IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-412

No. COA20-891

Filed 3 August 2021

Forsyth County, Nos. 18 JA 123–25

IN THE MATTER OF:

N.T., K.M., A.C.

Appeal by respondents from order entered 31 August 2020 by Judge Lisa V.L. Menefee in Forsyth County District Court. Heard in the Court of Appeals 14 April 2021.

Forsyth County Department of Social Services, by Assistant County Attorney Melissa Starr Livesay, for petitioner-appellee.

Kimberly Connor Benton for respondent-appellant father.

Anné C. Wright for respondent-appellant mother.

Ellis & Winters LLP, by James M. Weiss, for guardian ad litem.

DIETZ, Judge.

¶ 1 Respondents appeal the trial court's permanency planning order awarding guardianship of Nate, Kennedy, and Ava[1] to Nate's paternal grandparents and ceasing reunification efforts with Respondents. Respondent-Father argues that the

[1] We use pseudonyms to protect the identities of the juveniles.

trial court failed to fulfill its duties under the Indian Child Welfare Act with respect to Nate because, despite information in the record indicating that Father reported Cherokee heritage in his family, the trial court did not take any action to address whether Nate qualified as an "Indian child" under the Act.

¶ 2 Under controlling precedent from this Court and our Supreme Court, we must vacate the trial court's order and remand for a determination of whether the Indian Child Welfare Act applies to Nate. Because the trial court placed all three children with Nate's paternal grandparents, the outcome on this issue may impact the court's rulings with respect to the other issues raised in this appeal. Accordingly, consistent with our past precedent, we vacate the trial court's order without reaching the remaining issues and remand for further proceedings.

Facts and Procedural History

¶ 3 Respondent-Mother is the mother of Nate, Kennedy, and Ava. Respondent-Father was married to Mother and resided in the home with Mother and all three children but is the biological father of Nate only.

¶ 4 In June 2018, Respondents noticed that one-month-old Nate's head looked swollen and took him to the hospital. Nate was admitted to the hospital for skull fractures, but neither parent was able to provide an explanation of the cause of the injuries. Doctors believed the injuries were caused by non-accidental trauma and contacted the Forsyth County Department of Social Services. Mother told DSS that

she thought Nate's injuries were the result of birth trauma.

¶ 5 On 11 June 2018, DSS filed petitions alleging that Nate was abused and neglected based on his unexplained injuries that were believed to be caused by non-accidental trauma and alleging that Kennedy and Ava were neglected because they resided in the same home. DSS obtained nonsecure custody of the three children and placed them with Nate's paternal grandparents.

¶ 6 At the first nonsecure custody hearing, Father "informed the Court that his paternal grandmother's mother is Cherokee Indian." Additionally, the DSS court reports in the record include statements, under the heading "Indian Child Welfare Act (ICWA)," that Father told DSS "that he has some Cherokee Indian heritage in his family" and told the trial court "that he had some Cherokee Indian on his paternal grandmother's side of the family." However, it does not appear from the record that the trial court conducted any further inquiry or determined whether Nate was subject to the protections of the Indian Child Welfare Act.

¶ 7 Following an adjudication and disposition hearing in October 2018, the trial court entered an order in January 2019 adjudicating all three children neglected based on Nate's unexplained head injuries. The order maintained DSS custody of the children and continued their placement with Nate's paternal grandparents. In a February 2019 review order, the trial court made no changes to the custody or placement of the children, noting that Respondents had made some progress on their

case plans, but they continued to maintain that they could not explain how Nate was injured.

¶ 8 In May 2019, the trial court entered a permanency planning order, setting a primary plan of guardianship for the children with a secondary plan of reunification. The court found that Respondents had made adequate progress on their case plans except for "not offering a viable explanation" for Nate's injuries. In addition to Mother continuing to assert that Nate's injuries were "due to birth trauma," the court noted that Father posited an explanation that Nate's injuries were caused by an accidental fall from his car seat. DSS's corresponding court report noted that a doctor indicated that the accident Father described was unlikely to have caused Nate's injuries and opined that the cause was blunt force trauma.

