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NEBRASKA SUPREME COURT
COURT OF APPEALS

CASE NO. A-22-653

IN THE NEBRASKA COURT OF APPEALS

IN THE INTEREST OF MANUEL C. AND MATEO S.

APPEAL FROM THE SEPARATE JUVENILE COURT
OF LANCASTER COUNTY, NEBRASKA
HONORABLE SHELLIE D. SABATA, JUVENILE JUDGE

BRIEF OF APPELLEE

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BASIS OF JURISDICTION

Appellee submits that there is no basis for jurisdiction. "In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. When an appellate court is without jurisdiction to act, the appeal must be dismissed. *In re Interset of Jassenia H.,* 291 Neb. 107, 112, 864 N.W.2d 242, 247 (2015). Although ICWA and NICWA have repercussions upon a child's welfare and the parent-child relationship, these consequences are not realized until some adjudicative or dispositive action is taken by the juvenile court. *Id*. at 115, 864 N.W.2d at 248. However, all the heightened protections afforded by ICWA and NICWA apply prospectively to future determinations in the proceeding. *Id.* at 115, 864 N.W.2d at 249. Until the court takes action to implement or contravene the heightened protections afforded by ICWA and NICWA in some fashion, we cannot conclude that the mere determination of applicability affects a substantial right. *Id.* at 116, 864 N.W.2d at 249.

In the present case, a motion to terminate parental rights is pending and has been pending since well before there was any information that ICWA could potentially apply. The State should have been allowed to proceed on that motion and then the Appellant should have filed an appeal at that time to determine whether ICWA standards should have been applied at the time of the termination proceedings. Appellant is not a surrogate for the tribe and does not have standing to raise issues on the tribe's behalf.

STATEMENT OF THE CASE

A. Nature of the Case

After a motion to terminate parental rights was filed, there was an assertion that ICWA applied. However, at the time of the hearing neither parent was an enrolled member in a federally recognized tribe.

B. Issues Tried in the Court Below

Whether ICWA applies when a tribe admits that the parent is not enrolled but wants to extend the benefits of membership for purposes of ICWA.

C. Issues Decided in the Court Below

The Court properly decided that ICWA did not apply at the time of the hearing.

D. Scope of Review

The Appellate Court's review is de novo on the record and reaches its conclusions independently of the Separate Juvenile Court's findings. *In re Interest*

of Diana M., 20 Neb. App. 472, 478 (2013). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Christopher R.*, 13 Neb. 748, 755 (2005).

PROPOSITIONS OF LAW

I.

In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. When an appellate court is without jurisdiction to act, the appeal must be dismissed. *In re Interset of Jassenia H.,* 291 Neb. 107, 112, 864 N.W.2d 242, 247 (2015).

II.

Although ICWA and NICWA have repercussions upon a child's welfare and the parent-child relationship, these consequences are not realized until some adjudicative or dispositive action is taken by the juvenile court. *Id.* at 115, 864 N.W.2d at 248.

III.

However, all the heightened protections afforded by ICWA and NICWA apply prospectively to future determinations in the proceeding. *Id.* at 115, 864 N.W.2d at 249.

IV.

Until the court takes action to implement or contravene the heightened protections afforded by ICWA and NICWA in some fashion, we cannot conclude that the mere determination of applicability affects a substantial right.
Id. at 116, 864 N.W.2d at 249.

V.

The Appellate Court's review is de novo on the record and reaches its conclusions independently of the Separate Juvenile Court's findings. *In re Interest of Diana M.*, 20 Neb. App. 472, 478 (2013).

VI.

When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Christopher R.*, 13 Neb. 748, 755 (2005).

VII.

Under Nebraska law, a party to a proceeding who seeks to invoke a provision of NICWA has the burden to show that the act applies in the proceeding. *In re Adoption of Kenten H.*, 272 Neb. 846, 853, 725 N.W.2d 548, 554 (2007).

STATEMENT OF FACTS

Said juveniles were initially removed from their mother's care and custody in the end of January 2021 due to the mother's use of methamphetamine while pregnant with the youngest and while the oldest boy was in her care. (T9-11). At the first hearing, the court inquired about ICWA and no party including the mother gave any information that there was a tribal connection for the children.

At the hearing, the tribe offered an exhibit that established that they believed the mom and children were eligible for enrollment. (E22). The tribe initially planned on not offering any additional evidence other than that statement that mom and/or children were eligible. (13:4-5).

Legal counsel for the tribe explained that because Amber S., the mother of the juveniles, is eligible for enrollment, the Red Lake Band of Chippewa considers her a member for purposes of being accorded the protections of ICWA. (4, Exhibit 23).

