SUMMARY
Date October 28, 2021

2021COA130

No. 18CA1391 *Peo in Interest of OS-H* — American Indian Law — ICWA; Juvenile Court — Dependency and Neglect — Adjudication; Family Law — Uniform Parentage Act — Paternity

In this case involving competing presumptions of paternity, a division of the court of appeals considers whether a paternity adjudication within a dependency and neglect proceeding constitutes a child-custody proceeding under the Indian Child Welfare Act of 1978 (ICWA). The division concludes that it does. The division also decides that, under the facts of this case, ICWA applies to a father who is only a presumptive biological parent of a child and the record does not demonstrate compliance with ICWA's inquiry provisions.

The division further concludes that the juvenile court must reconsider whether the child's paternity had already been

established on two previous occasions — on the child's birth certificate and when an adjudication was entered in an earlier dependency and neglect case involving the child. As a result, the division reverses the judgment and remands the matter to the juvenile court for further proceedings.

COLORADO COURT OF APPEALS **2021COA130**

Court of Appeals No. 18CA1391
Washington County District Court No. 17JV11
Honorable Kevin L. Hoyer, Judge

The People of the State of Colorado,

Petitioner-Appellee,

In the Interest of O.S-H., a Child,

and Concerning M.S.C.,

Respondent-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE HAWTHORNE*
Grove and Martinez*, JJ., concur

Announced October 28, 2021

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 In this dependency and neglect proceeding, M.S.C. (biological father) appeals the juvenile court's judgment adjudicating S.W. (stepfather) to be the legal father of O.S-H. (the child). To resolve biological father's appeal, we must first decide an unanswered question in Colorado: Does a paternity adjudication within a dependency and neglect proceeding constitute a child-custody proceeding under the Indian Child Welfare Act of 1978 (ICWA)? We answer yes and conclude that the record does not show compliance with ICWA's inquiry provisions.

¶ 2 We then turn to biological father's assertion that the juvenile court lacked authority to adjudicate the child's paternity because it had already been established. While the record shows that biological father was named on the child's birth certificate and had previously been subject to a dependency and neglect case involving the child, the court did not determine whether these circumstances constituted prior paternity determinations before it decided who should be declared the child's father.

¶ 3 For these reasons, we reverse the judgment and remand the matter to the juvenile court for further proceedings.

I. Background

¶ 4 In the late summer of 2017, the Washington County Department of Human Services (Department) obtained temporary custody of the child and initiated a dependency and neglect case. The Department asserted that the child's mother was deceased, biological father was in prison, and stepfather did not have appropriate housing for the child.

¶ 5 The juvenile court adjudicated the child dependent and neglected as to stepfather. And it granted the Department's request for genetic testing to determine whether biological father was the child's biological parent. It also adopted a treatment plan for stepfather and placed the child in his care.

¶ 6 Biological father was served with notice of the proceeding and promptly asserted that he was the biological parent and was named as the father on the child's birth certificate. Testing later confirmed biological father's genetic relationship to the child.

¶ 7 Still, stepfather filed a motion to determine paternity on the basis that he had held the child out as his own. The court adjudicated the child dependent and neglected as to biological father and set a paternity hearing. Soon after, as part of a request

to continue the hearing, biological father reiterated that he was named as the father on the child's birth certificate. After a hearing, the court adjudicated stepfather the child's parent and dismissed biological father from the case.[1]

II. The Indian Child Welfare Act

¶ 8 Biological father contends that the juvenile court failed to comply with ICWA because it did not inquire of him whether he knew or had reason to know that the child is an Indian child. The Department and guardian ad litem (GAL) argue that ICWA was not implicated because this was a paternity proceeding and not a child-custody proceeding.

A. The Legal Framework

¶ 9 ICWA aims to protect and preserve Indian tribes and their resources and to protect Indian children who are members of or are eligible for membership in an Indian tribe. 25 U.S.C. § 1901(2), (3); *People in Interest of M.V.*, 2018 COA 163, ¶ 10. ICWA recognizes that Indian tribes have a separate interest in Indian children that is equivalent to, but distinct from, parental interests. *B.H. v. People in*

[1] The court subsequently certified the order as a final judgment under C.R.C.P. 54(b) and it is now properly before us.

