DA 22-0405

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 1

IN RE THE MATTER OF L.R.J., C.M.J., AND C.S.J.,

BONNIE ANNE JONES and
ANDY JOHN JONES,

Petitioners and Appellees,

v.

LEVI LUKE JONES,

Respondent,

MARTHA JOANN JONES,

Respondent and Appellant.

APPEAL FROM: District Court of the Twenty-First Judicial District,
In and For the County of Ravalli, Cause No. DR-17-182
Honorable Jennifer B. Lint, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Bradley J. Jones, Bulman Jones & Cook PLLC, Missoula, Montana

For Appellees:

Jane E. Cowley, Laird Cowley, PLLC, Missoula, Montana

Submitted on Briefs: November 30, 2022

Decided: January 3, 2023

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Together with their father, Martha Joann Jones (Mother) signed a Stipulated Parenting Plan in 2017 agreeing to place her three minor children in the care and custody of their paternal grandparents, Bonnie Anne Jones and Randy John Jones (Grandparents), and accepting certain obligations to "ensure restoration of [her] custodial rights." Several years later, after obtaining new counsel and participating in a court-ordered parenting assessment, Mother filed a notice withdrawing her consent to the stipulated plan and invoking the Indian Child Welfare Act (ICWA) to seek immediate return of the children. Mother now appeals the Twenty-First Judicial District Court's denial of her motion. We reverse the District Court's determination that ICWA does not apply to this proceeding. But we decline Mother's request to order the children's immediate return to her and instead remand for the court to conduct further proceedings in compliance with ICWA's requirements.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Grandparents filed in August 2017 a Petition to Establish Parenting and Custody of the three minor children, alleging that a child-parent relationship, as defined by § 40-4-211(6), MCA, existed between the children and Grandparents and that the Parents had engaged in conduct contrary to the child-parent relationship.[1] The Petition stated that Grandparents "do not allege that Respondents are unfit to parent and do not seek

[1] Mother and the children's father both were named as Respondents and both signed the Stipulated Parenting Plan. The father, however, did not participate in the proceedings that are the subject of Mother's appeal and has not joined in the appeal. We refer to them jointly as Parents.

termination of Respondents' parental rights." It noted that Parents denied engaging in conduct contrary to the child-parent relationship but had agreed, after consultation with counsel, to the establishment of custodial rights to the children in Grandparents. Grandparents stated that the intended purpose of the arrangement was "to establish sufficient time for the children to reside with [Grandparents] so that [Parents] may resolve any allegations or matters pending with Child Protective Services."

¶3 A week later, Parents and Grandparents filed a Stipulated Parenting Plan signed by all parties and their respective counsel. It designated Grandparents as the sole custodians of the children. The Stipulated Plan provided:

> From time to time, Grandparents may allow contact or visitation between children and Parents, but such contact shall be at the sole discretion of Grandparents until June 15, 2018. After June 15, 2018, Parents may file an appropriate motion to either modify custodial rights to the minor children or establish parental visitation on a regular schedule. In either event, Parents shall be required to show that such a modification is in the best interests of the children applying the standards of Mont. Code Ann[.] § 40-4-212.

The Stipulated Plan required Parents to assume responsibility for the children's medical insurance and medical expenses, but it otherwise gave Grandparents all control and decision-making authority. It was to "be made an integral part of any order concerning custody of the children" and to "be binding upon the parties, their personal representatives, heirs, and assigns." It concluded with the following paragraph, titled "Parental Responsibilities":

> Grandparents are exercising the authority granted based upon the express representation by Parents that Parents will undertake consumer credit counseling, marriage counseling, individual counseling on parenting or personal development matters and parenting classes to correct deficiencies in parenting that have brought the parties to this point. The parties agree that

> the District Court shall have the authority to order and enforce the Parents to participate in the counseling and improvement necessary to ensure restoration of their custodial rights.

¶4 The District Court entered an order the following week, approving the Stipulated Plan and directing the parties to "perform the terms and conditions of the parenting plan in all respects." More than a year later, and several months after the Stipulated Plan's June 2018 trigger date, Parents' counsel withdrew from the case with consent of the Parents and leave of court.

