indian Child Welfare Act

White Earth argues that ICWA applies to the 2016 guardianship proceedings and respondents were therefore required to provide the tribe with notice of those proceedings. 25 U.S.C. § 1912(a). Section 1912(a) provides that "[i]n 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 . . . an Indian child shall notify the parent or Indian custodian and the Indian child's tribe." If a state-law action for foster care placement occurs in violation of section 1912(a), section 1914 provides that the Indian child's tribe, as well as the parent from whom the child was removed, "may petition any court of competent jurisdiction to invalidate such action." 25 U.S.C. § 1914. Because

section 1912(a) was violated by the guardianship proceedings, White Earth argues, section 1914 requires an invalidation of the same. The district court held that ICWA is inapplicable because the guardianship proceedings were not "foster care placement" proceedings.

ICWA defines "foster care placement" as any "action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." 25 U.S.C. § 1903(1)(i). In interpreting this definition, this court has held that, to be a "foster care placement" under ICWA, a given proceeding or action must encompass four prongs:

> (1) removing the Indian child from the child's parent or Indian custodian; (2) temporarily placing the child in a "foster home or institution or the home of a guardian or conservator" where; (3) the parent or Indian custodian cannot have the child returned upon demand; and (4) parental rights have not been terminated.

In re Custody of A.K.H., 502 N.W.2d 790, 792 (Minn. App. 1993) (quoting 25 U.S.C. § 1903(1)(i)), *review denied* (Minn. Aug. 24, 1993). Each of these prongs must apply to the proceeding in question. *See id.*

White Earth argues that all four prongs apply to the guardianship proceedings and that the district court erred by holding that none applied. First, White Earth argues that the guardianship proceedings removed the children from their parent, because A.B.'s parental rights were only "suspended" under tribal law, and she could therefore request that her rights be reinstated "once the adoptions had failed."

White Earth contends that the death of the adoptive parents constituted an adoption failure which renders the guardianship proceedings merely the most recent link in a chain of further removals of the children from their parent, A.B. The district court disagreed, finding that the "parents" for purpose of this prong were the adoptive parents, from whom the children were "removed," if at all, not by the guardianship proceedings but by M.G.'s death and his appointment of J.G. as the children's guardian. The district court concluded, therefore, that the guardianship proceedings did not remove the children from anyone's custody, but rather resulted in a guardianship the children's parents initiated by will.

We agree with the district court that the guardianship proceedings which White Earth seeks to invalidate were not "removals" as contemplated by ICWA. The propriety of this conclusion is appreciable in light of the fact that, by the time the district court formally awarded guardianship to respondents, the children had been in respondents' care for over three months. Even if the original probate transfer of guardianship could be described as a removal, and it is not clear that it can, that transfer was the result of the adoptive parents' natural deaths—not respondents' petition.

Further, even if the guardianship proceedings were ICWA "removals," they were not removals with respect to A.B., as White Earth argues. By the time the probate court appointed guardianship, the children had not only been removed from the custody of their biological parents, but had also been formally adopted; and both actions were facilitated by the White Earth tribal court. The guardianship proceedings in no way altered, and in fact were entirely extraneous to, the children's legal relationship to A.B. Indeed, A.B. would not have her parental rights ostensibly restored by the White Earth tribal courts until

nearly three years after the guardianship proceedings; and we cannot say that those proceedings "continued to remove" or "further removed" the children from A.B. simply because it was hypothetically possible at the time that A.B. could have her rights restored. Therefore, the district court correctly determined that the guardianship proceedings did not satisfy the first prong of the definition of "foster care placement" under ICWA.

As for the second prong of a foster-care placement under ICWA—the requirement that the action temporarily places the child in the home of a guardian or conservator—White Earth argues that, because guardianships under Minnesota law are capable of being terminated in a variety of ways, they are temporary placements, not permanent.[3] Minn. Stat. § 524.5-112 (2018). We disagree. While it is true that guardianships can be terminated, unless and until they are, they endure—free of any particular lifespan. Minn. Stat. § 524.5-201 (2018) ("The guardianship continues until terminated, without regard to