Interest of X.H., 138 P.3d 299, 303 (Colo. 2006); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989). Accordingly, in a proceeding in which ICWA may apply, tribes must have a meaningful opportunity to participate in determining whether the child is an Indian child and to be heard on the issue of ICWA's applicability. *B.H.*, 138 P.3d at 303.

¶ 10 To determine whether ICWA applies to a case, the juvenile court must answer two fundamental questions. *People in Interest of K.R.*, 2020 COA 35, ¶ 4. First, is the proceeding a child-custody proceeding as defined by ICWA? *See People in Interest of C.A.*, 2017 COA 135, ¶ 8; *see also People in Interest of L.L.*, 2017 COA 38, ¶ 13; 25 U.S.C. § 1903(1). Second, is the child an Indian child? *L.L.*, ¶ 13; 25 U.S.C. § 1903(4).

¶ 11 We recognize that other divisions of this court and the federal guidelines implementing ICWA have posed these questions in the opposite order. *See K.R.*, ¶ 4; *L.L.*, ¶ 13; Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act (Dec. 2016), https://perma.cc/3TCH-8HQM (2016 Guidelines); *see also* Notice of Guidelines, 81 Fed. Reg. 96,476 (Dec. 30, 2016). But we agree with the divisions of this court that have concluded that the

first question to be answered should be whether ICWA applies to this type of proceeding. *C.A.*, ¶ 8, *see also People in Interest of K.G.*, 2017 COA 153, ¶ 10. If ICWA does not apply to a proceeding, there is no requirement for a court to determine whether a child is an Indian child.

¶ 12 The federal regulations and guidelines implementing ICWA impose a duty of inquiry and notice on juvenile courts. 25 C.F.R. 23.107(a) (2020); 2016 Guidelines. The court must ask each participant on the record at the beginning of every emergency, voluntary, or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. 25 C.F.R. § 23.107(a); *see also L.L.*, ¶ 19. All responses should be on the record. 25 C.F.R. 23.107(a). These same requirements are incorporated into the Children's Code. § 19-1-126(1)(a), C.R.S. 2020; *see also People in Interest of K.C. v. K.C.*, 2021 CO 33, ¶ 46.

¶ 13 It is "critically important" that the court inquire into whether a child is an Indian child because, if an inquiry is not made, "a child-custody proceeding may not comply with ICWA and thus may

deny ICWA protections to Indian children and their families." 2016 Guidelines at 11; *see also C.A.*, ¶ 17.

¶ 14 If the court has reason to know that a child involved in a child-custody proceeding is an Indian child, the petitioning party must send notice of the proceeding to the potentially concerned tribe or tribes. *B.H.*, 138 P.3d at 302; *see also* 25 U.S.C. § 1912(a); § 19-1-126(1)(b). However, notice cannot be accomplished without conducting an inquiry in the first place.

¶ 15 Whether ICWA applies to a dependency and neglect case is a question of law that we review de novo. *M.V.*, ¶ 32.

B. Was the Paternity Adjudication a Child-Custody Proceeding?

¶ 16 The Department and GAL argue that ICWA does not apply because biological father is appealing from a paternity adjudication, which is not part of a child-custody proceeding. We disagree.

¶ 17 As discussed above, ICWA applies to a child-custody proceeding. As pertinent here, a child-custody proceeding includes actions for foster care placement and termination of parental rights. 25 U.S.C. § 1903(1). This includes any action that may result in foster care placement. *K.G.*, ¶ 14; 25 C.F.R. § 23.2 (2020). A foster care placement is defined as

> 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[.]

