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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-84

Filed 15 August 2023

Chatham County, No. 21-JT-3

IN THE MATTER OF: M.G.G.

Appeal by Respondent Father from Order entered 13 October 2022 by Judge Sherri Murrell in Chatham County District Court. Heard in the Court of Appeals 18 July 2023.

Jane R. Thompson for Stephenson & Fleming, LLP, for Petitioner-Appellee Chatham County Department of Social Services.

Richard Croutharmel for Respondent-Appellant Father.

Michelle F. Lynch for Guardian Ad Litem.

RIGGS, Judge.

Appellant-Father (“Father”) appeals from the trial court’s order terminating his parental rights to his minor child M.G.G. The trial court’s 13 October 2022 termination order was decided on statutory grounds of dependency pursuant to N.C. Gen. Stat. § 7B-1111(3), and prior involuntary termination of Father’s parental rights to another child pursuant to N.C. Gen. Stat. § 7B-1111(9). Father contends that the trial court erred by failing to comply with the statutory provisions under the Indian

Child Welfare Act (“ICWA”). Specifically, Father argues the trial court received evidence indicating M.G.G. might be an Indian child and failed to: (1) make the required statutory inquiries; and (2) establish, in the record, satisfactory evidence that ruled out M.G.G.’s status as an Indian child under the ICWA before entering a child custody order. After careful review, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Father is the biological father of M.G.G. (born in February 2021). Father and M.G.G.’s biological mother (“Mother”) never married. Although Mother was married to another man at the time of M.G.G.’s birth, Father established paternity of M.G.G. on 13 May 2021. M.G.G.’s parents have a history with Chatham County Department of Social Services (“DSS”) for allegations involving child neglect and substance abuse dating back to January 2019.

On 4 February 2021, DSS filed a petition to remove M.G.G. from his parents’ care on grounds of neglect and dependency. The trial court granted nonsecure custody to DSS in an order dated 4 February 2021, stating that “[b]ased on an inquiry of the petitioner, [t]he court finds [M.G.G.] is not an ‘Indian Child’ as defined in ICWA.” The court made an additional handwritten finding which indicated, “[a]bsent new information no additional action is required of the [DSS Director] under the ICWA.”

A year later on 24 February 2022, Father reported to the DSS foster care worker that he had “*some* American Indian heritage in his lineage” but could not

provide any details. Mother was also present at the time Father reported this information to DSS, and she disclosed that her father (maternal grandfather, “MGF”) is “100% full-blooded American Indian.” The DSS worker telephoned M.G.G.’s maternal grandmother (“MGM”) to inquire about the family’s American Indian lineage. MGM disclosed to the DSS worker that she and MGF “have Cherokee on their sides, but [Mother] certainly was not 1/16 Indian American and no one on either side of the families had ever registered or gotten [sic] their enrollment card or collected or used any benefits from the tribe.” On 24 February 2022, the DSS worker included the above investigative findings in her permanency planning hearing review report and submitted it to the court the same day.

On 4 April 2022, the trial court conducted a permanency planning review hearing and heard evidence from the DSS worker regarding Father’s progress towards reunification. The court acknowledged reviewing the DSS worker’s report and found it to be “credible and factually sufficient evidence to support” entry of the court’s permanency planning order, and admitted the report without objection. The court concluded that based on Father’s failed progress on his case plan for reunification with M.G.G., DSS was no longer required to work towards reunification; the court ordered DSS to file a petition for termination of Father’s parental rights. The court also concluded that M.G.G.’s pre-adoptive placement was compliant under the provisions of the ICWA.

At the termination hearing held on 8 September 2022, the court heard evidence

regarding DSS' petition for termination of Father's parental rights. The DSS foster care worker also testified at the hearing. After making findings on Father's substance abuse history and failure to make reasonable progress on his reunification case plan for M.G.G., the trial court concluded it was in M.G.G.'s best interest for Father's parental rights to be terminated.

Accordingly, on 13 October 2022, the trial court entered its order for termination of Father's parental rights and Father timely appealed.

On 13 July 2023, the trial court held a post-termination review hearing and addressed supplemental exhibits provided by DSS and relating to "membership in any of the three Cherokee Tribes recognized by the federal government." DSS sent notifications regarding the proceedings involving M.G.G. to several Cherokee Indian Tribes: the Eastern Band of Cherokee Indians (North Carolina), the Cherokee Nation (Oklahoma), and the United Keetoowah Band of Cherokee Indians in Oklahoma.¹ Although none of DSS letters are dated, a DSS supervisor was present at the post-termination hearing, and the court determined the ICWA notices were sent by DSS on 22 May 2023. DSS received return receipt verifications, confirming the ICWA notices were sent by registered mail. DSS received responses from all the Tribes, via mail and email, verifying that M.G.G. was not considered an Indian child as defined

¹ The Eastern Band of Cherokee Indians (North Carolina), the Cherokee Nation (Oklahoma), and the United Keetoowah Band of Cherokee Indians in Oklahoma, collectively, will be referred to as "the Tribes."

under the ICWA. On 14 July 2023, DSS filed a motion to supplement the record to consider “additional evidence related to whether . . . [M.G.G.] was an Indian Child under the ICWA.” DSS’s motion to supplement was granted, and the record has been properly supplemented.

II. ANALYSIS

A. Standard of Review

Father alleges that the trial court erred by not complying with the ICWA when it failed to inquire about M.G.G.’s potential status as an Indian child at the termination hearing. State courts have limited subject matter jurisdiction under the ICWA. 25 U.S.C. § 1911 (2021). This court reviews *de novo* issues on appeal involving questions of law and subject matter jurisdiction. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006); *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). Subject matter jurisdiction can be challenged at any time, at any stage in the proceedings, even after judgment has been entered. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). Father asserts the record demonstrates that the trial court failed to make the required inquiries under the ICWA and North Carolina precedent interpreting that statute to rule out M.G.G.’s status as an Indian child before entering a child custody order. Based on the record as supplemented, we disagree.