¶ 9 Following a July 2020 permanency planning hearing, the trial court entered an order in August 2020 awarding guardianship of all three children to Nate's paternal grandparents, ceasing reunification efforts with Respondents, eliminating reunification as a secondary plan, and waiving further scheduled review hearings. The trial court found that "[s]ignificant issues prevent the minor children from return[ing] home" because the court has "not been provided of an explanation of [Nate's] injuries" despite "24 months for the parents to provide an explanation," during which the "parents have only provided multiple inconsistent explanations." Respondents appealed the trial court's permanency planning order.

Analysis

I. Father's appeal

¶ 10 Father first argues that the trial court erred by failing to fulfill its statutory duties under the Indian Child Welfare Act as to Nate. Father contends that, because the record unequivocally indicates that he informed DSS and the trial court of possible Cherokee heritage in his family, the trial court was required to conduct an inquiry into whether Nate qualifies as an "Indian child" under the Act before proceeding with guardianship. We are constrained by precedent to accept this argument, vacate the trial court's order, and remand for further proceedings.

¶ 11 The issue of whether a trial court complied with the requirements of the Indian Child Welfare Act is reviewed *de novo*. *See In re A.P.*, 260 N.C. App. 540, 542–46, 818 S.E.2d 396, 398–400 (2018). In child custody proceedings, ICWA applies if the child involved "is an Indian child. '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." *In re L.W.S.*, 255 N.C. App. 296, 297–98, 804 S.E.2d 816, 818 (2017) (citations omitted). The Act and its implementing federal regulations require that, if a trial court in a child custody proceeding "knows or has reason to know that an Indian child is involved, the party seeking the foster care placement" of that 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." 25 U.S.C. § 1912; *see also* 25 C.F.R. § 23.107. "If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an 'Indian child,'" the trial court is required to:

> (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(b).

¶ 12 Our Supreme Court recently has clarified that under "the current federal regulations, state courts bear the burden of ensuring compliance with the Act." *In re E.J.B.*, 375 N.C. 95, 101, 846 S.E.2d 472, 476 (2020). In *E.J.B.*, the Supreme Court held that the trial court erred by "fail[ing] to ensure that any Cherokee tribes were actually notified" because "the record shows that the trial court had reason to know that an Indian child might be involved" where "DSS indicated in its court reports that respondent-father indicated that he had Cherokee Indian heritage." *Id.* at 103, 846 S.E.2d at 477.

¶ 13 Then, in a follow-up case, our Supreme Court held that the trial court "failed to comply with the requirements of ICWA" where "it had been reported at an early stage in proceedings" that the child involved "might be an Indian child through his maternal grandmother in upstate New York." *In re N.K.*, 375 N.C. 805, 823, 851 S.E.2d 321, 334 (2020). The Court held that, "until a determination has been made concerning the issue of whether [the child] is an Indian child as a result of his potential affiliation with a tribe in New York, the trial court had failed to comply with the requirements of ICWA." *Id.* "[T]he trial court had reason to know that an Indian child might be involved," but "[t]he record fail[ed] to contain sufficient information to permit a determination that the trial court adequately ensured that compliance with the notice requirements of ICWA actually occurred." *Id.* at 824–25, 851 S.E.2d at 335. "As a result, we hold that this case should be remanded to the [trial court] for further proceedings concerning the issue of whether the notice requirements of ICWA were complied with . . . and whether [the child] is an Indian child for purposes of ICWA." *Id.* at 825, 851 S.E.2d at 335.

