IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-574

Filed 19 December 2023

McDowell County, No. 21 JT 88

IN THE MATTER OF: L.A.S.

Appeal by respondent-mother from order entered 9 March 2023 by Judge Ellen M. Shelley in District Court, McDowell County. Heard in the Court of Appeals 20 November 2023.

Batch, Poore, and Williams, PC, by Sydney J. Batch, for respondent-appellant-mother.

Aaron G. Walker for McDowell County DSS.

Smith Law, by Jackson W. Moore, Jr., for the Guardian ad Litem.

PER CURIAM.

Respondent-mother appeals from the trial court's judgment and order terminating her parental rights to her daughter Lilly.[1] Respondent-mother contends the trial court lacked subject matter jurisdiction because it failed to comply with the requirements of the Indian Child Welfare Act ("ICWA"). For the following reasons,

[1] A pseudonym is used to protect the identity of the minor child.

we affirm the trial court's order.

I. Background

Respondent-mother gave birth to Lilly on 22 July 2019. Lilly tested positive for THC at birth, and respondent-mother tested positive for THC, amphetamines, and methamphetamines. While Lilly was in the NICU, respondent-parents did not visit, and the hospital had difficulty contacting respondent-mother. When Lilly was released from the hospital, it was recommended that Lilly receive numerous services, but the parents did not engage with the services.

On 21 May 2021, while living in McDowell County, respondent-parents dropped Lilly off with a nonrelative caregiver and asked her to care for Lilly until respondent-mother was able to find a homeless shelter for them to live in. On 8 June 2021, McDowell County Department of Social Services ("DSS") received a report that Lilly was left with a babysitter and needed medical care, but respondent-parents were unavailable to consent to Lilly's medical treatment. The same day, a social worker met with respondent-parents; during the home visit, both parents appeared to be under the influence. During their conversation, respondent-mother admitted to using methamphetamines and marijuana two weeks prior. Respondent-mother also discussed some of Lilly's developmental challenges, but stated she was not worried about them. When the social worker asked respondent-parents what their long-term plan was to care for Lilly, neither parent could describe what that plan would look like.

Respondent-mother agreed to sign a safety plan allowing Lilly to remain in the temporary safety placement, but when DSS attempted to reach respondent-mother to consent to medical treatment for Lilly, she did not respond. On 29 June 2021, the social worker met with respondent-mother who admitted that she told respondent-father to leave after a domestic violence incident the night prior, and the domestic violence had begun four years ago. Respondent-mother further admitted that she continued to use drugs. Due to ongoing concerns of domestic violence, substance abuse, homelessness, and failure to meet Lilly's needs, DSS filed a juvenile petition.

On 1 July 2021, DSS filed a petition alleging that Lilly was a neglected juvenile. DSS assumed nonsecure custody of Lilly and placed her in foster care. The trial court entered a nonsecure custody order on 9 July 2021 finding that Lilly was not a member of a state recognized tribe.

At a pre-adjudication hearing held on 4 November 2021, respondent-mother informed the court that her grandfather was Cherokee. At the conclusion of the hearing, the trial court ordered DSS to inquire with the Eastern and Western Band of the Cherokee Indian tribe regarding Lilly's status. On 3 February 2022, DSS sent an ICWA notice to the Cherokee Nation. DSS received a non-membership letter, dated 10 February 2022, from the Cherokee Nation, indicating Lilly was not an Indian child and that the Cherokee Nation had no legal standing to intervene. At the next nonsecure custody hearing in February 2022, the trial court found that Lilly was not a member of a state recognized tribe.

After a number of continuances, a hearing on adjudication and disposition was held on 14 April 2022. At the conclusion of that hearing, Lilly was adjudicated neglected, and respondent-mother was ordered to complete several court ordered services, including a clinical assessment, substance abuse treatment, maintaining sobriety, submitting to random drug screens, and maintaining appropriate housing, employment, income, and transportation. The trial court also suspended respondent-parents' visitation until the parents began to "aggressively comply with their case plans." The trial court did not address or revisit whether Lilly was a member of a state recognized tribe at this hearing.

Respondent-mother completed a mental health assessment and ten group sessions but did not submit to any drug screens. Respondent-mother also admitted to using methamphetamines on 20 April, 3 May, 10 June, and 1 July 2022.

At a 28 July 2022 permanency planning hearing, after finding that respondent-parents failed to comply with their court-ordered services, the trial court made Lilly's primary plan adoption with a secondary plan of reunification. On 25 January 2023, DSS filed a motion to terminate respondent-parents' parental rights to Lilly. The motion alleged five different grounds to terminate parental rights.

The trial court conducted a hearing on the motion to terminate parental rights on 9 March 2023. Respondent-parents were not present at the hearing. A social worker testified at the hearing and several exhibits were admitted into evidence. At the conclusion of evidence, the trial court concluded that grounds existed to terminate

respondent-parents' rights and that it was in Lilly's best interests to do so. Following the hearing, the trial court entered an order terminating respondent-parents' parental rights to Lilly. Respondent-mother filed notice of appeal on 4 April 2023.

