IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-25

Filed 3 October 2023

Robeson County, No. 14JT356

IN THE MATTER OF: M.L.B.

Appeal by respondent from order entered 23 September 2022 by Judge William J. Moore in Robeson County District Court. Heard in the Court of Appeals 6 September 2023.

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

Administrative Office of the Courts, by Guardian ad Litem Appellate Counsel Matthew D. Wunsche, for Guardian ad Litem.

Office of the Parent Defender, Wendy C. Sotolongo by Assistant Parent Defender Jacky L. Brammer, for the respondent-appellant.

TYSON, Judge.

Respondent-father ("Respondent") appeals from an order terminating his parental rights. We vacate and remand.

I. Background

Respondent is the biological father of "Mary," a fourteen-year-old female. *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of the juvenile).

The facts underlying this appeal are set out in greater detail in the Supreme Court of North Carolina's prior opinion. *See In re M.L.B.*, 377 N.C. 335, 857 S.E.2d

101 (2021). The pertinent facts are as follows:

The Robeson County Department of Social Services ("DSS") filed a petition on 6 May 2016 alleging then five-year-old Mary was neglected because of substance abuse and domestic violence by respondent parents. The district court adjudicated Mary as neglected on 28 April 2015.

The district court found neither Respondent nor Mary's mother had made reasonable progress with their case plan. Both Respondent's and Mary's mother's parental rights were terminated on 18 March 2020. Respondent appealed.

Our Supreme Court held, *inter alia*: the district court failed to make an inquiry into whether or not Mary was an Indian Child during the termination hearing. *Id.* at 341-42, 857 S.E.2d at 105. The Supreme Court reversed and remanded the 18 March 2020 termination order for the trial court to make an Indian Child Welfare Act ("ICWA") inquiry. *Id.*

Upon remand, the district court held a hearing wherein social worker Rolanda Collins testified DSS had sent inquiries to three Cherokee Tribes and one Tuscarora Tribe. Two of the Cherokee Tribes and the Tuscarora Tribe responded neither of the respondent parents were enrolled in their tribal registries. One Cherokee Tribe did not respond, despite multiple DSS' attempts to contact them. The trial court terminated both of Respondent's and Mary's mother's parental eights by order entered 23 September 2022. Respondent appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7B-1001(a)(7) (2021).

III. Issues

Respondent argues the trial court erred by: (1) failing to make a complete ICWA inquiry; and, (2) terminating his parental rights for failure to make reasonable progress, neglect, and willful failure to pay a reasonable portion of the cost of care.

IV. Standard of Review

The issue of whether a trial court complied with ICWA requirements is reviewed *de novo*. *In re A.P.*, 260 N.C. App. 540, 542-46, 818 S.E.2d 396, 398-400 (2018).

V. ICWA Inquiry

Respondent argues the termination should not have proceeded without DSS requesting assistance from the Bureau of Indian Affairs with the Cherokee Tribe, which failed to respond to DSS' multiple notices. Our Supreme Court reversed the prior termination and remanded with the mandate to "comply with the requirements of ICWA." *In re M.L.B.*, 377 N.C. at 342, 857 S.E.2d at 105.

An "Indian child" is defined in the United States Code 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[.]" 25 U.S.C. § 1903(4) (2018). This 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. *In re A.D.L.*, 169 N.C. App. 701, 708, 612 S.E.2d 639, 644 (2005).

The burden rests upon DSS and 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." *In re L.W.S.*, 255 N.C. App. 296, 298, nn 3-4, 804 S.E.2d 816, 819, nn3-4 (2017). ICWA requires when the court "knows or 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[.]" 25 C.F.R. § 23.107(a), (b)(1)-(2) (2023). Federal regulations require a court to "[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 [being] an 'Indian child[.]'" 25 C.F.R. § 23.107(b)(2).

ICWA provides, notwithstanding the completion of custody proceedings, if the provisions of ICWA were violated, "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[.]" 25 U.S.C. § 1914 (2018).

This Court has required social service agencies to send notice to the claimed tribes rather than risk the trial court's orders being voided in the future, when claims of a minor's Indian heritage arise, even where it may be unlikely the juvenile is an "Indian child." *See In re A.R.*, 227 N.C. App. 518, 524-25, 742 S.E.2d 629, 634 (2013); *In re C.P.*, 181 N.C. App. 698, 702, 641 S.E.2d 13, 16 (2007).

A. ICWA Requirements

Congress enacted ICWA 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." 25 U.S.C. § 1902 (2018).

