IN THE NEBRASKA COURT OF APPEALS

Case No. A-22-653

In re Interest of Manuel C. & Mateo S.

APPEAL FROM THE SEPARATE JUVENILE COURT
OF LANCASTER COUNTY, NEBRASKA

Honorable Shellie D. Sabata,
Judge of the Separate Juvenile Court
of Lancaster County, Nebraska

REPLY BRIEF OF APPELLANT
Amber Spencer

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STATEMENT OF THE BASIS OF JURISDICTION

Appellant incorporates by reference and reasserts her statement of jurisdiction contained in his original brief. Therefore, we reassert that jurisdiction is appropriate according to NEB. REV. STAT. § 43-2,106.01 (Reissue 2016). This is an appeal of the Separate Juvenile Court of Lancaster County's August 26, 2022 Order holding the minor children subject to this case are both not an "Indian child" as defined in the federal and Nebraska Indian Child Welfare Acts, and vacating that Court's August 25, 2022 Order granting the Red Lake Band of Chippewa Indians' Motion to Intervene. (T133-136). Appellant has timely perfected the appeal in accordance with Nebraska law.

In its Brief of Appellee, the Lancaster County Attorney argues the Separate Juvenile Court of Lancaster County's August 26, 2022 order is not a final, appealable order, and that the Court of Appeals is without jurisdiction. The State's argument in inapposite and more fully addressed in the Argument herein.

STATEMENT OF THE CASE

Appellant incorporates by reference and reasserts her statement of the case contained in her original brief.

REPLY ARGUMENT

I

APPELLEE INCORRECTLY ASSERTS THAT JURISDICTION IS NOT PROPER.

II

APPELLEE INCORRECTLY ASSERTS THAT THE JUVENILES ARE NOT INDIAN CHILDREN AS DEFINED IN THE FEDERAL AND NEBRASKA INDIAN CHILD WELFARE ACTS.

PROPOSITIONS OF LAW

I

We agree that, under the ICWA, enrollment is not a necessary condition of tribal membership. Although membership may be established through proof of enrollment, enrollment is not the exclusive test of membership.

Nelson v. Hunter, 132 Or. App. 361, 364 (1995)

II

The commentary to this portion of the Guidelines states, "This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria. *Cohen, Handbook of Federal Indian Law* 133 (1942)."

In re Junious M., 144 Cal. App. 3d 786, 793 (1983)

III

An order denying intervention in juvenile court proceedings is a final, appealable order.

In re Interest of Artamis G., 27 Neb.App. 135, 139 (2019).

IV

For a court to determine that some recognized tribal members, or persons eligible to become members, are not members of a tribe for purposes of the ICWA would interfere with the tribes' sovereign right to determine for themselves membership qualifications and classifications.

Matter of N.C.H., 311 Or. App. 102, 108 (2021)

V

The principal purposes of the Act are to promote the stability and security of Indian tribes by preventing further loss of their children; and to protect the best interests of Indian children by retaining their connection to their tribes.

In Re Baby Girl Doe, 262 Mont. 380, 388 (1993)

STATEMENT OF FACTS

Appellant incorporates by reference and reasserts her statement of the facts contained in her original brief.

REPLY ARGUMENT

I. APPELLEE INCORRECTLY ASSERTS THAT JURISDICTION IS NOT PROPER.

An order may be reviewed on appeal if it affects a substantial right made during a special proceeding. Neb. Rev. Stat. § 25-1902(1)(b). A proceeding before a juvenile court is a special proceeding for appellate purposes. *In re Interest of Brittany C.*, 13 Neb.App. 411, 418 (2005).

Appellee Lancaster County Attorney, on behalf of the State of Nebraska, asserts that the Separate Juvenile Court of Lancaster County's August 26, 2022 Order is not a final appealable order. The Lancaster County Attorney characterizes the August 26, 2022 Order as an order that determines only whether the federal and Nebraska Indian Child Welfare Acts (ICWA) apply to these proceedings and that alone does not affect a substantial right. According to the Lancaster County Attorney, the Court of Appeals is therefore without jurisdiction to hear this appeal, citing *In re Interest of Jassenia H.*, 291 Neb. 107 (2015). This argument is misplaced for several reasons.

First, unlike in *Jassenia H.*, the August 26, 2022 Order does more than determine whether ICWA applies to these proceedings. The August 26, 2022 Order also finally determines the Red Lake Band of

Chippewa Indians' motion to intervene as a party in these proceedings. Appellee Lancaster County Attorney does not address the Tribe's intervention in its Brief of Appellee.

An order denying intervention in juvenile court proceedings is a final, appealable order. *In re Interest of Artamis G.*, 27 Neb.App. 135, 139 (2019). See also *In re Interest of Enyce J.*, 291 Neb. 965 (2015) (concerning foster parents' ability to intervene); *In re Interest of Elias L.,* 277 Neb. 1023 (2009) (concerning Native American Tribe's ability to intervene); *In re Interest of Kayle C.*, 253 Neb. 685 (1998) (concerning grandparents' ability to intervene).

