The Indian Child Welfare Act and Subject Matter Jurisdiction in Child Welfare Actions

The Indian Child Welfare Act (ICWA)* is a complex federal law that applies to abuse, neglect, or dependency (A/N/D); termination of parental rights (TPR); and adoption proceedings. One of the purposes of ICWA is to provide special protections to federally recognized Indian tribes and the tribes' children and families. *See* 25 U.S.C. 1901?1902.

Subject matter jurisdiction between tribal courts and state courts is governed by ICWA when an "Indian child" is the subject of the A/N/D, TPR, or adoption proceeding. When any of the criteria of 25 U.S.C. 1911(a) are met, the tribal court has exclusive subject matter jurisdiction. When that criteria do not exist, ICWA allows for concurrent jurisdiction between state and tribal courts. *See* 25 U.S.C. 1911(b), (c). The N.C. Court of Appeals (COA) recently published two opinions addressing subject matter jurisdiction under ICWA. In one case, the COA held that the N.C. court had jurisdiction in an adoption proceeding that involved two Indian children. In the other case, the COA remanded for further proceedings in the trial court in part to ensure the trial court had subject matter jurisdiction in the A/N/D action when it was uncertain whether the child was an "Indian child."

A takeaway from these cases is that the N.C. court is not automatically divested of subject matter jurisdiction when an Indian child is the subject of the proceeding. But, how does the N.C. court know if it has subject matter jurisdiction?

First, Is the Child an "Indian Child"

"Indian Child" Defined

ICWA defines "Indian child" at 25 U.S.C. 1903(4) as any unmarried person under 18 years old who is

1. a member of a federally recognized tribe, or
2. eligible for membership in a federally recognized tribe and a biological parent of that child is a member of a federally recognized tribe.

The child's status is based on their political affiliation (citizenship) with a tribe and not their American Indian ancestry. *See* section B.1 of Guidelines, 2016.

Mandatory Inquiry

At the commencement of an A/N/D, TPR, and/or adoption proceeding, the court must ask whether any participant knows or has reason to know if the child is an Indian child. 25 C.F.R. 23.107. If the

child is an Indian child, the court must comply with ICWA. If there is "reason to know" the child is an Indian child but there is insufficient evidence for the court to determine whether the child is an Indian child, the court must comply with ICWA until it is determined that the child is not an Indian child. *Id*. To determine whether the child is an Indian child, ICWA requires that the petitioner (or movant in an TPR) send notice to the tribe(s) the child may be a member of or eligible for membership of and the Eastern Regional Director of the Bureau of Indian Affairs. *Id*.; 25 C.F.R. 23.111 (notice requirements).

If evidence from the tribe is provided that the child is an Indian child, ICWA applies. If that evidence is not provided within 30 days of receipt of the notice, the person asserting the child may be an Indian child has the burden of proof, which must be more than his or her equivocal testimony. *See In re A.P.*, 818 S.E.2d 396 (N.C. Ct. App. 2018); *In re C.P*. 181 N.C. App. 698 (2007); *In re Williams*, 149 N.C. App. 951 (2002).

Exclusive Jurisdiction with the Tribal Court

Under 25 U.S.C. 1911(a), a tribal court has exclusive jurisdiction when the Indian child

1. resides within the tribe's reservation,
2. is domiciled within the tribe's reservation, or
3. is a ward of a tribal court.

The COA examined this statute in *In the Adoption of K.L.J.*, 831 S.E.2d 114 (N.C. Ct. App. 2019), a N.C. adoption proceeding that involved two Indian children. Both children are members of the Cheyenne River Sioux Tribe. They had also been the subject of child custody proceedings in the tribal court where their parents' rights were terminated and custody was ordered to a "paternal aunt," upon which the case was dismissed by the tribal court. The "aunt," as custodian, placed the children with the adoption petitioners in N.C. and ultimately sought a G.S. Chapter 35A guardianship for the children with the petitioners through the N.C. courts. The guardians subsequently initiated adoption proceedings in N.C. After notice of the adoption proceeding was sent to the Tribe and to the "aunt," the "aunt" intervened and raised subject matter jurisdiction under ICWA as an issue. The district court determined it had subject matter jurisdiction and granted the adoptions. The COA affirmed.

The COA held that the exclusive jurisdiction provision of ICWA did not apply because the criteria of 25 U.S.C. 1911(a) did not exist. In its opinion, the COA focused on whether the children are wards of the tribal court giving that court exclusive subject matter jurisdiction over the adoptions since the children did not meet the jurisdictional criteria of residing or being domiciled within the reservation. Recognizing that ICWA does not define "ward of tribal court," the COA adopted the definition of "ward of the state" from Black's Law Dictionary. As applied to ICWA, an Indian child is a "ward of tribal court" when he or she "is housed by or provided protections and necessities from the tribe" and when that stops, the Indian child "will cease being its ward for purposes of 25 U.S.C. §

1911(a).” *In the Adoption of K.L.J.*, 831 S.E.2d at 117. The COA held the children were not wards of the tribal court – they lived outside of the reservation and were not provided protections and necessities from the tribe after custody was ordered to the “aunt.”

