IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-722

No. COA22-153

Filed 1 November 2022

Forsyth County, No. 20-JA-19

IN THE MATTER OF: M.J.

Appeal by Respondent Mother from orders entered 29 November 2021 by Judge Denise S. Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 20 September 2022.

Assistant County Attorney Melissa Starr Livesay for Petitioner-Appellee Forsyth County Department of Social Services.

GAL Appellate Counsel Matthew D. Wunsche for Appellee Guardian ad Litem.

Anné C. Wright for Respondent-Appellant Mother.

INMAN, Judge.

¶ 1 Respondent Mother ("Mother") appeals from two orders, one adjudicating her daughter M.J. ("Mallory")[1] neglected and the other denying visitation. Mother asserts that the trial court: (1) failed to investigate Mallory's potential Native American heritage under the Indian Child Welfare Act ("ICWA"); and (2) abused its discretion in denying Mother any form of visitation. After careful review, we affirm

[1] We use a pseudonym for ease of reading and to protect the identity of the minor.

the trial court's orders.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 This is the second appeal from an order adjudicating Mallory neglected. Our previous decision recites the following pertinent facts:

> Mallory was born in June 2010. When Mallory was five years old, Mother was arrested on several outstanding warrants, leading DSS to investigate whether Mother was providing adequate care to Mallory. DSS was unable to locate Mother and Mallory and terminated its investigation.
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> Four years later, when Mallory was nine years old, Mother and Respondent-Father ("Father") were arrested for breaking into storage units with Mallory present. While her parents were incarcerated, Mallory was released into the care of her maternal uncle, who informed DSS that Mallory had previously witnessed acts of domestic violence between her parents. Mallory's uncle was arrested a short time later, and Mallory moved in with her adult sister.
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> A DSS social worker spoke with Mallory in December 2019 and learned that Mallory's parents used methamphetamines, crack cocaine, and alcohol while in her presence. Mallory also said that Mother had attempted to force her to take methamphetamines and blew methamphetamine smoke in her face when she refused. She confirmed her uncle's report that she had witnessed Mother and Father physically attack each other and reported that Mother repeatedly beat her, threatened her with weapons, and verbally abused her. Mallory recounted several occasions when she and her Mother fled from police together. She said she and her parents were homeless and lived in cars or hotels.
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> The DSS worker learned that while in her parent's custody, Mallory had not been enrolled in school since kindergarten.

Shortly after her parents' arrest, she enrolled in second grade, but she was severely behind academically. Programs were available to remedy these learning deficits, but Mother and Father reportedly refused to consent to allow Mallory to receive such assistance. Mallory's parents likewise refused to allow her to receive needed counselling to address the abuse and trauma she reported witnessing in her parents' care.

DSS filed a juvenile petition alleging neglect based on the above reports. The petition alleged neglect based on: (1) lack of proper care, supervision, or discipline; (2) lack of necessary remedial care; and (3) an environment injurious to Mallory's welfare. DSS received nonsecure custody and continued Mallory's placement with her adult sister.

The trial court held a disposition hearing on DSS's petition on 18 September 2020, and DSS called several witnesses to support its petition. Two law enforcement officers testified about arresting Mother and Father for breaking into storage units. They further testified about Mallory's reports of homelessness, her parents' drug usage, and incidents of domestic violence. Mallory also testified and corroborated the DSS allegations of drug usage, homelessness, theft, inadequate education, and domestic violence. She asked that she not be returned to her parents' custody.

DSS then called Mallory's adult sister as a witness, who testified about Mallory's education setbacks and incidents of her parents' methamphetamine use, homelessness, thefts, and acts of domestic violence. A forensic examiner testified that Mallory gave similar accounts during an interview, and a teacher testified to Mallory's withdrawal from kindergarten for ten days of consecutive absences. Finally, a social worker testified to Mallory's educational deficiencies and Mother's refusal to allow remedial evaluations.

Mother testified in opposition to the petition. She denied

> all the allegations, leading the trial court to call a recess out of concern that Mother was on the verge of committing perjury. When proceedings resumed, Mother's counsel informed the trial court that her client had a sudden illness and had left to visit a doctor. The trial court proceeded with the hearing without Mother present and adjudicated Mallory neglected. At the disposition hearing on 23 September 2020, the trial court ordered that DSS maintain continued custody and that neither parent have visitation without filing a motion and obtaining an order from the court. The trial court entered a written adjudication and disposition order on 13 January 2021.

In re M.J., 2021-NCCOA-600, ¶¶ 4-11 (unpublished).