In *In re Interest of Elias L.*, the Nebraska Supreme Court heard the denial of the Ponca Tribe of Nebraska's motion to intervene in juvenile court proceedings. 277 Neb. 1023. The Court reversed and remanded the case because it held the juvenile court had improperly denied the Ponca Tribe's motion to intervene. Id., at 1031.

The denial of intervention in this case is an adjudicative and dispositive action that also contravenes implementation of the heightened protections ICWA affords. As is pointed out in the cross-appeal of Appellee Red Lake Band of Chippewa Indians (hereinafter "the Tribe"), ICWA states that "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, … the Indian child's tribe shall have a right to intervene *at any point* in the proceeding." 25 U.S.C. § 1911(c) (emphasis supplied); see also Neb. Rev. Stat. § 43-1504(3). The August 26, 2022 Order finally determines the Tribe's invocation of § 1911(c), and therefore the August 26, 2022 Order is a final, appealable order.

Appellee Lancaster County Attorney also argues that a motion to terminate parental rights had been pending before any information that ICWA could potentially apply and that, therefore, the State should have been allowed to proceed on their motion in spite of the allegations that ICWA may apply in the case. However, testimony from the Tribe indicated that as soon as the Tribe found out about the family they immediately tried to contact the contact the parties and intervene so they could fully participate in the matter. *See* (38:12-25, 39:1-5, 40:16-24, 41:5-6). Moreover, it was also presented by the Tribe

that it was a different proceeding prior to ICWA being enacted that caused the severance of Appellant and her family from the Tribe.

Again, the Tribe may intervene *at any point* of a termination of parenting rights proceedings. To not allow the Tribe to intervene at this point or any other in the proceeding would directly contravene ICWA.

Second, by denying that ICWA applied to the present case and not allowing the Red Lake Band of Chippewa Indians to intervene, the Separate Juvenile Court made a dispositive action as to whether or not Appellant or the Tribe had the ability to request the case be transferred to tribal jurisdiction and which would render a formal hearing on the termination of parental rights moot. The right to transfer to a tribal court was recognized by Congress when it enacted ICWA as a significant advantage for Indian children as the tribal court could provide both the parent and the children the recognition and implementation of Native American customs and traditions. *In re Interest of Jassenia H.*, 291 Neb. at 113–14. The request to transfer is a substantial right. Denying the application of ICWA and denying the Tribe's intervention affects Appellant's substantial rights. *See In re Interest of Brittany C.*, 13 Neb.App. at 412–13 (holding that an order that would ultimately bar a transfer to tribal court is a final, appealable order because it affected a substantial right). A denial of the tribe's intervention, due to the improper finding that ICWA does not apply, results in the inability to transfer this case which, therefore, affects Appellants substantial rights.

Third, in *Jassenia H.* the case was appealed before the juveniles therein had been adjudicated under Neb. Rev. Stat. § 43-247(3)(a). *Jassenia H.,* 291 Neb. at 115. Therefore in *Jassenia H.,* no action had yet been taken that would implement or contravene the heightened protection afforded by ICWA. *Id*. at 115-16. The present case has already been adjudicated and, furthermore, the denial that ICWA applies post-adjudication contravenes the heightened protections that would automatically take affect if it was properly found that ICWA did apply to the Indian children in the present case.

Fourth, the heightened protections that come with ICWA not being applied and implemented to the proceedings in the present post-adjudication case includes safeguards at a Motion to Terminate Parental Rights formal hearing. These protections include, *inter alia*, the requirement of active efforts as set out in 25 U.S.C. § 1912(d), and a higher burden of proof and the requirement of qualified expert testimony as set out in 25 U.S.C. § 1912(f). The above protections substantially affect Appellant's rights to ensure that any breakup of the Indian family is absolutely necessary. To deny the intervention of the Tribe and the protections of ICWA, when it is clear from the record Appellant is an Indian member of their Tribe, goes against the reasons that ICWA was enacted by Congress.

The finding that ICWA did not apply means the heightened protections are not in affect, which substantially changes the way in which a custody determination will proceed. The added protections of ICWA were specifically put in place to ensure that any breakup of the Indian family was absolutely necessary and with active efforts made to avoid the familial breakup if at all possible. Both the denial that ICWA applies and the denial of the Red Lake Band of Chippewa Indians intervention affect the substantial right the parent's or the Tribe's ability to request a transfer of jurisdiction to the tribal court, among other substantial rights.

Finally, Appellee Lancaster County Attorney's argument ignores significant changes to ICWA jurisprudence in recent years. Appellee Lancaster County Attorney cites *In re Adoption of Kenten H.*, 272 Neb. 846 (2007), for the proposition that the party seeking to invoke a provision of ICWA has the burden to show that ICWA applies to the proceeding. Appellee Lancaster County Attorney also cites *Jassenia H.* for the proposition that an order determining whether ICWA applies to a proceeding does not affect a substantial right.

