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IN RE INTEREST OF RAMON N., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RAMON N., APPELLANT.

789 N.W.2d 272

Filed October 5, 2010. No. A-10-265.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Trial: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
4. **Juvenile Courts: Final Orders: Appeal and Error.** Generally, it has been held that adjudication and disposition orders are final, appealable orders.
5. **Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
6. **Pleadings: Jurisdiction.** It is the rule in Nebraska that the sufficiency of a petition is not the test of jurisdiction.
7. **Pleadings: Judgments: Jurisdiction: Collateral Attack: Appeal and Error.** Even though a judicial body errs in holding that a petition is sufficient, if it had jurisdiction, such holding will not subject the judgment rendered to collateral attack.
8. **Pleadings: Judgments: Jurisdiction.** The sufficiency of the petition is not a test of jurisdiction; although it may be defective in substance, it will support a judgment if the court has authority to grant the relief demanded and the facts upon which the demand is based are intelligibly set forth.
9. **Indian Child Welfare Act: Jurisdiction.** A juvenile court having jurisdiction over the parties and the subject matter constitutes a court of competent jurisdiction within the meaning of Neb. Rev. Stat. § 43-1507 (Reissue 2008).
10. **Indian Child Welfare Act: Child Custody.** Under Neb. Rev. Stat. § 43-1505(4) (Reissue 2008), a party seeking to effect a foster care placement of an Indian child shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
11. **Rules of Evidence: Expert Witnesses.** Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Dennis R. Keefe, Lancaster County Public Defender, Valerie R. McHargue, and Margene M. Timm for appellant.

Gary Lacey, Lancaster County Attorney, Jenna L. Berg, and Christopher M. Reid, Senior Certified Law Student, for appellee.

Sarah E. Sujith, Special Assistant Attorney General, of Department of Health and Human Services, for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Several months and proceedings after the juvenile court adjudicated Ramon N., the court changed Ramon's placement, and Ramon then sought to invalidate the proceedings for failure to comply with the Nebraska Indian Child Welfare Act (ICWA). Ramon appeals from the court's order refusing to invalidate the earlier proceedings, applying ICWA going forward, and continuing Ramon's placement. We conclude that the absence of ICWA allegations in the petition does not support invalidating the adjudication, but we reverse the portion of the court's order continuing Ramon's out-of-home placement without receiving evidence of active efforts or testimony of a qualified expert, pursuant to Neb. Rev. Stat. § 43-1505 (Reissue 2008), and we remand for further proceedings.

BACKGROUND

On July 27, 2009, the State filed a petition seeking to adjudicate 16-year-old Ramon under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2008) because he had violated curfew and run from his home. The petition did not contain any allegations regarding his possible status as an Indian child or any references to ICWA.

On August 14, 2009, the juvenile court sustained a motion by Ramon's counsel to continue the adjudication hearing and proceeded to hear evidence regarding Ramon's placement. The State called Ramon's mother, Kellie N., who had asked the State to file an "ungovernable petition" concerning Ramon.

Kellie testified that Ramon had smoked what she believed to be marijuana in her presence, that he had been gone from her home on a number of days, and that she had called the police. On July 28, Kellie told Ramon to leave her home and he did so after packing his bags. Although Ramon told Kellie that he had been staying with his paternal grandmother, Kellie had not been able to verify that information. She believed that Ramon was in a dangerous situation because she did not know where he was and was unable to control his behavior. Kellie asked for Ramon to be placed in the temporary custody of the Nebraska Department of Health and Human Services (DHHS) for placement outside of her home. The court found that reasonable efforts had been made to allow Ramon's legal and physical custody to remain with his parents, but that doing so would be contrary to Ramon's health, safety, and welfare. The court therefore found that it was in Ramon's best interests to be placed in the temporary legal custody of DHHS in an out-of-home placement. Ramon was placed at an emergency shelter from August 14 to 28. On August 28, Ramon was placed with his paternal grandmother.

