IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-424

No. COA21-625

Filed 21 June 2022

Surry County, No. 17JT102

IN THE MATTER OF N.C.-L.L.S., A Minor Child.

Appeal by respondent from judgment entered 26 July 2021 by Judge Marion M. Boone in Surry County District Court. Heard in the Court of Appeals 11 May 2022.

BJK Legal, by Benjamin J. Kull, for the respondent-appellant father.

The Law Office of Partin & Cheek, PLLC, by R. Blake Cheek, for petitioner-appellee Surry County Department of Social Services.

Administrative Offices of the Courts, by GAL Appellate Council James N. Freeman, Jr., for guardian ad litem.

TYSON, Judge.

¶ 1 Respondent-father ("Respondent") appeals from an order terminating his parental rights. We affirm.

I. Background

¶ 2 Respondent is the biological father of "Nicki." (pursuant to N.C. R. App. P.

42(b), a pseudonym is used to protect the identity of the juvenile).

¶ 3 Nicki's mother suffers from mental illness and was involuntarily committed on 12 December 2017. Surry County Department of Social Services ("DSS") filed a petition on 14 December 2017 alleging neglect. On 12 July 2018, the trial court adjudicated Nicki as a neglected juvenile and continued her placement with DSS. Nicki's mother relinquished her parental rights on 11 December 2018.

¶ 4 DSS petitioned to terminate Respondent's parental rights on 4 February 2021. Respondent's termination hearing was held 5 May 2021. At the beginning of the hearing, DSS' counsel requested the court to address whether Indian Child Welfare Act ("ICWA") issues were present. 25 U.S.C. § 1912 (2018); 25 C.F.R. § 23.107(b)(2) (2022).

¶ 5 Respondent told the court "My stepdad has always told me that my dad was a Native American." Respondent further stated he is "still trying to ascertain his [father's] specific identity," and he was unaware of any specific tribe with which his family may be affiliated. DSS' counsel offered, and the court accepted into evidence a copy of Respondent's AncestryDNA kit test results. Respondent's DNA result estimated 20% of his heritage was from "Indigenous Americas-Mexico" and 2% from "Indigenous Americas-Yucatan Peninsula." The trial court found this result was not "membership, … in a federally recognized tribe or something else" and held nothing had been produced tending to show an ICWA issue in the hearing.

¶ 6 The trial court entered separate termination and adjudication orders terminating Respondent's parental rights. Respondent appeals.

II. Jurisdiction

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

III. Issues

¶ 8 Respondent argues the trial court erred by: (1) not complying with N.C. Gen. Stat. § 7B-1101; (2) ruling ICWA requires proof of membership to trigger the act's protections; and, (3) ruling ICWA was not invoked where Respondent testified Nicki may be of Indian descent.

IV. Standard of Review

¶ 9 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. N.C. Gen. Stat. § 7B-1101

¶ 10 Respondent argues the trial court lacked subject matter jurisdiction to terminate his parental rights by failing to comply with the requirements of N.C. Gen. Stat. § 7B-1101 (2021) by failing to make an explicit finding that it had jurisdiction under N.C. Gen. Stat. § 50A-201 (2021).

¶ 11 N.C. Gen. Stat. § 7B-1101 confers a trial court's subject matter jurisdiction over

a petition to terminate parental rights and provides, *inter alia*:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent.

N.C. Gen. Stat. §7B-1101.

¶ 12 N.C. Gen. Stat. § 50A-201 provides:

> [A] court of this State has jurisdiction to make an initial child-custody determination only if:
>
> > (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

N.C. Gen. Stat. § 50A-201.

¶ 13 In the case of *In re K.N.*, 378 N.C. 450, 456, 861 S.E.2d 847, 852 (2021), the respondent-father argued the trial court had lacked subject matter jurisdiction because the trial court had failed to include an explicit finding it possessed jurisdiction under N.C. Gen. Stat. § 50A-201. Our Supreme Court rejected this

argument, holding: "The trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites of the Act were satisfied when the court exercised jurisdiction." *Id.* (citation omitted).

¶ 14 Nicki and her mother had lived in North Carolina since her birth and she had resided with her foster parents in Surry County since 16 February 2018. The trial court possessed subject matter jurisdiction to enter the termination order. Respondent's argument is overruled.

VI. ICWA

¶ 15 Respondent argues the termination hearing should have been continued for further investigation into the applicability of ICWA to this petition. Respondent asserts the trial court erred in requiring proof of membership in a recognized tribe and in concluding Nicki was not an "Indian child" pursuant to 25 U.S.C. § 1912; 25 C.F.R. § 23.107(b)(2).

¶ 16 During the termination hearing, the following colloquy occurred:

> THE COURT: Okay. It's not – the query is not do you have any percentage of some Indian tribe. That's not the inquiry. Do you have any relatives – close relatives that are, to be blunt, card-carrying members of a particular tribe? And it's not any tribe. It's got to be a federally recognized tribe.
>
> [RESPONDENT]: Have you ever - - have you ever been shown a copy of my birth certificate? Because as of now,

> under father, it says unknown.
>
> THE COURT: Okay. But let's go back to the Indian [child] issue, because that's the only thing we're looking at right now.
>
> [RESPONDENT] My father's a Native American, but right now my birth certificate says unknown, and I'm still trying to ascertain his specific identity.
>
> THE COURT: Okay. Is he a member of a tribe?
>
> [RESPONDENT] He may be deceased. I'm not sure what his name is, but my blood is evident from the DNA test.
>
> THE COURT: But you're not aware of what, if any, tribe?
>
> [RESPONDENT]: That's correct, Your Honor. I haven't found my tribe yet.