25 U.S.C. § 1903(1)(i); *see also M.V.*, ¶ 33.

¶ 18 And placing a child in the care of a nonbiological parent constitutes a foster care placement under ICWA because ICWA defines a parent as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom." 25 U.S.C. § 1903(9); *In re Marriage of Stockwell*, 2019 COA 96, ¶¶ 18-21 ("A foster care placement, which here takes the form of an [allocation of parental responsibilities] to a person who is not a parent under ICWA, is a child custody proceeding under ICWA because the parent cannot have the child returned upon demand but must instead overcome procedural and substantive barriers to regain custody and control of the child."). Thus, although a nonbiological father may be declared a parent under state law, he is not a parent under ICWA. *See Stockwell*, ¶¶ 17-18.

¶ 19 Also, this case originated as, and continues to be, a dependency and neglect case. Dependency and neglect cases are child-custody proceedings under ICWA. § 19-1-126(1); *see generally L.L.*, ¶ 17; *People in Interest of A.R.*, 2012 COA 195M. Under the Children's Code, the juvenile court has exclusive, original jurisdiction in dependency and neglect proceedings. § 19-1-104(1)(b), C.R.S. 2020. And, once a child has been adjudicated dependent and neglected, all matters related to the child's status, including paternity, must be addressed in the open dependency and neglect case. *People in Interest of D.C.C.*, 2018 COA 98, ¶ 16; *see also People in Interest of E.M.*, 2016 COA 38M, ¶ 24, *aff'd sub nom. People in Interest of L.M.*, 2018 CO 34.

¶ 20 The paternity adjudication here was not an independent proceeding. Rather, it determined the child's father within the dependency and neglect proceeding. And, thus, biological father's parental rights could have been terminated and, in fact, the child was placed in a foster care placement with the nonbiological parent. In other words, while the paternity adjudication is not a stand-alone child-custody proceeding, it can be an integral part of one.

¶ 21 We are aware that one jurisdiction has held that ICWA does not apply to paternity actions because such an action is not one that could result in the termination of parental rights. *See J.A.V. v. Velasco*, 536 N.W.2d 896, 901 (Minn. Ct. App. 1995) ("[Putative father's] paternity action is not an action that can result in the termination of the parent-child relationship. If [his] action is unsuccessful, the parent-child relationship between [him] and [the child] will not be terminated, it will simply never be established."). But *J.A.V.* is distinguishable from this case, which involves a paternity determination arising in a dependency and neglect action.

¶ 22 For these reasons, we conclude that a paternity adjudication in a dependency and neglect proceeding constitutes a child-custody proceeding under ICWA.

C. Was ICWA Applicable When Father Was Only A Presumptive Parent?

¶ 23 We next consider whether ICWA applies to a father who is only a presumptive biological parent of a child. Our answer is not always, but in this case yes.

¶ 24 Recall that ICWA defines a parent as any biological parent or parents of an Indian child or any Indian person who has lawfully

adopted an Indian child. But it specifically exempts an unwed father where paternity has not been acknowledged or established. 25 U.S.C. § 1903(9).

¶ 25 ICWA does not define the terms "acknowledge" and "establish" or include standards on how an unwed father can acknowledge or establish paternity. *In re Adoption of B.B.*, 2017 UT 59, ¶ 50; *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 934 (N.J. 1988). The Bureau of Indian Affairs' interpretive guidelines also lack any discussion on the issue of determining paternity. *See* 2016 Guidelines at 85. Likewise, the General Assembly has not defined how an unwed father can acknowledge or establish paternity under ICWA.

¶ 26 Courts in some other jurisdictions have looked to state law to determine whether an alleged father of an Indian child has acknowledged or established paternity. *See, e.g.*, *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Ct. App. 2003) ("[B]ecause the ICWA does not provide a standard for the acknowledgment or establishment of paternity, courts have resolved the issue under state law."); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. 1995) ("Congress intended to have the issue of acknowledgement or

establishment of paternity determined by state law."); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985) (ICWA does not apply to children born out of wedlock unless paternity is acknowledged or established "through the procedures available through the tribal courts, consistent with tribal customs, or through procedures established by state law."), *overruled on other grounds by In re Baby Boy L.*, 2004 OK 93. New Jersey's supreme court has concluded that

> Congress intended to defer to state or tribal law standards for establishing paternity, so long as these approaches are permissible variations on the methods of acknowledging and establishing paternity within the general contemplation of Congress when it passed the ICWA and provide a realistic opportunity for an unwed father to establish an actual or legal relationship with his child.