¶5 In August 2019, appearing on her own behalf, Mother filed a motion to hold Grandparents in contempt for failing to follow the Stipulated Plan, using for her motion a form provided for self-represented litigants. Mother submitted a supporting affidavit listing the provisions of the Stipulated Plan with which Grandparents allegedly had failed to comply. She followed several days later with a motion requesting return to Parents of custodial rights to the children, asserting that Parents had completed the stipulations of the Parenting Plan. After considering Grandparents' response, the District Court stayed ruling on Mother's motion and ordered a parenting assessment at Grandparents' expense. Dr. Sarah Baxter conducted the assessment and filed it with the court on March 31, 2020. The court ordered the parties to submit status reports by the end of April advising whether they had resolved the parenting issues or would be proceeding to mediation. Grandparents filed a status report indicating the parties were working from the Baxter assessment and did not require court action at that time.

¶6 In the meantime, Parents obtained new counsel, who filed a notice of appearance at the end of November 2019. On June 1, 2020, Parents' counsel filed a motion for status

hearing, requesting from the court "instruction regarding interpretation, financial logistics, and execution of recommendations" in Dr. Baxter's assessment. At the July 2 status hearing, the District Court requested that counsel file status reports and agree to a guardian ad litem within thirty days or, if unable to agree, to so advise the court and it would appoint one. At Parents' recommendation, the court appointed a guardian ad litem at the end of October 2020, and she issued her preliminary report and recommendations two months later.

¶7 The District Court adopted the guardian ad litem's report and, on January 28, 2021, Parents filed a Notice of Compliance identifying their alleged completion of specific recommendations and ongoing counseling in the reunification process with their children. Nothing further occurred until April 14, 2021, when Mother filed, through Parents' counsel, a notice that she was withdrawing her consent to the Stipulated Parenting Plan and a motion for immediate return of the children to her custody. Mother submitted an affidavit attesting to her membership in the federally recognized Native Village of Kotzebue Tribe in Alaska and to her children's eligibility for membership. She asserted that she had completed everything Grandparents and the court had asked of her, yet Grandparents had not agreed to further contact with the children, and she believed they had no intention of ever returning the children to her care. Mother gave notice that she had withdrawn her consent to the Stipulated Parenting Plan pursuant to 25 U.S.C. § 1913(b), part of ICWA.

¶8 Grandparents disputed the application of ICWA, arguing that the children were not removed from their family but placed with Grandparents by Parents' stipulation and that ICWA did not apply to parenting plan disputes, citing this Court's decision in

In re Bertelson, 189 Mont. 524, 617 P.2d 121 (1980). Grandparents argued that the children's placement should be governed by the best interest standards in § 40-4-212, MCA.

¶9 By order of the court, Mother promptly provided verification from the Tribe that the three children were automatically eligible for Tribal enrollment with the Native Village of Kotzebue. When the court did not rule, Mother filed a renewed motion in May 2022 for immediate return of the children. Both parties briefed the motion, and the District Court entered an order denying it on July 7, 2022. The court relied on *Bertelson*, ruling that ICWA does not apply to internal family disputes. The court reasoned in part that the State had not initiated the action, and "the children were not removed by a governmental agency and placed in foster care with [Grandparents]." It pointed out that Parents had consented to the children's placement and found that they were seeking "to circumvent the considered reunification plan of the G.A.L." contrary to the children's best interests. The court determined that "[t]aking the children out of their current, stable setting would cause trauma" and ordered Parents to comply with the terms of the guardian ad litem's plan.

STANDARD OF REVIEW

¶10 Whether a district court has complied with ICWA's substantive and procedural requirements presents a question of law, which we review to determine whether the court's application of the law is correct. *In re L.A.G. & N.L.*, 2018 MT 255, ¶ 10, 393 Mont. 146, 429 P.3d 629.

DISCUSSION

¶11 State courts must strictly follow the minimum federal requirements ICWA prescribes for the removal of Indian children from their families. 25 U.S.C. § 1902. "ICWA applies to all state court child custody proceedings involving an 'Indian child.'" *In re L.A.G. & N.L.*, ¶ 13 (citing 25 C.F.R. § 23.103(a)(1)). As applicable here, a "child custody proceeding" includes a "foster care placement," 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) (emphasis added). Bureau of Indian Affairs rules explain further that a "child-custody proceeding" includes either an involuntary proceeding or "[a] voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand." 25 C.F.R. § 23.103(a)(1)(i-ii). ICWA does not apply, however, to