The Bureau of Indian Affairs specifies in its final rules that expressly states that Tribes are not allowed to claim children and that it only applies to children who are citizens of a federally recognized tribe or who are eligible for citizenship and the child's parent is a citizen of the tribe. (E24,

The tribal representative, Sara Greenhalgh, stated that when Amber S. becomes enrolled, then she is a citizen of the nation. (22:19-21). She went on to state that there was no distinction between enrollment and membership. (23:1-3). Even though Amber S. is not enrolled yet, the tribe still wanted ICWA to apply to the case. (24:20-24). When further questioned, she stated that she was unsure as

to whether Amber S.'s father was an enrolled member. (34:3-5). She stated that enrollment was in the process at that time. (34:17-20).

ARGUMENT

I. AN ICWA DETERMINATION IS NOT A FINAL APPEALABLE ORDER.

Appellee submits that there is no basis for jurisdiction. "In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. When an appellate court is without jurisdiction to act, the appeal must be dismissed. *In re Interset of Jassenia H.,* 291 Neb. 107, 112, 864 N.W.2d 242, 247 (2015). Although ICWA and NICWA have repercussions upon a child's welfare and the parent-child relationship, these consequences are not realized until some adjudicative or dispositive action is taken by the juvenile court. Id. at 115, 864 N.W.2d at 248. However, all the heightened protections afforded by ICWA and NICWA apply prospectively to future determinations in the proceeding. Id at 115, 864 N.W.2d at 249. Until the court takes action to implement or contravene the heightened protections afforded by ICWA and NICWA in some fashion, we cannot conclude that the mere determination of applicability affects a substantial right. Id. at 116, 864 N.W.2d at 249. A substantial right is an essential legal right, not a mere technical right. *In re Interest of Becka P*., 296 Neb. 365, 371, 894 N.W.2d 247, 252 (2017).

In the present case, a motion to terminate parental rights is pending and has been pending since well before there was any information that ICWA could potentially apply. The State should have been allowed to proceed on that motion and then the Appellant could have filed an appeal at that time to determine whether ICWA standards should have been applied at the time of the termination proceedings. At that point, a substantial right may have been affected. But at this time, no substantial right of the Appellant has been affected.

Further, whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed. *Id.* At any time, after Amber S. is enrolled, the issue of ICWA applicability could be raised again. In fact, she could

seek to address this issue again even before she is enrolled (hopefully, with the same finding.) The issue can be raised again, and the determination that neither child is at present an Indian Child, is not a final appealable order because of this very lack of finality as well as lack of a substantial right.

II. THE COURT DID NOT ERR IN FINDING THAT JUVENILES WERE NOT INDIAN CHILDREN AT THE TIME OF THE HEARING.

Pursuant to Neb. Rev. Stat. § 43–1503(4) and 25 U.S.C. § 1903(4), "Indian child means 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." Under Nebraska law, a party to a proceeding who seeks to invoke a provision of NICWA has the burden to show that the act applies in the proceeding. *In re Adoption of Kenten H*., 272 Neb. 846, 853, 725 N.W.2d 548, 554 (2007).

Here, neither the Appellant nor the tribe established that either Amber S. or the juveniles were members of the tribe. As the tribe acknowledged, its own processes, the need to double check and make recommendations prior to formal enrollment, that had not occurred yet. The tribal attorney wants to extend membership to Amber S., before the tribe's formal process of the enrollment committee has finished. The tribe gets to decide its enrollment process but does not get to decide that ICWA can prematurely apply prior to their membership process.

The Bureau of Indian Affairs specifically states that ICWA does not allow tribes to claim children. And that is exactly what is happening here. Neither Amber S. nor her father were enrolled members of the Red Lake Band of Chippewa at the time of the hearing. The tribe is trying to claim children for purposes of ICWA. Someone is either a member of a tribe or not a member of a tribe. If the tribe is not ready to consider Amber S. a citizen for all purpose at the time of the hearing, the tribe should be barred from extending federal law to claim that Amber S. is a member for purposes of child protective custody proceedings in another state.

CONCLUSION

For the foregoing reasons, Appellee requests that the Nebraska Court of Appeals find that it lacks jurisdiction to hear this appeal as a finding that ICWA does not yet apply is not a final appealable order. If the Nebraska Court of Appeals does find there is jurisdiction, the Appellee respectfully requests that the Court affirm the Separate Juvenile Court's findings that neither Manuel C. nor Mateo S. are Indian Children as defined by ICWA.

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CERTIFICATE OF WORD COUNT

I hereby state that this document was prepared using Microsoft Word and that this brief complies with the typeface requirements of Neb. Ct. T. App. § 2-103, and contains _2,121____ words not including this certification.

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Certificate of Service

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