On 21 September 2023, the trial court conducted a post-termination of parental rights hearing. The trial court found that on 11 August 2023, DSS mailed additional tribal notification letters and copies of the juvenile petition to three tribes, identified as "Cherokee Nation", "Eastern Band of Cherokee Indians", and "United Keetoowah Band of Cherokee Indians." The trial court also found that DSS sent letters to the Bureau of Indian Affairs Child Welfare Services requesting assistance to determine membership eligibility.

On 22 August 2023, the Bureau of Indian Affairs responded to DSS with a letter identifying the appropriate tribes to contact and notify were the Eastern Band of Cherokee Indians, Cherokee Nation, and United Keetoowah Band of Cherokee Indians in Oklahoma. DSS received letters from the Eastern Band of Cherokee Indians, the Cherokee Nation, and the United Keetoowah Band, each stating that Lilly was neither registered nor eligible to register as a member of the respective tribe and that Lilly was not considered an Indian child.

Based on these findings, the trial court concluded that DSS had complied with ICWA notification requirements and that there was "sufficient, credible evidence . . . that the juvenile is not an Indian Child as defined by the Indian Child Welfare Act, 25 U.S.C. § 1912." The trial court ordered custody of Lilly to continue

with DSS and decreed that Lilly was not an Indian child and that the ICWA did not apply to her and subsequent custody or adoption proceedings.

II. Discussion

Respondent-mother contends the trial court did not have subject matter jurisdiction to terminate parental rights because it failed to comply with the requirements of the ICWA. We disagree.

"Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]" *In re J.M.*, 377 N.C. 298, 303 (2021) (citing *In re T.R.P.*, 360 N.C. 588, 590 (2006)).

The ICWA was enacted 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 (2012). Additionally, pursuant to 25 C.F.R. § 23.107(a),

> State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding[.] State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

25 C.F.R. § 23.107(a) (2016).

Our Supreme Court recently held that prior noncompliance with the ICWA can

be cured in the course of post-termination review hearings if the trial court ensures that DSS exercises due diligence in contacting and working with Indian tribes. *In re D.J.*, 378 N.C. 565, 571–75 (2021). In *In re D.J.*, the mother told Orange County DSS ("OCDSS") she had Cherokee and Iroquois heritage. *Id.* at 572. OCDSS sent ICWA notices to the Eastern Band of Cherokee Indians and notifications to two other state-recognized tribes, receiving non-membership letters in return from each tribe. *Id.*

After the case was transferred from the foster care unit to the adoption unit of OCDSS, OCDSS officials became aware that the notifications did not comport with ICWA requirements. *Id.* OCDSS subsequently "mailed additional Tribal Notification Letters, including Consent to Explore American Indian Heritage, and copies of the Juvenile Petition" to "the nine tribes identified as 'Iroquois' " and "the three tribes identified as 'Cherokee'[.]" *Id.* OCDSS received letters of the juvenile's non-eligibility status from eight of the nine tribes identified as "Iroquois" and from the three tribes identified as "Cherokee." *Id.* at 572–74. OCDSS additionally sent a letter to the Bureau of Indian Affairs Child Welfare Services requesting assistance in determining eligibility; the Bureau responded with an acknowledgment of OCDSS efforts, and although two tribes had not responded, OCDSS had "done due diligence and completed [its] ICWA responsibilities." *Id.* at 573.

Based on the foregoing, our Supreme Court stated

> after ensuring DSS's due diligence in its compliance with the notice requirements of 25 U.S.C. § 1912(a), albeit post-termination, the trial court concluded that [the juvenile] is

> *not an Indian child*. Thus, we need not address whether and what remedy exists for noncompliance with 25 U.S.C. § 1912(a) in a child-custody proceeding involving an Indian child as defined by 25 U.S.C. § 1912. In this matter, any error by the trial court on account of its belated compliance with the ICWA is not prejudicial.

Id. at 575 (emphasis in original).

This case presents a similar set of facts and procedural history. Like in *In re D.J.*, the trial court conducted a review hearing following termination of respondent-mother's parental rights. At the hearing, the trial court received evidence that DSS had sent letters to the three "Cherokee" tribes, as well as a letter to the Bureau of Indian Affairs Child Welfare Services to request assistance in determining eligibility. DSS received letters from each tribe confirming that Lilly was not registered nor eligible to be registered and a letter from the Bureau confirming the three tribes that needed to be contacted. These efforts were substantially similar to those our Supreme Court affirmed in *In re D.J.* There is sufficient credible evidence in the record to conclude that Lilly is not an Indian child for purposes of the ICWA, and any error by the trial court on account of its belated compliance with the ICWA is not prejudicial.

III. Conclusion

For the foregoing reasons, we affirm the termination order.

AFFIRMED.

Panel Consisting of: Judges ARROWOOD, HAMPSON, and GRIFFIN.

Report per Rule 30(e).