¶ 3 Mother appealed the first adjudication and disposition orders, leading us to vacate and remand the adjudication order for further findings. *Id.* ¶ 20. On remand, the trial court entered another adjudication order adjudicating Mallory neglected based on the existing record.

¶ 4 On 22 November 2021, the trial court conducted a disposition hearing attended by all parties. Mother testified at the hearing, telling the trial court that her grandfather was "100 percent Cherokee." When asked if she herself was a member or citizen of any tribe, Mother testified "my mother said that . . . my grandfather was 100 percent Cherokee Indian. . . . [Am I] [a] member or citizen [of any tribe], no. I mean I never registered if that is what you're asking." Then, when asked if Mallory was a member of any tribe, Mother responded "no." Mother subsequently left the

hearing without informing the trial court or counsel. The trial court took judicial notice of a prior order finding that Mother was not a registered member of any tribe.

¶ 5 The trial court entered a disposition order on 29 November 2021. The order includes findings that Mallory is not an Indian child subject to ICWA and that the sole indication of any tribal heritage came from Mother's unreliable testimony. The order also concluded that it was contrary to Mallory's best interests to have visitation with Mother. Mother appeals.

II. ANALYSIS

¶ 6 Mother presents two principal arguments: (1) the trial court failed to comply with its burden under ICWA to ensure Mallory is not an Indian child subject to the Act; and (2) the trial court abused its discretion in denying Mother visitation. We hold that Mother has failed to demonstrate error under either theory.

A. ICWA

¶ 7 The ICWA compels a trial court in involuntary child custody matters to investigate a child's membership in a tribe if it has "reason to know" the minor is an Indian child based on information "indicating that the child is an Indian child." 25 C.F.R. § 23.107 (2022). It is not enough that a relative possess Native American heritage, as ICWA is concerned only with "(1) [w]hether the child is a citizen of a Tribe; or (2) whether the child's *parent* is a citizen of the Tribe and the child is also eligible for citizenship." *In re M.L.B.*, 377 N.C. 335, 2021-NCSC-51, ¶ 16 (emphasis

added). As a result, "[t]he inquiry is not based on the race of the child, but rather indications that the child and her parent(s) may have a *political* affiliation with a Tribe." *Id.* (emphasis added) (citations and quotation marks omitted). In short, "Indian heritage, which is racial, cultural, or hereditary does not indicate Indian tribe membership, which is political. Thus, these statements [of Indian heritage] do not provide reason to know that [a juvenile] is an Indian child under [ICWA]." *In re C.C.G.*, 380 N.C. 23, 2022-NCSC-3, ¶ 19 (citations omitted).

¶ 8 Mother contends that her testimony concerning Mallory's great-grandfather's heritage gave the trial court "reason to know" that Mallory was an Indian child such that further investigation was required under ICWA. Mother's argument fails because *In re M.L.B.* and *In re C.C.G.*, which involved sufficiently analogous facts, squarely control to the contrary. Mother affirmatively testified that neither she nor Mallory was a member of any tribe, and the trial court took judicial notice, without objection, of a prior finding that Mother was not a tribal member. Because the record shows that neither Mallory nor Mother was a citizen or member of any tribe, the trial court, after accurately reciting and applying the requirements of the statute, properly found that ICWA did not apply. *See In re M.L.B.*, ¶ 16. Assuming that Mallory's great-grandfather was of Cherokee heritage, that fact did not provide the trial court with reason to know Mallory is an Indian child in the face of all the other evidence, as information suggesting political membership of a parent triggers ICWA, and the

evidence before the trial court was to the contrary. *In re C.C.G.*, ¶ 19.2

B. Visitation

¶ 9 We apply the abuse of discretion standard to dispositional orders of visitation. *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). These hearings are informal, and the Rules of Evidence are relaxed; a trial court may rely on and incorporate into its findings written reports submitted by the parties. *In re K.W.*, 272 N.C. App. 487, 492, 846 S.E.2d 584, 589 (2020). A trial court may prohibit visitation if it determines visitation is contrary to the best interests of the child. N.C. Gen. Stat. § 7B-905.1(a) (2021).

¶ 10 Here, the trial court found as follows:

> 24. [Mother] has failed to make herself available to the agency for updates to be obtained about her current status. There is no information available on any current services that [Mother] is participating in.
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> . . . .
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> 30. [Mallory] has expressed fear of in-person visitation, specifically stating her concern about her ability to manage her Mother's behaviors during visits. [Mallory] has also expressed fear that her Mother would attempt to take her away from DSS if visits resumed.