B. The Indian Child Welfare Act

Congress enacted the 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 which will reflect the unique values of Indian culture[.]” 26 U.S.C. § 1902 (2021). For the ICWA to apply, “a proceeding must first be determined to be a child custody proceeding as defined by the Act itself, and it must then be determined that the child in question is an Indian child of a federally recognized tribe.” *In re C.P.*, 181 N.C. App. 698, 701, 641 S.E.2d 13, 16 (2007). A “child custody proceeding,” as defined under the ICWA includes:

(i) “foster care placement” which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship;

(iii) “preadoptive placement” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

25 U.S.C. § 1903 (2021). An Indian child under the ICWA 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) (emphasis added).

For the inquiry into a child’s status as an Indian child, the burden rests upon state courts to ensure that “active efforts have been made to prevent the breakup of the Indian family” and that “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 nn. 3-4 (2017); *see also*, 25 C.F.R. § 23.120 (2021) (emphasis added). As it relates to notification requirements to tribal representatives for identification of potential Indian children, the ICWA provides:

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 . . .

In re C.P., 181 N.C. App. at 702, 641 S.E.2d at 16 (emphasis added). Should DSS not know which tribe to contact, or the tribe refuses to respond, “the trial court must seek assistance from the Bureau of Indian Affairs prior to making its own independent determination” regarding a juvenile’s status as an Indian child. *In re D.J.*, 378 N.C. 565, 571, 862 S.E.2d 766, 771 (2021).

In determining whether a child fits the criterion under the ICWA, the trial

court must inquire whether a participant in the child custody proceeding “knows or has reason to know that the child is an Indian child.” 25 C.F.R. § 23.107(a) (2021). “This inquiry is made at the commencement of the proceeding and all responses should be on the record.” 25 C.F.R. § 23.107(a). A trial court:

has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

- (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
- (2) 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;
- (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
- (4) The court is informed that the domicile or residence of the child, the child’s parent, or the child’s Indian custodian is on a reservation or in an Alaska Native village;
- (5) The court is informed that the child is or has been a ward of a Tribal court; or
- (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

25 C.F.R. § 23.107(c).

Further, the North Carolina Supreme Court has stated that:

If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine

that the child is or is not an ‘Indian child,’ the court must: confirm, by way of a 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 a 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)) (emphasis added). Importantly, the court is required 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).

At the commencement of this proceeding, the trial court did not know or have reason to know that M.G.G. was an Indian child for purposes of the ICWA, but that did not end our review for compliance with the ICWA. Even when a trial court does not have such knowledge at the commencement of the proceeding, after its initial inquiry, it can still come to “know[] or [have] reason to know that an Indian child is involved” when a participant in the proceeding informs the court of discovered information that indicates a child is an Indian child. 25 C.F.R § 23.107(c).

In this case, M.G.G. was removed from Father’s care on 4 February 2021, and the first pre-adjudication hearing for nonsecure custody was held the same day. At that hearing, the trial court entered findings in its order concluding that M.G.G. was not an Indian child and the ICWA did not apply. That same order included a provision which provided if DSS received “new information” regarding M.G.G.’s

status as an Indian child, then additional action would be required pursuant to the ICWA.

Prior to the trial court's post-termination hearings and the supplementation of the record before this panel, the record did not reflect that the trial court made the requisite inquiry pursuant to the ICWA before ordering DSS to file for termination of Father's parental rights and before terminating those rights. 25 C.F.R. § 23.107(a); *see also*, 25 U.S.C.A. § 1903. Rather, up through termination, the trial court appeared to make conclusory findings, based on the DSS worker's report at the review hearing, that M.G.G. was not subject to the ICWA. Nevertheless, pursuant to its authority under N.C. Gen. Stat. § 7B-908, the trial court conducted a post-termination hearing and accepted additional evidence on this question. Because on the supplemented record, "the determination of whether there is reason to know that [M.G.G.] is an Indian child can be made on the record, . . . we conclude that there is no reversible error." *In re C.C.G.*, 380 N.C. 23, 31, 868 S.E.2d 38, 44–45 (2022); *see also*, *In re A.L.*, 378 N.C. 396, 862 S.E.2d 163 (2021) (remanding to trial court due to lack of record evidence for ICWA compliance to determine reason to know requirement).

DSS's supplement to the record documents notification of M.G.G.'s status as a potential Indian child that was sent to the Tribes. Although none of the notices to the tribes are dated, each letter requests that the Tribes respond by 15 June 2023 as to M.G.G.'s status, which two of the Tribes did, and confirmed M.G.G. was not an

Indian child under the ICWA.² While it would have been preferable for the record to have been fully developed prior to the termination hearing, based on the supplement to the record, we cannot find any reversible error. And although Father contends in his brief the trial court failed to establish evidence addressing M.G.G.'s status under the ICWA, competent evidence now in the record demonstrates to the contrary. Each Cherokee tribe notified by DSS sent responses which confirmed M.G.G. is not an Indian child as defined under the ICWA. Father did not raise any issues other than compliance with the ICWA on appeal.

III. CONCLUSION

For the foregoing reasons, we affirm the 2022 Order Terminating Parental Rights by the trial court.

AFFIRMED.

Judges CARPENTER and WOOD concur.

Report per Rule 30(e).

² The response letter from the United Keetoowah Band of Cherokee Indians in Oklahoma was dated for 23 June 2023, and also confirmed M.G.G. is not an Indian child under the ICWA.