[3] White Earth cites *Department of Human Services v. J.G.* to support its argument that guardianships are temporary for the purposes of ICWA. 317 P.3d 936, 946 (Or. Ct. App. 2014). Not only is that case not binding on this court, but to the extent that it is offered as persuasive authority, we find it distinguishable. The *J.G.* court noted that a guardianship under Oregon law is "temporary in the sense that it does not terminate parental rights, and it may be vacated by a court." *Id.* White Earth focuses only on the second clause of that sentence, but the *J.G.* court places the emphasis on the first—stating in the prior sentence that "the definitions of foster care placement and termination of parental rights reveal that the term 'temporary placement' merely distinguishes a foster care placement from an action that would permanently end the parent-child relationship." *Id.* The Oregon Court of Appeals concluded that the guardianship at issue was temporary because the child's parent maintained some rights, and the guardianship did not purport to terminate parental rights. *Id.* at 948. Here, parental rights had already ended. The children's legal parents passed away, and guardianship over them was appointed to respondents in accordance with Minn. Stat. § 524.5-202(a) (2018) (stating that "[a] guardian may be appointed by will" in a section titled Parental Appointment of Guardian). The guardianship proceedings here could not be described as "temporary" even under *J.G.* because there was nobody else to whom the children could have gone.

the location of the guardian or minor ward."). Moreover, every type of custodial relationship is capable of being terminated under certain circumstances, so White Earth's logic would render every relationship temporary and the distinction meaningless. *See e.g.*, *In re Welfare of Rosenbloom*, 266 N.W.2d 888, 889-90 (Minn. 1978) (discussing the conditions under which natural parental rights may be terminated). Thus, the district court correctly determined that the guardianship proceedings do not satisfy the second prong of the ICWA definition of "foster care placement."

For their arguments on the third and fourth prongs, White Earth relies on the premise that the "parent," for purposes of the ICWA analysis, is A.B. However, we cannot, at least in the context of this case, give the effect to the distinction between "suspended" and "terminated" parental rights that White Earth requests. Whatever effect this attribute of tribal law might have on state courts in other contexts, it was nullified here when the adoptive parents formally adopted the children. Each of the adoption decrees, all of which were issued by the White Earth tribal courts, contain the following language: "it is hereby adjudged and decreed that from and after the date hereof, the said child . . . shall be deemed and taken to be the child and heir of the petitioners above named in all respects the same as though born to them." Further, these adoptions were not in conflict with A.B.'s suspended parental rights, because the White Earth code providing for such suspensions states that the children of a parent with suspended rights may be adopted.[4] *See* White Earth Band of Ojibwe Judicial Code 4a-7(A)(2).

[4] Additionally, White Earth Child/Family Protection Code states that a parent whose rights have been suspended "shall have no standing to appear at, nor any notice of, any future

White Earth asks us to selectively account for the tribal laws and proceedings at issue here. Were we to conclude that A.B. is the parent for the foster-care-placement analysis under ICWA, we would have to entirely disregard the children's adoptions; but the parties present us with no reason to question their validity. White Earth provides no arguments with which we could harmonize their assertions that A.B.'s parental rights were both "terminated enough" to permit adoption of the children "in all respects the same as though born to" the adoptive parents; and yet not so terminated that subsequent transfers of custody should be considered "removals" from A.B.'s parenthood under ICWA. Therefore, we reject White Earth's contention that A.B. is the parent for purposes of the ICWA foster-care-placement analysis. We agree with the district court that A.B.'s parental rights were, effectively, legally terminated—if not by the White Earth courts, then certainly by the subsequent adoption of the children.

II. Surviving Parent

A.B. reasserts White Earth's arguments and raises some of her own as to why the guardianship proceedings should be invalidated. However, the district court denied her motion to intervene, so on appeal she may only seek review of that denial. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that an appellate court generally will not consider matters not argued to and considered by the district court). Therefore, A.B. is only a party to this action to the extent that she challenges the denial of her motion to

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legal proceedings involving the child." § 8.07(g). Yet, A.B. argues that she was also entitled to notice under ICWA precisely because her rights were "suspended" under White Earth law.

intervene, so we do not consider any additional arguments she makes—to the extent that those arguments are distinguishable from White Earth's. For the same reasons we affirm the district court's denial of White Earth's petition to invalidate, we also affirm its denial of A.B.'s motion to intervene.

For the foregoing reasons, the district court did not err in determining that 25 U.S.C. § 1903(1)(i) did not apply to the guardianship proceedings, that White Earth was therefore not entitled to notice, and that its petition to invalidate must be denied.

Affirmed.