IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1114

Filed: 21 July 2020

Robeson County, No. 17-JA-251

IN THE MATTER OF: D.L.

Appeal by respondent-mother from order entered 2 October 2019 by Judge William J. Moore in District Court, Robeson County. Heard in the Court of Appeals 9 June 2020.

J. Edward Yeager, Jr. for petitioner-appellee Robeson County Department of Social Services.

Miller and Audino, LLP, by Jeffrey L. Miller, for appellant-mother.

Stephen M. Schoeberle for appellee-guardian ad litem.

STROUD, Judge.

Mother appeals from an order granting custody of her minor child, Bob,[1] to his Father. Because the trial court failed to comply with the required procedures of the Indian Child Welfare Act ("ICWA"), and the trial court had reason to know Bob could

[1] We use a pseudonym to protect the privacy of the juvenile.

meet the definition of an Indian child, we vacate and remand to the trial court for further proceedings.

I. Background

Bob was born in April 2016 to Mother and Father.[2] In 2015, the Robeson County Department of Social Services ("DSS") began providing Mother and Father services to address their substance abuse and domestic violence issues. Mother and Father voluntarily placed Bob and his brother with Mother's cousin in July 2017. A juvenile petition was filed on 20 September 2017 alleging Bob was a neglected juvenile. On a "Court Report for Adjudication Hearing" DSS marked "No" to the question which stated, "Is there any information to indicate the child may be subject to the Indian Child Welfare Act?" The Guardian ad Litem filed court reports for each hearing. Each of those reports listed Bob's race as "American Indian." The narrative description of Bob also referred to him as a "Native American male child." This description was repeated on other reports filed by the Guardian ad Litem.

The trial court adjudicated Bob as a neglected juvenile following a March 2018 hearing. A disposition order concluded Bob should remain in the kinship care of Mother's cousin. Following a review hearing, the trial court continued custody and placement authority with DSS with a plan of reunification for Mother, with a concurrent plan of custody with Father. In a permanency planning order entered 12

[2] Bob has a younger brother who is not a part of this appeal.

March 2019, the court changed Bob's primary plan to guardianship with a relative with a concurrent plan of reunification with either parent. Following another permanency planning hearing, the trial court concluded "although against the Department's recommendation, the Court believes that it is in the best interests of the child, [Bob], that legal and physical custody be awarded to the father, Don Locklear and there is no need for further review in this matter." Mother timely appealed.

II. The Indian Child Welfare Act

Mother contends the trial court erred by "exercising its subject matter jurisdiction and entering a child custody order because it failed to comply with the required procedures of the Indian Child Welfare Act." We review *de novo* the issue of the trial court's compliance with the Indian Child Welfare Act. *See In re A.P.*, 260 N.C. App. 540, 818 S.E.2d 396 (2018), *review denied*, 372 N.C. 296, 827 S.E.2d 99 (2019).

> The ICWA was enacted by Congress in 1978 to establish the "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes" in order to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." In relevant part ICWA states:
>
> > 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. . . . 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.
>
> An "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." ICWA's notice requirement is mandatory and triggered when the proceeding is a "child custody proceeding," and the child involved is determined to be an "Indian child" of a federally recognized tribe.

Id. at 542-43, 818 S.E.2d at 398-99 (alteration in original) (citations omitted) (quoting 25 U.S.C. § 1912(a)).

Further, "the burden rests upon the state courts to confirm that active efforts have been made to prevent the breakup of Indian families and those active efforts must be documented in detail in the record." *Id.* at 543, 818 S.E.2d at 399. This Court has held the "trial court has 'reason to know the child could be an "Indian child"' in instances where 'it appears that the trial court had at least some reason to suspect that an Indian child may be involved.'" *In re K.G.*, ___ N.C. App. ___, ___, 840 S.E.2d 914, 916 (2020) (quoting *In re A.P.* 260 N.C. App. at 545, S.E.2d at 399).

> The ICWA pr[e]scribes that once the court has reason to know the child could be an "Indian child," but does not have conclusive evidence, the court should confirm and "work with all of the Tribes . . . to verify whether the child is in fact a member." Federal law provides: "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[.]" Further, a court must "[t]reat 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 re A.P., 260 N.C. App. at 544, 818 S.E.2d at 399 (second and subsequent alterations in original) (citations omitted).

Here, Mother and DSS agree the trial court did not determine whether Bob was subject to the ICWA despite being on notice of the issue by the information in the record. The reports filed by Bob's Guardian ad Litem indicated his race was "American Indian." The trial court's findings stated it "relies on and accepts into evidence the Guardian ad Litem Report." Therefore, the trial court had reason to know Bob could be subject to the IWCA but did not take the mandatory steps outlined in the Act. The trial court must "[t]reat 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.'" *Id. (*quoting 25 C.F.R. § 23.107(b)(2)).

We recognize that the trial court here ultimately gave custody to Bob's Father and did not place him in foster care or terminate parental rights, so the court did not break up the family. Yet the record does not show if only one parent or both were of

American Indian descent. In addition, both parents were notified of the proceedings, but ICWA also requires notification to the Indian Tribe. *See* 25 U.S.C. § 1912. The ICWA notification requirement must be met to protect the integrity of the entire proceeding and prevent delay in obtaining permanency for the juvenile. *See* 25 U.S.C. § 1914 ("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.").

Therefore, we vacate the trial court's order and remand for the trial court to comply with requirements of the ICWA and to conduct further proceedings as appropriate based upon the results of the ICWA notification. Since we must remand for additional proceedings, we do not reach Mother's second argument.[3]

III. Conclusion

[3] The GAL's brief on appeal took no position on the ICWA issue but addressed only Mother's second argument, whether the "evidence and the trial court's findings were insufficient to support a conclusion that the best interest of Bob would be served by awarding his custody to Father." The GAL agreed with Mother that the order did not include sufficient findings of fact to support the conclusions of law. Most of the relevant findings of fact in the trial court's order stated that it "relies on and accepts into evidence" the items of evidence presented by DSS and the GAL and found all of this evidence to be "credible and reliable." Despite the trial court's adoption of all the evidence presented by DSS and the GAL as its findings, the trial court also noted its conclusion was "against the Department's recommendation" without making any findings as to why it rejected the DSS recommendations previously found to be "credible and reliable." We will not address the merits of this argument. But as guidance on remand, we note the trial court is not required to accept DSS's recommendations, but the trial court's findings of fact should address the rationale for its conclusions of law so the conclusion does not appear to be contradictory to the findings of fact.

"We remand to the trial court to issue an order requiring notice to be sent as required by 25 U.S.C. § 1912(a), and which complies with the standards outlined in 25 C.F.R. § 23.111." *In re K.G.*, ___ N.C. App. at ___, 840 S.E.2d at 917 (ellipses omitted). Based upon the results of the ICWA notification and after further hearing, the trial court shall enter any other appropriate orders.

VACATED AND REMANDED.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).