On September 4, 2009, the juvenile court adjudicated Ramon and set a dispositional hearing for October 8. A verbatim record of the adjudication hearing is not included in the bill of exceptions. On October 8, the court's journal entry and order stated that the matter was continued until November 16 and required the State to provide notice of the proceedings to the Oglala Sioux Tribe (Tribe). The State filed an ICWA notice with the juvenile court on October 9 and sent the notice to the Tribe via registered mail on October 14.

On February 16, 2010, the juvenile court conducted a hearing for review. No representative of the Tribe appeared for the hearing. Kellie testified that she would be willing to have Ramon reside with her again if he followed her rules. The court received a court report from DHHS, prepared on February 8, which stated that in September 2009, Kellie indicated the family was affiliated with the Tribe and Ramon was an enrolled member. Eric Zimmerman, an employee of DHHS who coauthored the court report, testified that Ramon was not making sufficient progress in his current placement, that

his school attendance had been poor, that he recently tested positive for marijuana and had not had a negative test since approximately mid-November 2009, and that he had been discharged from a substance abuse treatment program for poor attendance. The report recommended that Ramon remain placed with his paternal grandmother, but Zimmerman testified that the structure provided at a group home level would be beneficial to Ramon. The juvenile court found that reasonable efforts had been made to preserve and reunify the family but ordered that Ramon should remain with DHHS for appropriate care and placement. The court ordered that Ramon be placed at the "Staff Secure" facility of the Lancaster County Youth Services Center until the court approved a specific placement arranged by DHHS.

On February 18, 2010, Ramon filed a petition to invalidate the proceedings. He alleged that the petition to adjudicate did not plead facts under ICWA and that the court found it was in Ramon's best interests to be placed in an out-of-home placement without any expert testimony on whether serious emotional harm or physical damage to Ramon was likely to occur if he were not removed from the home, as required by ICWA.

On March 5, 2010, the juvenile court conducted a hearing on the petition. Again, no representative of the Tribe appeared. The court received into evidence Ramon's enrollment paper with the Tribe dated December 26, 2006. Kellie testified that she and Ramon were members of the Tribe and that she had testified to that fact in a previous case under § 43-247(3)(a).

The juvenile court overruled the petition but specifically found that ICWA applied effective March 5, 2010. The court stated that it considered the testimony of Kellie—as an enrolled member of the Tribe and as Ramon's biological parent—to be expert testimony. Based on Kellie's knowledge of the Tribe, Ramon, and the situation and based on the evidence presented on August 14, 2009, the juvenile court found that the continued custody of Ramon by his parents was likely to result in serious emotional or physical damage to Ramon. The court then received additional evidence as to placement.

Zimmerman testified that it was his understanding that Ramon was willing to be compliant with a placement at the Omaha Home for Boys, but that the facility needed to interview Ramon. The court continued the matter for a further "placement check" hearing.

Ramon timely appeals.

ASSIGNMENT OF ERROR

Ramon assigns that the juvenile court erred in overruling the petition to invalidate the proceedings.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

[3] A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), *disapproved on other grounds, In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

ANALYSIS

At issue in this case is the juvenile court's denial of Ramon's petition to invalidate the proceedings. Any Indian child who is the subject of an action for foster care placement under state law may petition a court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of Neb. Rev. Stat. §§ 43-1504 to 43-1506 (Reissue 2008). See Neb. Rev. Stat. § 43-1507 (Reissue 2008).

We examine the two specific deficiencies argued by Ramon: pleading requirements at the adjudication stage and evidence of active efforts, including testimony of a qualified expert witness.

Pleading Requirements.

Ramon contends that because the petition for adjudication did not plead any language regarding ICWA, any proceedings under it should be invalidated. He cites to *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009), and *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006), in support of his argument that it is necessary to plead facts under ICWA in an action for adjudication of Indian children. In both those cases, an appeal was taken from the adjudication order. Ramon, on the other hand, did not appeal from the order adjudicating him, and the argument in his brief on this issue attacks only the petition for adjudication.