Both *Kenten H.* and *Jassenia H.* were decided prior to when the United States Department of the Interior Bureau of Indian Affairs promulgated binding regulations implementing the federal ICWA. Indian Child Welfare Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016). The regulations became effective December 12, 2016. Id.

One of the regulations require state courts to ask each participant in a child-custody proceeding whether the participant knows or has reason to know that the child involved is an Indian child. 25 C.F.R. § 23.107(a). "Reason to know" a child is an Indian child is defined in the regulations at 25 C.F.R. § 23.107(c). 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 then must, confirm due diligence was made to work with the Tribe to verify whether the child is an Indian child, and treat the child as an Indian child unless and 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).

These regulations, therefore, effectively abrogate *Kenten H.*, in that they eliminate any burden of proof on the party seeking to invoke ICWA. The regulations instead create a presumption that ICWA applies upon a mere showing that there is reason to know a child may be an Indian child. Then they require the court to determine whether ICWA applies.

Jassenia H. held the order in that case finding ICWA did not apply was merely an advisory opinion, because the *Jassenia H.* Court believed the lower court could reverse that decision in future adjudicative or dispositive acts. 291 Neb. at 115. Under *Kenten H.*, perhaps this made sense, because a participant could potentially produce evidence that the children involved were Indian children, meeting the burden that ICWA applied. However under the binding 2016 ICWA regulations the determination of whether ICWA applies to the case is a final adjudicative and dispositive act. It therefore affects all of the rights Appellant would have if the Separate Juvenile Court had determined that the juvenile herein were Indian children, including, *inter alia*, the requirement of active efforts as set out in 25 U.S.C. § 1912(d), and a higher burden of proof and the requirement of qualified expert testimony as set out in 25 U.S.C. § 1912(f).

For all of the foregoing reasons, the August 26, 2022 Order affects a substantial right in a special proceedings, is therefore a final,

appealable order, and the Court of Appeals has jurisdiction to hear this appeal.

II. APPELLEE INCORRECTLY ASSERTS THAT THE TRIBE IS CLAIMING THE JUVENILES AS THEY ARE INDIAN CHILDREN OF THEIR TRIBE AND THE DOCUMENT IS NOT OFFICIAL GUIDELINES OR REGULATION.

Appellee incorrectly asserts that the tribe is claiming the children. The Red Lake Band of Chippewa Indians has relayed that Appellant is a member of the Tribe and that her children are eligible to be members. (T121-123, 24:20-25, 25:1-3, 27:5-10 E22:1, E23:1-2).

Furthermore, they have distinguished the relationship Appellant and her family have to the Tribe, the breakup of a prior Indian family that caused a severance of their ties, and how Appellant was able to reconnect with the Tribe. *See* (38:12-25, 39:1-5, 40:16-24, 41:5-6). By requesting intervention, the Tribe is wanting to ensure protection of their descendants and assure that the heightened protections provided by ICWA are in place.

Appellee Lancaster County Attorney also points to the document of Frequently Asked Questions to the Final Rule: Indian Child Welfare Act Proceedings (E24). This document is merely one of asked questions and is not a part of the actual guidelines or regulations.

What case law has made clear in references to the regulations and guidelines, as was also referenced in the Tribe's cross-appeal, is that only a Tribe can decide who is or is not a member of their tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 72 n.32 (1978); *see also Montana v. United States*, 450 U.S. 544, 564 (1981) (Indian tribes retain their inherent power to determine tribal membership….).

Moreover, *Matter of N.C.H.* holds that, "For a court to determine that some recognized tribal members, or persons eligible to become members, are not members of a tribe for purposes of the ICWA would interfere with the tribes' sovereign right to determine for themselves membership qualifications and classifications." 311 Or. App. 102, 108

(2021). The lower court in the present case has supplanted the Tribe's sovereign rights by not accepting the overwhelming evidence presented to them that Appellant is considered a member of the Tribe. This evidence included the testimony of a tribal official, the Tribes own Motion to Intervene, and the electronic correspondence between the State's County Attorney and the Tribe's attorney definitively show that Appellant is considered a member of the Red Lake Band of Chippewa Indians. (T121-123, 24:20-25, 25:1-3, 27:5-10 E22:1, E23:1-2). To deny the recognition that the Appellant is a tribal member interferes with the Tribe's rights as a sovereign nation.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Appellant's original brief, this court should reverse the determination of the lower court.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF WORD COUNT

I, Jacinta Dai-Klabunde, state that I prepared this document using Microsoft Word 2016 and that this brief complies with the typeface requirements of Neb. Ct. R. App. P. § 2-103, and contains 2,980 words not including this certification. The total word count for

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Certificate of Service

I hereby certify that on Thursday, December 29, 2022 I provided a true and correct copy of this *Appellant's Reply Brief* to the following:

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