Child of Indian Heritage, 543 A.2d at 935 (citations omitted).

¶ 27 Other states have rejected a state-law-based approach in favor of a more flexible reasonableness standard. The Utah Supreme Court reasoned that it was appropriate to apply such a standard to the time and manner in which an unwed father may acknowledge or establish his paternity because it comported with the congressional findings and the purpose of ICWA as well as its

protectiveness of parental rights pertaining to Indian children. *B.B.*, ¶ 71.

¶ 28 Alaska's supreme court held that although the father did not comply with the state's legitimization statute, the father "sufficiently acknowledged paternity of [the child] to invoke the application of ICWA." *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011). The court concluded that "to qualify as an ICWA parent an unwed father does not need to comply perfectly with state laws for establishing paternity, so long as he has made reasonable efforts to acknowledge paternity." *Id.*

¶ 29 In Arizona, a division of the court of appeals held that although father did not file a paternity action or seek legal custody of the child, "[t]hese actions . . . are not required. The [ICWA] merely requires that a putative Indian father acknowledge or establish paternity." *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000).

¶ 30 We also note that a reasonableness standard is consistent with the principles of statutory construction governing ICWA. Statutes must be liberally construed in favor of Indians, with ambiguous provisions interpreted to their benefit. *Id.*; *see also*

B.H., 138 P.3d at 302. In other words, statutes enacted for the benefit of Indians, as well as regulations, guidelines, and state statutes promulgated for their implementation, must be liberally construed in favor of Indian interests. *People in Interest of D.B.*, 2017 COA 139, ¶ 10; *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

¶ 31 And the reasonableness standard comports with the presumption that federal statutes are generally intended to apply uniformly. *See Holyfield*, 490 U.S. at 43; *Jerome v. United States*, 318 U.S. 101, 104 (1943). This would be an unreachable outcome if acknowledging or establishing paternity is decided as a matter of highly variable state law. This approach also furthers ICWA's purpose of establishing minimum federal standards for the removal of Indian children from their families as declared in 25 U.S.C. § 1902. *Cf. Holyfield*, 490 U.S. at 47 n.22 ("Where Congress did intend that ICWA terms be defined by reference to other than federal law, it stated this explicitly.").

¶ 32 For these reasons, we conclude that a reasonableness standard is consistent with ICWA's plain language. So, we turn to the plain meaning of "acknowledge" and "establish."

¶ 33 Black's Law Dictionary defines "acknowledge" as "[t]o recognize (something) as being factual and valid" or "[t]o show that one accepts responsibility for." Black's Law Dictionary 28 (11th ed. 2019). Webster's defines "acknowledge" as "to show by word or act that one has knowledge of and agrees to (a fact or truth)." Webster's Third New International Dictionary 17 (2002). Black's Law Dictionary defines "establish" as "[t]o prove; to convince." Black's Law Dictionary at 688. Webster's defines "establish" as "to prove or make acceptable beyond a reasonable doubt" or "to provide strong evidence for." Webster's Third New International Dictionary at 778.

¶ 34 The record shows that biological father took ample steps to acknowledge or establish his paternity of the child. First, no party disputed that biological father was named on the child's birth certificate. To be named on the child's birth certificate, biological father had to meet one of two conditions. He was either married to mother at the time of the child's conception or birth or he had to submit a written form asking to be named as the father. *See* § 25-2-112(3)(a), (b), C.R.S 2020. Second, biological father asserted his paternity of the child in the pleading that he filed with the court

once he was given notice of the case. Third, before the contested evidentiary hearing on paternity, he completed genetic testing to confirm that he was the child's biological father.