[4,5] The adjudication order was a final, appealable order from which no appeal was taken and ordinarily would not be subject to collateral attack except for lack of jurisdiction. Generally, it has been held that adjudication and disposition orders are final, appealable orders. *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006). Clearly, the adjudication order was a final order. We have stated that in the absence of a direct appeal from an adjudication order, a parent—or in this case, a child—may not question the existence of facts upon which the juvenile court asserted jurisdiction. See *id.* This is a corollary of the doctrine precluding most collateral attacks on final orders. Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

[6-8] Further, it is the rule in this jurisdiction that the sufficiency of a petition is not the test of jurisdiction. *Schilke v. School Dist. No. 107*, 207 Neb. 448, 299 N.W.2d 527 (1980). Even though a judicial body errs in holding that a petition is sufficient, if it had jurisdiction, such holding will not subject the judgment rendered to collateral attack. *Id.* The sufficiency of the petition is not a test of jurisdiction; although it may be defective in substance, it will support a judgment if the court has authority to grant the relief demanded and the facts upon which the demand is based are intelligibly set forth. *Id.*

Clearly, the juvenile court had jurisdiction of the parties and the subject matter at the time of the entry of the adjudication order.

[9] We recognize that § 43-1507 provides an enforcement remedy for ICWA violations, and we assume without deciding that this statutory remedy constitutes an additional basis for a collateral attack on final orders within the purview of this statute. While ICWA provides minimum federal standards in state Indian child custody proceedings, it does not oust states of their traditional jurisdiction over Indian children. See *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996). A juvenile court having jurisdiction over the parties and the subject matter constitutes a court of competent jurisdiction within the meaning of § 43-1507.

We do not believe that the pleading requirement enforced on direct appeal in *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009), and *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006), constitutes a sufficient basis for a court to invoke § 43-1507 to invalidate an adjudication order, at least where no denial of the substantive protections of ICWA occurred in connection with the adjudication. We do not have the verbatim proceedings of the adjudication hearing before us, and Ramon has not directed our attention to any substantive violation of ICWA in connection with the adjudication or prior placements.

We find support for this conclusion in the text of § 43-1507. The statute allows the invalidation of "any action for foster care placement or termination of parental rights." *Id.* It does not, however, provide authorization for annulling an entire adjudication proceeding.

We find additional guidance in two cases bearing on the finality of adjudication orders. In *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006), which also involved a petition to invalidate, we noted that the mother did not appeal from the adjudication or dispositional orders and that she waited approximately 18 months to file the petition to invalidate despite clearly being aware of ICWA's applicability since the filing of the State's amended petition and through all of the hearings that she sought to invalidate. We

stated, "[B]ecause we conclude that any error with respect to these orders is harmless in this case, we need not determine whether our rules of error preservation or waiver preclude [the mother] from petitioning to invalidate previous court orders." *In re Interest of Enrique P. et al.*, 14 Neb. App. at 470, 709 N.W.2d at 689. In the later case of *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008), when the mother argued that the trial court erred at the adjudication stage because it did not make a finding of active efforts, the Nebraska Supreme Court stated that it would not address her arguments about alleged errors at the adjudication stage because the mother did not appeal the adjudication order. Applying this guidance to the instant case, it would follow that because Ramon did not appeal from the order adjudicating him, he cannot now challenge the absence of ICWA language in the petition.

We find additional support for our conclusion in a decision applying the ICWA provisions prospectively from the date Indian child status is established on the record. In *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007), a deputy county attorney gave notice of an adjudication hearing to the Iowa Tribe of Kansas and Nebraska and stated in an affidavit that the child was a member of or eligible for membership in that tribe. After the court adjudicated the child, a petition for adoption was filed which included an affidavit identifying the father as being affiliated with "'the Ute tribe.'" *Id.* at 849, 725 N.W.2d at 551. However, the adoptive parents alleged that the child was not an Indian child. Soon after the entry of the decree of adoption, the Iowa Tribe filed an entry of appearance and notice of intervention, which alleged that the child was enrolled in the tribe. The mother then sought to vacate the adoption under ICWA. The Nebraska Supreme Court stated, "[T]he critical issue in the instant case is not *whether* [the child] is an 'Indian child,' but, rather, *when* his status was established in these proceedings." *In re Adoption of Kenten H.*, 272 Neb. at 854, 725 N.W.2d at 554. Thus, the court determined that the provisions of ICWA and the federal Indian Child Welfare Act apply prospectively from the date Indian child status is established on the record, which occurred

when the Iowa Tribe entered its appearance shortly after entry of the decree of adoption.