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[2] In arguing blood relation suffices to trigger ICWA, Mother relies on a case from Colorado's intermediate appellate court that was recently reversed by that state's supreme court. *People ex rel. My.K.M.*, 491 P.3d 495, 500, 2021 COA 33M (Col. Ct. App. 2021), *overruled by People v. V.K.L.*, 512 P.3d 132, 142, 22 CO 35 ¶ 31 (Col. 2022). Needless to say, we are bound by our Supreme Court's decisions in *M.L.B.* and *C.C.G.*, not a reversed decision from Colorado's intermediate appellate court.

. . . .

34. . . . [Mother] has continued to deny that any conduct she engaged in while [Mallory] was in her care was neglectful or inappropriate. These behaviors included domestic violence in [Mallory's] presence, substance abuse in [Mallory's] presence, and failing to provide [Mallory] with a minimally adequate living arrangement or an education.

35. If [Mother] will not accept that she needs to change anything whatsoever about her parenting of [Mallory], services which are intended to correct the neglectful behaviors or change the circumstances of neglect will not benefit her.

36. [Mother] has been aggressive in her interactions with FCDSS staff and during court proceedings. . . .

37. Social Work Supervisor Stefanie Johnson also testified that [Mother] engaged in disruptive conduct during a Permanency Planning Review Meeting for [Mallory] which was held within the last week.

38. FCDSS has made efforts to obtain a Parenting Capacity Evaluation for [Mother] . . . . [Mother] did not cooperate and the PCE was not completed.

. . . .

43. [Mallory] has consistently stated she does not want to live with her parents or visit with them because she does not feel safe. [Mallory] however has expressed at times a desire to have a relationship with her parents.

. . . .

45. . . . [B]oth FCDSS and the GAL recommended that [Mother] not be awarded visitation or contact with [Mallory].

> . . . .
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> 58. On November 6, 2021, [Mallory] informed the GAL that she was not sure she wanted to resume any contact with her parents. [Mallory] shared that she worries about how to handle her Mother's extreme emotions . . . . She fears her parents will overreact and try to take her away if she saw them in person.
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> 63. [Mallory] is not ready to resume in person visits with her parents. Given her Mother's volatile behavior, it is not reasonable to expect an 11-year-old child to be responsible for regulating the behavior of a parent during a visit or phone call.
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> 64. The Mother has engaged in disruptive, inappropriate behavior during court proceedings and meetings. She has engaged in inappropriate communications with professionals connected to the case . . . .
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> 65. The GAL has not been to [Mother's] home because she fears for her personal safety in the parents' home.
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> 66. As recently as this month, [Mallory] has expressed fear of her parents taking her away and worried about her ability to manage her Mother's conduct during visitation.

¶ 11 Mother only challenges findings of fact 58 and 66. These findings, however, are adequately supported by the evidence. They are either directly adapted from or supported by findings in the GAL report, and the trial court is permitted to incorporate that report into its findings at the disposition stage. *In re K.W.*, 272 N.C. App. at 492, 846 S.E.2d at 589. These findings, coupled with the remaining unchallenged findings, are sufficient to support the trial court's discretionary decision

to deny visitation. Mother demonstrated volatile behavior throughout the proceeding, both in and out of court; she left the disposition hearing without warning or notice to the trial court, her counsel, or the other parties; she continues to believe that her neglectful conduct (domestic violence, drug use, and failure to provide housing and education) was appropriate, notwithstanding her completion of parenting, drug treatment, and domestic violence programs; Mother's conduct has frightened not only Mallory but the GAL; Mallory is afraid Mother will try and abduct her; and both the GAL and DSS recommend disallowing visitation. These findings collectively support a reasoned decision to deny Mother visitation, and Mother's argument that some evidence may have supported some visitation[3] is not sufficient to demonstrate an abuse of discretion. *See, e.g., Everette v. Collins*, 176 N.C. App. 168, 170, 625 S.E.2d 796, 798 (2006) (noting that a trial court's supported findings are binding on appeal even when evidence in the record would support a contrary finding).

III. CONCLUSION

¶ 12 For the foregoing reasons, we hold the trial court complied with its obligations under ICWA and did not abuse its discretion in denying Mother visitation. The trial court's adjudication and disposition orders are affirmed.

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[3] For example, Mother argues that her completion of substance abuse treatment, parenting education, and domestic violence education demonstrate she is ready for visitation. Mother overlooks the trial court's unchallenged findings establishing that these programs did not improve Mother's behavior or positively impact her conduct.

AFFIRMED.

Judges DIETZ and JACKSON concur.

Report per Rule 30(e).