¶ 35 Under these circumstances, we conclude that biological father met ICWA's definition of a parent.

D. Was the Court's Inquiry Sufficient?

¶ 36 The juvenile court addressed ICWA's applicability at the temporary custody (or shelter) hearing. It asked stepfather whether he had any knowledge from the deceased mother or any other source that the child was a member of or eligible for membership in an Indian tribe. Stepfather indicated he did not have any such information.

¶ 37 Five months later, biological father was present by telephone at a hearing for the first time. The court asked the county attorney whether there were any ICWA issues and the county attorney responded, "I don't believe so." But the court did not directly inquire of biological father at that hearing or any other hearing whether the child was a member of or eligible for membership in an Indian tribe. And no further inquiry regarding ICWA's applicability

was made at the evidentiary hearing on stepfather's request to be adjudicated the child's father.

¶ 38 So the record does not show compliance with ICWA and we must reverse the court's paternity adjudication.

III. Prior Paternity Determination

¶ 39 Biological father contends that the juvenile court lacked authority to adjudicate paternity because his paternity had already been established on two previous occasions — when he was named on the child's birth certificate and when an adjudication was entered against him in a 2011 dependency and neglect case. We conclude that the juvenile court must reconsider this issue.

¶ 40 A juvenile court may determine a child's paternity (or parentage) as part of a dependency and neglect proceeding. *See People in Interest of J.G.C.*, 2013 COA 171, ¶ 10. However, when a paternity issue arises in a nonpaternity proceeding, such as a dependency and neglect case, the court must still follow the procedures outlined in the Uniform Parentage Act (the UPA). *Id.* at ¶ 11. And a failure to follow the UPA's requirements deprives the court of jurisdiction to determine paternity. *In re Support of E.K.*, 2013 COA 99, ¶ 9.

¶ 41 Under the UPA, a man is presumed to be a child's father if, among other things, he acknowledges his paternity of the child in a writing filed with the court or registrar of vital statistics. § 19-4-105(1)(e), C.R.S. 2020. Such a writing includes the child's birth certificate. *See J.G.C.*, ¶ 23. The UPA also provides that such a duly executed voluntary acknowledgment of paternity shall be considered a legal finding sixty days after its execution unless another man is presumed to be the child's father. § 19-4-105(1)(e), (2)(b)(I). In that instance, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted. § 19-4-105(1)(e).

¶ 42 Once a court has entered a decree establishing a child's paternity, that decree rebuts other presumptions of paternity. § 19-4-105(2)(a). A prior paternity determination may be challenged based on fraud, duress, or mistake of material fact. § 19-4-105(2)(c). Any challenge based on mistake of material fact must be brought within the six-month time limit of C.R.C.P. 60(b). *People in Interest of J.A.U. v. R.L.C.*, 47 P.3d 327, 333 (Colo. 2002). A paternity determination may also be set aside if genetic test results exclude the individual named as the father as the child's biological

parent. § 19-4-107.3(1)(a), C.R.S. 2020. But such a motion must be filed within two years from the date the order was entered. § 19-4-107.3(2)(a).

¶ 43 As already noted, the record shows no dispute that biological father was named on the child's birth certificate. Indeed, at the temporary custody hearing, the Department and stepfather both agreed that this was the case. And biological father again reiterated this fact in his pleadings filed with the court.

¶ 44 But the court made no determination whether the birth certificate constituted a legal finding of paternity sixty days after it was filed with the registrar of vital statistics. Nor did the court make a finding as to whether the birth certificate was ineffective because stepfather was a presumed father at that time and did not provide written consent.

¶ 45 These missing findings are significant. Although the record does not include a copy of the child's birth certificate, it was likely issued near the time of the child's birth. Section 25-2-112(1) provides that a certificate of birth for each live birth which occurs in this state shall be filed with the state registrar or as otherwise directed by the state registrar within ten days after such birth. Yet,

stepfather testified that the child had begun living with him when he was fifteen months old. He also explained that he began a romantic relationship with the child's mother when he was released from prison at the end of 2011, more than a year after the child's birth in August 2010.