> [a] voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

25 C.F.R. § 23.103(b)(4).

¶12 The District Court did not analyze these provisions of ICWA because it found *Bertelson* dispositive. As here, *Bertelson* involved a dispute between the mother and paternal grandparents of a child. *Bertelson*, 189 Mont. at 527, 617 P.2d at 123. *Bertelson* stated that such a dispute "does not fall within the ambit of the Indian Child Welfare Act,"

which was intended "to preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution." 189 Mont. at 531, 617 P.2d at 125. Because the case involved "an internal family dispute" and "not which foster or adoptive home or institution will best 'reflect the unique values of Indian culture . . . ,'" the *Bertelson* Court dismissed ICWA's applicability. 189 Mont. at 531-32, 617 P.2d at 126.

¶13 Grandparents argue that *Bertelson* compels dismissal of Mother's claim to the protections of ICWA and urge the Court to affirm on that basis. Mother contends that the District Court should not have relied on *Bertelson* because that case involved an issue of competing jurisdiction between State and Tribal court, which is not at issue here. Mother points out that other courts have not followed *Bertelson*'s reasoning that ICWA does not apply to an "internal family dispute," which is contrary to the express provisions of the Act.

¶14 *Bertelson* has limited application here. The issue there was whether a custody dispute over an Indian child living with her Indian grandparents on the Rocky Boy Indian Reservation should be resolved in State court or in Tribal court. The opinion contained a lengthy discussion of personal and subject matter jurisdiction and set forth what the Court determined to be "an appropriate test" for deciding which court was the appropriate forum. *Bertelson*, 189 Mont. at 529-30, 617 P.2d at 124-25. The Court remanded for an evidentiary hearing and the trial court's consideration of numerous factual and legal matters to determine "which is the better forum to ascertain the best interest of the child." *Bertelson*, 189 Mont. at 540, 617 P.2d at 130. The *Bertelson* Court rejected ICWA's

application without analysis or consideration of the definition of "child custody proceeding" in 25 U.S.C. § 1903(1)(i), and it is not clear from the limited facts in the opinion how the statute may have applied in the case. In any event, we agree with Mother that *Bertelson*'s conclusory statement that ICWA has no application to an "internal family dispute" is incorrect when the parent's voluntary placement of the child with another person does not allow the parent to regain custody of the child "upon demand." 25 U.S.C. § 1903(1)(i). We overrule *Bertelson*'s blanket statement that ICWA cannot apply to internal family disputes.[2] By its express terms, ICWA applies here, and *Bertelson* does not dispose of Mother's appeal.

¶15 The Stipulated Parenting Plan that Mother signed in 2017 plainly "operate[d] to prohibit the [children's] parent . . . from regaining custody of the [children] upon demand." 25 C.F.R. § 23.103(b)(4); 25 U.S.C. § 1903(1)(i). It required Parents to move for modification of custody or visitation rights and to prove to the trial court that their proposed change satisfied the best-interest standards Montana law requires for determining a parenting plan. Section 40-4-212, MCA. The trial court entered the Stipulated Parenting Plan as an order of the court, and Parents were bound by its terms. The ensuing litigation well demonstrates that Mother could not simply pick up the children from Grandparents and take them home. Under the clear definition of "child custody proceeding," ICWA governs the parties' dispute in this case.

[2] BIA regulations clarify that ICWA does not apply to "[a]n award of custody of the Indian child to *one of the parents* including, but not limited to, an award in a divorce proceeding." 25 C.F.R. § 23.103(b)(3) (emphasis added).

¶16 Mother contends that because the District Court failed to follow ICWA's procedural requirements, once she withdrew her consent to the Stipulated Parenting Plan she was entitled as a matter of law to the return of her children. Mother cites 25 U.S.C. § 1913(b), which provides:

> Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

Mother maintains that this law affords the trial court no discretion but to order the children's immediate return to her custody.

¶17 Grandparents counter that, even if ICWA applies, the case should be remanded for the District Court to conduct further proceedings in compliance with its provisions. They maintain first that, because Mother's consent to the placement was voluntary—which Mother now disputes—the trial court's failure was to establish the validity of her consent in accordance with the requirements of § 1913(a). Grandparents suggest the record demonstrates valid consent notwithstanding the absence of specific findings. They next argue that, even if the District Court deviated from ICWA requirements, the proper remedy is remand for further proceedings.