¶ 14 Consistent with this Supreme Court precedent, this Court likewise has held that "a 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.*, 270 N.C. App. 423, 425, 840 S.E.2d 914, 916 (2020). In *K.G.*, we found that "the record shows the trial court had reason to

know an 'Indian child' may be involved" where "the trial court noted 'The mother indicates that she is of Cherokee ancestry, but did not know a specific tribe.'" *Id.* at 426, 840 S.E.2d at 916. "Although it had reason to know an 'Indian child' may be involved in these proceedings, the trial court did not ensure that the Cherokee Nation or the Eastern Band of Cherokee Indians were actually notified." *Id.* We observed that, although "from the record before us we believe it unlikely" the child was subject to ICWA, "we prefer to err on the side of caution by remanding for the trial court to . . . ensure that the ICWA notification requirements, if any, are addressed . . . since failure to comply could later invalidate the court's actions." *Id.* at 425, 840 S.E.2d at 916. Taken together, these cases stand for the proposition that, whenever parents indicate they have Native American heritage, the trial court must make a determination of whether ICWA applies.

¶ 15 Here, Father informed DSS and the trial court that he had Cherokee heritage in his family because "his paternal grandmother's mother is Cherokee Indian." That information was included in an early court order as well as in all of DSS's court reports throughout the proceedings in this case. But despite that information, there is no indication in the record that DSS or the trial court took any further action to inquire into or investigate whether Nate is an Indian child for purposes of ICWA, or to notify any Tribes. We find the information provided by Father in this case indistinguishable from similar information in *N.K.* and *K.G.* that this Court or our

Supreme Court held sufficient to require the trial court to conduct further investigation to determine ICWA's applicability and to ensure compliance with ICWA's notice requirements. *See In re N.K.*, 375 N.C. at 823, 851 S.E.2d at 334; *In re K.G.*, 270 N.C. App. at 426, 840 S.E.2d at 916. We are therefore constrained to vacate the trial court's order and remand for the trial court to determine whether Nate is an Indian child for purposes of ICWA and to ensure compliance with ICWA's notice requirements. *In re N.K.*, 375 N.C. at 825, 851 S.E.2d at 335.; *In re E.J.B.*, 375 N.C. at 103, 846 S.E.2d at 477; *In re K.G.*, 270 N.C. App. at 425–26, 840 S.E.2d at 916.

¶ 16 If the trial court determines "upon remand, after making any necessary findings or conclusions, that the notice requirements of ICWA were properly complied with or that [Nate] was not an Indian child," the court may enter a new permanency planning order based on the existing record or conduct any further proceedings the court deems necessary in the interests of justice. *In re N.K.*, 375 N.C. at 825, 851 S.E.2d at 335.

¶ 17 Father also raises several other arguments asserting that the evidence and the trial court's findings of fact were insufficient to support its award of guardianship of Nate to his paternal grandparents and the cessation of reunification efforts. We decline to address these arguments, as we have done in previous cases, because they may be mooted by the trial court's further proceedings on the ICWA issue. *See In re K.G.*, 270 N.C. App. at 423–24, 840 S.E.2d at 915.

II. Mother's appeal

¶ 18 Mother also appealed the trial court's permanency planning order and argues that the trial court erred in ceasing reunification efforts, eliminating reunification as a permanent plan, and implementing the plan of guardianship as to all three of the children because the evidence and findings of fact indicate that the children could safely be returned home in the immediate future.

¶ 19 As with Father's additional arguments, these issues may be mooted by our decision to vacate and remand the trial court's order on the basis of ICWA. *See In re K.G.*, 270 N.C. App. at 423–24, 840 S.E.2d at 915. Although the remand to determine ICWA's applicability to Nate does not directly impact Kennedy or Ava, guardianship of all three children was awarded to Nate's paternal grandparents, and the trial court's decision was largely based on issues pertaining to Nate's unexplained injuries. Thus, if the application of ICWA on remand results in any changes to the custody or guardianship determination for Nate, it may impact the determination for Nate's siblings as well.

Conclusion

¶ 20 For the reasons explained above, we vacate the trial court's permanency planning order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).