The “aunt” raised a second issue related to full faith and credit of a tribal court order as part of her argument that the N.C. court lacked subject matter jurisdiction. The COA held that the district court did not err when it failed to give full faith and credit to a tribal court order that concluded the children were wards of the tribal court – an order the “aunt” obtained 2 days before the adoption hearing.

ICWA requires every state to give full faith and credit to an Indian tribe’s judicial proceedings that are applicable to Indian child custody proceedings to the same extent that the state gives full faith and credit to judicial proceedings of any other entity. 25 U.S.C. 1911(d). The case law in N.C. addressing foreign judgments requires compliance with the Uniform Enforcement of Foreign Judgements Act (UEFJA). In applying the UEFJA to the tribal court order, the “aunt” as the party seeking to enforce the order was required to “file a properly authenticated foreign judgment with the office of the [C]lerk of [S]uperior [C]ourt in any North Carolina county along with an affidavit attesting to the fact that the foreign judgment is both final and unsatisfied in whole or in part....” *In the Adoption of K.L.J*., 831 S.E.2d at 118 (citations omitted). The “aunt” did not comply with this requirement – she only provided an unauthenticated faxed copy that was purportedly entered by the tribal court. Additionally, the COA determined there was a lack of due process for the adoption petitioners and the children, who were not given notice of or an opportunity to participate in the alleged hearing in tribal court.

As *In the Adoption of K.L.J.* demonstrates, ICWA does not automatically divest a N.C. court of subject matter jurisdiction over a child welfare proceeding involving an Indian child.

Concurrent Jurisdiction in State Court

In *In re A.P.*, 818 S.E.2d 396 (N.C. Ct. App. 2018), the COA addressed whether the trial court had “reason to know” that the child was an Indian child such that the mandatory notice provisions of ICWA applied. The COA cited 25 C.F.R. 23.107(c)(2), which states the court has reason to know a child is an Indian child if “any participant in the proceeding . . . informs the court that it has discovered information indicating that the child is an Indian child.” It then looked to opinions that were decided before the federal regulations were enacted (effective for proceedings initiated or after Dec. 12, 2016; 25 C.F.R. 23.143) and that concluded the ICWA notice requirement to the tribes was required when there was a suggestion that the child had Indian heritage. The court of appeals reasoned it was better to err on the side of caution and send the notice even when it was unlikely that the child was an Indian child. Based on those opinions, the COA in *In re A.P.* concluded that the trial court had reason to know the child was an Indian child when the respondent mother’s attorney notified the court at the adjudicatory hearing that there was an indication the mother and child had potential Cherokee and Bear Foot heritage.

The COA held that the trial court was required to direct DSS to send the notice to the potential tribes of the respondent-mother and child as set forth in 25 C.F.R. 23.111 and remanded the case for compliance with mandatory ICWA requirements. The COA directed that on remand if no response to the notice was received, the mother had the burden to prove ICWA applied (providing evidence that the child is an Indian child). And, if a response was received that confirmed the child is an Indian child, the trial court must determine if it (the state court) has subject matter jurisdiction under ICWA and, if so, comply with ICWA and the tribe's wishes. A tribe has the right to intervene in the North Carolina action. *See* *In re J.H.S.*, 808 S.E.2d 624 (N.C. Ct. App. 2018) (unpublished) (tribe intervened in N.C. neglect and dependency and TPR actions involving two Indian children).

The Take Away

The N.C. court has subject matter jurisdiction in an A/N/D, TPR, or adoption proceeding involving an Indian child unless 1 of the 3 criteria of 25 U.S.C. 1911 exists.

Practice Tip

In an A/N/D, TPR, or adoption proceeding where the court knows or has reason to know the child is an Indian child, include in the record the 25 U.S.C. 1911(a) criteria. This will clarify whether the state court has jurisdiction under ICWA even when it is uncertain whether the child is an Indian child and even when a notice has not been sent to the tribe or a response has not been received from the tribe. Address the following issues:

- Where does the child reside; is it a reservation?
- Where is the child's domicile (where is the domicile of the child's parents or if applicable Indian custodian or guardian, *see* 25 C.F.R. 23.2 (defining "domicile")); is it a reservation?
- Has the child ever been the subject of a child custody proceeding in a tribal court? If so, what is the status of that proceeding? Is there an order? What does the order provide? Has the order been modified? If so, in what court (the tribal court or a state court)?
- If the tribal court has exclusive jurisdiction, does an exception based on an emergency proceeding or an agreement between the tribe and state apply? (*see* 25 U.S.C. 1919 and 1922).

*ICWA is codified at 25 U.S.C. §§ 1901 – 1963. Federal regulations are found at 25 C.F.R. Part 23. Complementary Guidelines were published by the Bureau of Indian Affairs in 2016.

For more information about ICWA and its application to A/N/D, TPR, and adoption proceedings in N.C., see Chapter 13, section 13.2 of the *Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in the North Carolina*, here. Note, a Dec. 31, 2019 edition is forthcoming later this month.