¶ 46 Also, biological father and the child had been subject to a previous dependency and neglect case in 2011. It appears that as part of that case, the court may have issued an order adjudicating the child dependent and neglected as to biological father based on the assumption that biological father was the child's parent. And, the caseworker agreed that biological father had been named as the "father of [the child]" in that case. The class of persons who may be named a respondent in a dependency and neglect proceeding is limited to a parent, guardian, custodian, legal custodian, stepparent, or spousal equivalent. § 19-3-502(5), C.R.S. 2020.

¶ 47 But, again, the court did not address whether the prior adjudication was effectively a determination that biological father is the child's parent and, if so, whether the determination had been made after following the requirements of the UPA. *See E.K.*, ¶ 9.

¶ 48 And, if either the birth certificate or the previous adjudicatory order was effectively a paternity determination, the court did not apply the standards for setting it aside.

¶ 49 As a result, we must reverse the judgment.

IV. Holding Out Paternity Presumption

¶ 50 Biological father further contends that the juvenile court erred by determining that stepfather enjoyed a presumption of paternity under section 19-4-105(1)(d). We decline to consider this argument.

¶ 51 To start, this issue is not sufficiently developed for our review.

¶ 52 Under the UPA's holding out provision, a person is presumed to be the natural father of a child if, while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child. § 19-4-105(1)(d); *In re Parental Responsibilities Concerning A.R.L.*, 2013 COA 170, ¶ 19. In other words, a person may gain the status of a child's natural parent by holding the child out as his own. *People in Interest of S.N.V.*, 284 P.3d 147, 151 (Colo. App. 2011).

¶ 53 Stepfather testified that the child, who was then aged seven, had lived in his home since he was fifteen months old. Stepfather

also affirmed that when he met people, he would introduce the child as his son. The record contains no further evidence about the detail or context of these representations. Yet, apart from asserting that "natural child" is synonymous with "biological child," biological father does not explicitly argue that this evidence was insufficient to entitle stepfather to a presumption of paternity under section 19-4-105(1)(d).

¶ 54 And, in any event, on remand the court will not reach this issue unless it determines that there was no prior paternity determination and then reconsiders whether there are competing presumptions. Also, when weighing competing paternity presumptions, the court must focus on the child's best interests. *People in Interest of K.L.W.*, 2021 COA 56, ¶ 41; *see also N.A.H. v. S.L.S.*, 9 P.3d 354, 362 (Colo. 2000). The child's circumstances may have changed since the juvenile court entered judgment in this case and the court must determine the child's best interests based on his circumstances existing at the time of remand proceedings. *See In re Parental Responsibilities Concerning M.W.*, 2012 COA 162, ¶ 27 (applying the same standard to a court's determination regarding the allocation of parental responsibilities). Thus, while the court

may rely on the existing record in determining the child's best interests, it must also provide the parties the opportunity to present additional evidence concerning the child's current circumstances. *Id.*

V. Conclusion

¶ 55 The judgment is reversed and the case is remanded to the juvenile court. On remand, before the juvenile court may again adjudicate paternity, it shall direct the Department to procure biological father's appearance, if possible, so the court may make an ICWA-compliant inquiry of him on the record. If the inquiry provides reason to know that the child is an Indian child, the court should proceed in accordance with ICWA's provisions, including the requirement to provide notice of the proceeding to the applicable tribe or tribes.

¶ 56 The court must also consider whether the prior adjudicatory order or biological father's inclusion on the child's birth certificate constitutes a paternity determination and, if so, whether it may set aside the prior determination.

¶ 57 If the court determines that there was no prior paternity determination or it elects to set aside the prior determination, it

must reconsider the paternity determination based on the existing record as well as evidence related to the child's current circumstances.

JUDGE GROVE and JUSTICE MARTINEZ concur.