¶ 17 The trial court later concluded:

> At this point, I do not think that we have an ICWA issue. I think that this is – certainly, we want to cover those bases and try to always discern whether or not ICWA applies, but I don't have evidence presented to me that it does in this case. So with that being addressed – and I wanted us to address that thoroughly and get anything introduced that would show an ICWA issue – I don't – that's not been presented. So as a result of that, I think that we are ready to go ahead and proceed with this hearing.

¶ 18 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).

¶ 19 ICWA states, in relevant part:

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

VII. Indian Child

¶ 20 An "Indian child" is defined in the 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). ICWA's 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).

¶ 21 Under current federal regulations, effective 12 December 2016, the burden rests upon 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, 804 S.E.2d 816, 819, nn. 3-4 (2017); 25 C.F.R. § 23.107(a), (b)(1)-(2) (2021).

¶ 22 Whether the evidence Respondent presented at the adjudication hearing should have caused the trial court to "know or to have reason to know" Nicki is an "Indian child" and trigger the notice requirement is the issue before us. 25 U.S.C. § 1912(a). The federal regulations implementing ICWA and promulgated in 2016, clearly states the court has reason to know an "Indian child" is involved if: "Any 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) (2021).

¶ 23 ICWA proscribes that once 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(b)(1). Federal law provides: "No . . . 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). Further, a court must "[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).

¶ 24 ICWA provides even after 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).

A. In re A.R.

¶ 25 In the case of *In re A.R.*, the respondent-father claimed that he had "a family connection to a registered Native American group" which consequently qualified his children for the protections under ICWA. *In re A.R.*, 227 N.C. App. 518, 523, 742 S.E.2d 629, 633 (2013). No further evidence on the juveniles' Indian heritage was presented and the trial court continued the proceedings without ordering any ICWA notification. *Id.* The trial court issued an adjudication and disposition order concluding the children were neglected and abused. *Id.* at 519, 742 S.E.2d at 631.

¶ 26 On appeal, this Court recognized that "it appears that the trial court had at least some reason to suspect that an Indian child may be involved" *Id.* at 524, 742 S.E.2d at 634. Further, this Court held that "[t]hough from the record before us we believe it unlikely that [the juveniles] are subject to the 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 524-25, 742 S.E.2d at 634.

B. In re C.P.

¶ 27 In the case of *In re C.P.,* the respondent-mother made the bare assertion that she and her children could possibly be eligible for membership with a band of Potawatomi Indians. *In re C.P.*, 181 N.C. App. 698, 702, 641 S.E.2d 13, 16 (2007). The trial court required the ICWA notice to be sent. *Id.* When the time required under ICWA had passed without response from the tribe, the trial court allowed two continuances before determining ICWA did not apply and resumed the proceedings. *Id.* at 703, 641 S.E.2d at 16-17.

¶ 28 On appeal, the respondent asserted error in the trial court's refusal to continue the proceedings until the tribe responded. *Id.* at 701, 641 S.E.2d at 15-16. This Court held the trial court had complied with ICWA where the length of time of the continuance following the notification letter exceeded ICWA requirements and the respondent had offered no additional evidence to sustain her burden to show ICWA further applied. *Id.* at 703, 641 S.E.2d at 17.

¶ 29 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 Indian heritage arise, even where it may be unlikely the juvenile is an "Indian child." *See In re A.R.*, 227 N.C. App. at 524-25, 742 S.E.2d at 634; *In re C.P.*, 181 N.C. App. at 702, 641 S.E.2d at 16.

¶ 30 Respondent claimed Indian ancestry based on his stepfather's bare statement

and his DNA test. Respondent's birth certificate does not name his biological father and Respondent does not assert any Indian heritage through his mother. However, when questioned Respondent did not assert he is a member of a federally-recognized tribe stating "I haven't found my tribe yet." Respondent's DNA test results indicated he was of indigenous Mexican ancestry. Presuming Respondent's DNA test results are accurate, no indigenous Mexican tribes are included in the registry of federally recognized tribes. *See* 85 Fed. Reg. 5462 (2021). During the trial court's inquiry, Respondent could not name any possible federally-recognized tribe he or any ancestors were possibly members of at the time of the hearing. The Court did not "know or have reason to know" Nicki is an "Indian child" under ICWA. 25 U.S.C. § 1912(a). Respondent's argument is overruled.

VIII. Conclusion

¶ 31 The trial court possessed jurisdiction pursuant to N.C. Gen. Stat. § 7B-1101. The findings of fact and conclusions thereon of Nicki's neglect in the order terminating Respondent's parental rights are supported by clear, cogent and convincing evidence.

¶ 32 The trial court did not err in concluding ICWA was not applicable to Respondent or Nicki. Respondent failed to challenge any of the findings or conclusions of law or to challenge any grounds asserted in the petition to terminate his parental rights. The trial court's conclusions to terminate Respondent's parental

rights to Nicki on the grounds asserted in the petition are affirmed. *It is so ordered.*

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).