¶18 In the context of State-initiated cases seeking termination of parental rights, we have considered the appropriate remedy for a trial court's failure to comply with ICWA requirements. For starters, 25 U.S.C. § 1914 allows "any parent . . . from whose custody [an Indian] child was removed" to "petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of [25 U.S.C. §§ 1911, 1912, and 1913]." We have relied on Bureau of Indian Affairs ICWA

rules and guidelines to conclude that, even when a parent has established a violation, "the court must determine whether it is appropriate to invalidate the action." *In re S.B.*, 2019 MT 279, ¶ 28, 398 Mont. 27, 459 P.3d 214 (quoting 25 C.F.R. § 23.137(b); also citing Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* 76 (Dec. 2016), https://perma.cc/2JZM-YAUZ (2016 Guidelines)). *See also In re K.L.N.*, 2021 MT 56, ¶¶ 34-35, 403 Mont. 342, 482 P.3d 650 (concluding that ICWA violations in the temporary custody proceedings did not require invalidation of permanent custody proceedings that met ICWA standards); *In re L.A.G. and N.L.*, ¶ 29 (where trial court did not comply with ICWA, remanding case for "any further proceedings that may be necessary to meet the requirements of Title 41, chapter 3, MCA, and applicable ICWA standards" and permitting trial court to re-enter judgment on the merits of its prior findings and conclusions if it found ICWA standards satisfied).

¶19 Noteworthy here, the federal regulation on which we relied in *In re S.B.* applies to "an action for [either] foster-care placement or termination of parental rights." 25 C.F.R. § 23.137(b). As noted, Grandparents' custody under the Stipulated Parenting Plan meets the definition of a "foster-care placement." The District Court's 2017 failure to establish the validity of Mother's consent under 25 U.S.C. § 1913(a) and its subsequent refusal to honor Mother's withdrawal of that consent, even if error, thus do not preclude the court from determining whether it is appropriate to invalidate the children's placement with Grandparents.

¶20 In that regard, Mother's argument for immediate return overlooks 25 U.S.C. § 1920, which provides:

> Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian *or has improperly retained custody after a visit or other temporary relinquishment of custody*, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian *unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger*. (Emphases added.)

Applying 25 U.S.C. § 1920 and a state analog, the Washington Supreme Court has held:

> [T]he remedy when the Department improperly removes the children without providing active efforts is to affirm the dependency order, but to vacate the dispositional order's out-of-home placement and to remand for a determination of whether returning the children would subject the children to substantial and immediate danger or threat of danger.

In re Dependency of A.L.K., 196 Wn.2d 686, 703, 478 P.3d 63, 71 (2020). We determine that a like remedy is appropriate here.

¶21 Grandparents argue that the history of this case shows the risks of mental and physical harm to the children if placed immediately in Mother's care. They point to findings in Dr. Baxter's assessment, her recommendation that "reintroduction of the girls and their parents should occur only in a psychotherapeutic process," and her conclusion that the family "is likely to continue to require structure and support." Dr. Baxter set forth a list of principles to guide the reunification process between Parents and their children. At her recommendation, the court appointed a guardian ad litem, who also made numerous recommendations for a therapeutic reunification process that would not harm the children. In her final report, filed after Mother withdrew her consent and sought the children's immediate return, the guardian ad litem noted that even though the first therapeutic visit had gone well, "the children were quite dysregulated and subsequently confused about the

lack of follow-up. This dysregulation included night terrors, bed wetting, and fighting at school." She expressed concern that Parents' failure to continue with their therapeutic visits and structured process while they awaited a ruling on their ICWA motion "resulted in delay of their reunification therapy and dysregulation and confusion for the children."

¶22 Upon review of the record, we conclude that, despite the ICWA noncompliance issues, Mother is not entitled to an order for the immediate return of the children. Instead, the District Court is instructed to conduct further proceedings in compliance with 25 U.S.C. §§ 1914 and 1920 and to determine whether returning the children would subject them to substantial and immediate danger or threat of danger.

CONCLUSION

¶23 The District Court's July 7, 2022 Order denying Mother's motion for immediate return of the children on the basis of its conclusion that ICWA does not apply is reversed. The case is remanded for further proceedings in compliance with ICWA to determine whether the children should be returned to Mother's custody.

/S/ BETH BAKER

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR