IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-864

No. COA22-119

Filed 20 December 2022

Cumberland County, No. 21JA166

IN THE MATTER OF: V.J.

Appeal by respondent-appellant-father from order entered 15 September 2021 and order entered 12 November 2021 by Judge Cheri Siler Mack in Cumberland County District Court. Heard in the Court of Appeals 21 September 2022.

Patrick Andrew Kuchyt, for petitioner-appellee Cumberland County Department of Social Services.

Kimberly Connor Benton, for respondent-appellant-father.

Eric Johnson for respondent-appellee-mother.

Administrative Office of the Courts, by Guardian Ad Litem Appellate Counsel Michelle FormyDuval Lynch, for the guardian ad litem.

GORE, Judge.

¶ 1 Respondent-appellant-father appeals the trial court's disposition and adjudication orders. Because the trial court erred by not complying with the statutory requirements under the Indian Child Welfare Act ("ICWA"), we vacate and remand for additional proceedings not inconsistent with this opinion.

I.

¶ 2 In May 2021, the Cumberland County Department of Social Services ("DSS") received report of a diagnosis of failure to thrive for the juvenile due to her parents' care of her. The juvenile was born in the summer of 2020, and on 4 June 2021, DSS filed a petition stating the juvenile was born with serious medical issues and was a "medically fragile child." The juvenile was diagnosed with the following medical issues: hypotonia, oropharyngeal dysphagia (requires g-tube dependence), laryngomalacia, and global developmental delay.

¶ 3 Because of these serious complications, the juvenile requires specialized feeding and care according to health care providers; failure to comply with the specialized care could result in "malnutrition, failure to thrive, risk of death or serious injury," and risk of not developing as is possible for a child with these medical diagnoses. Specifically, the juvenile requires feeding six times a day through a feeding tube with a specialized formula. The juvenile was hospitalized four times since birth due to "weight loss and failure to thrive." A cycle of weight gain and loss occurred with the juvenile gaining weight during hospitalization and then losing that weight upon return to her parents' care.

¶ 4 Home healthcare nurses came to the juvenile's house forty hours per week to assist in the juvenile's care starting at her birth and continuing until the beginning of 2021. These nurses observed multiple times that the juvenile's morning formula

was unconsumed when they arrived. The respondent-mother later requested home healthcare only come twenty-four hours a week, which resulted in complete loss of home healthcare assistance (there were no part time nurses available). This resulted in the serious problems with weight loss and multiple hospitalizations.

¶ 5 DSS obtained nonsecure custody of the juvenile and continued placement in foster care but left the juvenile's sister in the care of the parents. At the pre-adjudication conference and nonsecure custody hearing the court included in the order that DSS was investigating whether the ICWA might apply because there was information the juvenile's "maternal grandmother may be Cherokee."

¶ 6 During the adjudication hearing, the parents and DSS filed a Stipulation Agreement and Written Agreement for Stipulation of Facts Pursuant to Section 7B-807. Reviewing the stipulated facts, the trial court determined the juvenile was neglected pursuant to Section 7B-101(15) because she was living in an "environment injurious to her welfare," and because she "did not receive proper care, supervision, or discipline" from her parents. The dependency allegation was dismissed. The court then entered a temporary adjudication order continuing the juvenile's custody with DSS and foster care placement. The parents were allowed supervised visitations with the juvenile when authorized by medical providers.

¶ 7 At the disposition hearing on 20 September 2021, DSS related the juvenile was gaining weight and still receiving specialized formula through a g-tube. The court

recognized respondent-appellant-father continued his employment as a janitor at Fort Bragg, and that the parent's home had "food, working utilities, and smoke alarms." The court continued custody with DSS but allowed the parents to have in-person supervised visits at the Boys and Girls Home in Kinston, North Carolina. The disposition order was filed 12 November 2021. On 22 November 2021, respondent-appellant-father filed a timely appeal of the adjudication and disposition orders.

II.

¶ 8 Respondent-appellant-father argues the trial court erred by failing to fulfill its statutory duties under the ICWA. Additionally, respondent-appellant-father argues the trial court erred by requiring him to obtain and maintain suitable housing and employment in the disposition order. This Court reviews an issue of subject matter jurisdiction de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010); *see In re A.P.*, 260 N.C. App. 540, 542–46, 818 S.E.2d 396, 398–400 (2018). While district courts generally have exclusive jurisdiction of juvenile abuse, neglect, and dependency matters, when the ICWA applies, the court must follow the ICWA's jurisdictional requirements. N.C. Gen. Stat. § 7B-200(a), (a)(5) (2021); *see* 25 U.S.C. § 1911 (2022); 25 C.F.R. § 23.103 (2022).

¶ 9 Respondent-appellant-father specifically argues the court was made aware the juvenile might be an "Indian child" and there is no evidence DSS inquired into or investigated whether the juvenile is an "Indian child" as defined by the ICWA.

Further, respondent-appellant-father argues the court was obligated to treat the juvenile as an "Indian child" until there was a determination she is not an "Indian child." We agree.

¶ 10 Our Supreme Court recently discussed the application of the ICWA. The promulgation of the ICWA in Congress "established 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 re E.J.B.*, 375 N.C. 95, 98, 846 S.E.2d 472, 474 (2020) (quoting 25 U.S.C. § 1902 (2018)) (internal quotations omitted). Within the ICWA, an "Indian child" is "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) (2022).