We conclude that under the circumstances of the case before us, the juvenile court did not err in refusing to invalidate the final adjudication order because of the State's failure to comply with the ICWA pleading requirement recognized in *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009), and *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006).

Active Efforts and Qualified Expert Witness.

Ramon next argues that the court, after finding that ICWA applied effective March 5, 2010, erred in continuing his out-of-home placement without sufficient evidence regarding the ICWA requirements of active efforts and expert testimony. The argument in his brief on this issue attacks only the court's March 5 order.

[10] At the February 2010 dispositional review hearing, the juvenile court found that reasonable efforts were made to preserve and reunify the family, but that a "Staff Secure" placement was the least restrictive placement. Then, at the March 2010 hearing, the court found that the ICWA standards applied, but the court received no expert testimony or evidence of active efforts to support continued placement out of the home. Under § 43-1505(4), a party seeking to effect a foster care placement of an Indian child shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. The ICWA requirement of "active efforts" requires more than the "reasonable efforts" standard applicable in non-ICWA cases, and at least some efforts should be culturally relevant. See, *id.*; *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). In our view, the evidence in the record does not rise to the level of culturally relevant active efforts.

Under ICWA, qualified expert testimony is required on the issue of whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. See § 43-1505(5). The juvenile

court stated in its March 5, 2010, order that it would ordinarily continue the hearing to provide an opportunity for the presentation of expert testimony. However, the court found that Kellie provided that evidence on August 14, 2009.

[11] The juvenile court's determination of whether Kellie qualifies as an expert under ICWA will be upheld unless the finding is clearly erroneous. Nebraska rules of evidence do not apply in dispositional hearings arising under the Nebraska Juvenile Code. See *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002). However, in determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007). Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert. *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007). Following the rule set forth in the standard of review section above, we review the juvenile court's decision treating Kellie as a qualified expert witness on ICWA issues for clear error.

The Nebraska Supreme Court has recognized the existence of guidelines to assist judges in determining whether a witness qualifies as an expert regarding ICWA issues. In *In re Interest of C.W. et al.*, 239 Neb. 817, 824, 479 N.W.2d 105, 111 (1992), *disapproved on other grounds, In re Interest of Walter W., supra*, the court noted that the Bureau of Indian Affairs had set forth the following guidelines under which expert witnesses will most likely meet the requirements of ICWA:

> "(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> "(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.

> "(iii) A professional person having substantial education and experience in the area of his or her specialty."

Under these guidelines, we conclude that the juvenile court's finding that Kellie was an expert was clearly erroneous. Kellie is a member of the Tribe. However, there is no evidence that the tribal community recognizes her as knowledgeable of Indian customs and childrearing practices or that she has "'substantial experience in the delivery of child and family services to Indians.'" *In re Interest of C.W. et al.*, 239 Neb. at 824, 479 N.W.2d at 111. Nor is there evidence that she is a professional person with substantial education and experience in an area of specialty. Instead, the court found that Kellie was an expert based only on the facts that she is a member of the Tribe and that she is Ramon's mother. We conclude these facts alone do not make her a qualified expert under ICWA. The juvenile court clearly erred in treating Kellie as a qualified expert under ICWA.

Because the evidence at the March 5, 2010, hearing did not establish active efforts or include testimony of a qualified expert, we conclude that the juvenile court erred in continuing Ramon's out-of-home placement. We reverse the juvenile court's order on this issue, and we therefore remand the matter to the juvenile court to allow the State to present qualified expert witness testimony and evidence of active efforts.

CONCLUSION

Upon our de novo review of the record and under the particular circumstances of this case, we conclude that Ramon cannot now utilize the absence of an ICWA allegation in the petition for adjudication to invalidate the adjudication pursuant to § 43-1507. We affirm the juvenile court's refusal to do so. We further conclude that because ICWA applied on and after March 5, 2010, the juvenile court erred in continuing Ramon's out-of-home placement without evidence of active efforts and testimony of a qualified expert witness. We therefore reverse the continuation of Ramon's out-of-home placement and remand the matter for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.