ICWA states, *inter alia*:

> In an involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party is 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.

25 U.S.C. § 1912(a) (2018).

Three federally recognized Cherokee tribes exist: The Eastern Band of Cherokee Indians, the Cherokee Nation, and the United Keetoowah Band of the Cherokee Indians. The record is silent as to which of the three Cherokee tribes did not respond. The determination for enrolled membership in a tribe is left to the "sole jurisdiction of the tribe, and state courts cannot substitute their own determination regarding a child's membership for that of the tribe." *In re E.J.B.*, 375 N.C. 95, 102,

846 S.E.2d 472, 476 (2020) (citing 25 C.F.R. § 23.105(c)).

Our Supreme Court in *In re E.J.B.* required DSS to "first seek assistance from the Bureau of Indian Affairs" when a tribe failed to respond to multiple written requests. *Id.* (citation omitted) Only after the tribe and Bureau of Indian Affairs have failed to respond to multiple requests can a State court make its own determination. *Id.* (citation omitted). This notice must be sent to the appropriate regional director of the Bureau of Indian Affairs. *Id.*

B. Proceedings on Prior Remand

On remand, DSS inquired of respondent parents about Mary's heritage, who responded Mary "was Native American, specifically Cherokee and Tuscarora."

Upon remand, the testifying social worker testified:

> [DSS Attorney]: In regards to this minor child, do you have any information or indication that any Native American (inaudible) Child Welfare Act would apply?
>
> [DSS Social Worker]: No, ma'am; we do not have information that she is.
>
> [DSS Attorney]: (Inaudible) have the respondent parents indicated Native American heritage of a federally recognized tribe?
>
> [DSS Social Worker]: Yes, ma'am.
>
> [DSS Attorney]: Did you send out letters in regards to that information?
>
> [DSS Social Worker]: Yes, ma'am. My supervisor did send those out to the Cherokee Nation and one other. I have the letters, and they were not found in the register as Native American.

The trial court found:

> That the Respondent Parent's indicated that the child was Native American, specifically Cherokee and Tuscarora. That upon learning that information the Department did send letters to all Cherokee Tribes and to the Tuscarora to inquire of the status of the child. The Department received letters from two of the three Cherokee Tribes and the Tuscarora Tribe and the child was not eligible for enrollment in either. The third Cherokee Tribe has failed after multiple attempts to respond to the Department.

Respondent argues the trial court erred by continuing termination proceedings and determining ICWA did not apply before hearing from one Cherokee Tribe and when DSS had not contacted the appropriate regional director of the Bureau of Indian Affairs. Respondent cites *In re E.J.B.*, wherein our Supreme Court held: "If a tribe fails to respond, the trial court must seek assistance from the Bureau of Indian Affairs prior to making its own independent determination." *Id.* at 106, 846 S.E.2d at 479 (citation omitted).

DSS and the Guardian Ad Litem argue this provision in *In re E.J.B.* does not comport with the Supreme Court of North Carolina's more recent case in *In re C.C.G.*, 380 N.C. 23, 39-31 868 S.E.2d 38, 43-45 (2022). The Supreme Court examined three DSS documents responding to potential ICWA applicability with a "no," but stating there was a "possible Cherokee" relationship on the mother's side. *Id.* at 29, 868 S.E.2d at 43. Our Supreme Court concluded this reference did not constitute a sufficient reason for the district court to know the child was an Indian child. *Id.* at 31, 868 S.E.2d at 45.

However, the issue in *In re C.C.G.* involves a determination without notification to the tribes. Nowhere in *In re C.C.G.* did our Supreme Court cite or repudiate its holding in the case of *In re E.J.B.*. *In re E.J.B.* requires DSS to contact the Director of the Bureau of Indian Affairs when a tribe fails to respond to their notification. *In re E.J.B.*, 375 N.C. at 106, 846 S.E.2d at 479 (citation omitted). DSS failed to comply with that requirement for the tribe, which failed to respond.

VI. Conclusion

The order terminating Respondent's parental rights is vacated. We remand this matter again to the trial court to issue an order requiring that a statutory notice be sent to the appropriate regional director of the Bureau of Indian Affairs for the Cherokee Tribe, from which DSS did not receive a response.

In light of our decision, we need not reach Respondent's remaining arguments. *It is so ordered.*

VACATED AND REMANDED.

Judges CARPENTER and GORE concur.

Report per Rule 30(e).