¶ 11 During 2016, the Department of the Interior codified regulations for consistent application of the ICWA. *In re E.J.B.*, 375 N.C. at 101, 846 S.E.2d at 476 (citing ICWA Proceedings, 81 Fed. Reg. 38,778, 38,782 (14 June 2016) (codified at 25 C.F.R. Part 23). These regulations created proceedings for the ICWA and placed the burden on state trial courts to "ensure[] compliance" with the same. *Id.* at 101, 846 S.E.2d at 476. Specifically, state courts must inquire during a child custody proceeding whether any "participant knows or has reason to know that the matter involves an

Indian child" and "inform the parties of their duty to notify the trial court if they receive subsequent information . . . to know the child is an Indian child." *Id.* (citing 25 C.F.R. § 23.107(a)).

¶ 12 The federal regulation specifies when a court "has reason to know the child . . . is an Indian child," 25 C.F.R. § 23.107(c) (2022), which is if, "[a]ny participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child." 25 C.F.R. § 23.107(c)(2). Further, if the court does have "reason to know" but it lacks "sufficient evidence" to definitively say the child "is or is not an Indian child," the court is required to:

> (1) Confirm, by way of 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) . . . .

In re N.K., 375 N.C. 805, 822–23, 851 S.E.2d 321, 334 (2020) (quoting 25 C.F.R. § 23.107(b)(1)). "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[] . . . ." 25 U.S.C. § 1912(a) (2022). Federal regulation also requires the court to "[t]reat the child as an Indian child, . . . until it is determined *on the record* that the child does not meet the definition of an Indian

child . . . ." 25 C.F.R. § 23.107(b)(2) (emphasis added) (internal quotations omitted).

¶ 13 Respondent-appellant-father argues the present case is similar to *In re N.K.* while DSS claims this situation is similar to *In re C.C.G.* This Court agrees with respondent-appellant-father.

¶ 14 In *In re N.K.*, the mother claimed the trial court did not follow the ICWA requirements. 375 N.C. at 823, 851 S.E.2d at 334. She argued the court was made aware during an early proceeding that the child could be an "Indian child through his maternal grandmother in upstate New York." *Id.* In that case, DSS sent inquiries to multiple tribes, but the question of the child's New York Indian ancestry was left unanswered. *Id.* The trial court had "ordered DSS to make diligent efforts" to determine the child's status, through notification of the relevant tribes and if necessary, contacting the "Bureau of Indian Affairs." *Id.* at 824, 851 S.E.2d at 335. DSS submitted various reports to the court regarding the inquiries made and the judge ultimately stated the child was not an Indian child. *Id.*

¶ 15 Our Supreme Court held that it could not discern if the court followed the ICWA requirements, because the notices sent by DSS were not in the record and DSS seemingly failed to seek out "assistance from the Bureau of Indian Affairs." *Id.* at 824–25, 851 S.E.2d at 335 (citation omitted). The "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 825, 851 S.E.2d at 335.

¶ 16 Whereas in *In re C.C.G.*, the Supreme Court held there was no reason for the trial court to know the juvenile was an "Indian child." 380 N.C. 23, 30, 2022-NCSC-3, ¶ 19. The only indications of membership or eligibility presented to the court were in 2 DSS court reports and an "in-home family services agreement." *Id.* at 29, 2022-NCSC-3, ¶ 18. These reports denied any indication the child may be subject to the ICWA and noted the parents' indication there may be a "distant Cherokee relation on her mother's side of the family" each time without further details. *Id.*

¶ 17 The Court stated, "Indian heritage, which is racial, cultural, or hereditary does not indicate Indian tribe membership, which is political." *Id.* at 30, 2022-NCSC-3, ¶ 19. Unlike in *In re C.C.G.*, in the case at hand, the court states in the pre-adjudication conference and nonsecure custody order that upon inquiry there is reason to believe the ICWA may apply. Such a statement, based upon this Court's previous determination to "err on the side of caution," requires remand to make certain on the record there is no need to comply with the ICWA. *In re A.R.*, 227 N.C. App. 518, 524–25, 742 S.E.2d 629, 634 (2013); *see In re A.P.*, 260 N.C. App. at 546, 818 S.E.2d at 400.

¶ 18 The record in this case is devoid of any indication that DSS made any inquiries into the child's possible membership or eligibility of membership with the Cherokee tribe. This appears to be a violation of the required proceedings as set forth in the

ICWA when the court "knows or has reason to know" the child could be an "Indian child." 25 C.F.R. § 23.107(a). Further, there is a significant distinction between DSS reports that passively note the parents' indication of possible remote relation to an Indian tribe, and a court order on the record that indicates the juvenile might be eligible for membership in a federally recognized Indian tribe. The latter carries greater weight and triggers the federal requirements for determining the juvenile's status as it relates to ICWA. Since the record lacks the inquiries required by federal regulation and our Supreme Court, we remand this case to address the deficiency.

¶ 19 We do not reach the issue of abuse of discretion within the disposition order, because the ICWA requirement is jurisdictional. As previously discussed, the trial court's jurisdiction is dependent upon the child's status under the ICWA, since it has "reason to know" the juvenile may be an "Indian child." 25 C.F.R. § 23.107(b). Until the trial court establishes this jurisdictional threshold, any adjudication or disposition orders are premature. Accordingly, we expressly vacate the adjudication and disposition orders as void. On remand, should the trial court determine, as a threshold issue, it may properly exercise jurisdiction in this case, the trial court should then revisit adjudication and disposition.

III.

¶ 20 For the foregoing reasons, we vacate the adjudication and disposition orders and remand for further inquiry into the status of the juvenile under the ICWA.

VACATED AND REMANDED.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).