

**Indian Child Welfare Act: subject matter jurisdiction, timing of expert testimony for permanent plan, and cease reunification**

- *State court must find subject matter exception to tribal court jurisdiction under ICWA applies*
- *Expert testimony regarding serious physical or emotional damage that would result to child if returned to parent must occur at hearing that results in permanency planning order for placement outside of parent's home*
- *"Active efforts" for reunification under in actions involving ICWA, but those efforts may be ceased when the court finds they would be futile*

**In re E.G.M.** \_\_\_ N.C.App. \_\_\_ (November 5, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy01ODQtMS5wZGY=>

**Facts:** A three year old Indian child as defined by the Indian Child Welfare Act (ICWA) was removed from her parents' care while they were domiciled on the Cherokee Tribe's Qualla Boundary land trust. Subsequently, the child was adjudicated neglected by the North Carolina district court. At disposition the court awarded legal custody to the respondent mother and placement in kinship care, where respondent mother was also residing. At that April 2012 dispositional hearing, an expert witness on Indian culture testified that continued custody or the return of custody to either parent would likely cause serious physical or emotional damage to the child. A permanency planning hearing was held in January 2013, and the Permanency Planning Order, after referencing the expert testimony from the April hearing, changed legal custody from the respondent mother to DSS with continued placement of the child with the kinship caregiver. Although the permanent plan continued to be reunification with the mother, the court relieved DSS of further reunification efforts with the respondent father based upon a finding that further efforts would be futile or inconsistent with the juvenile's health, safety and need for a safe, permanent home within a reasonable period of time. Both respondent mother and respondent father appealed, raising three issues under ICWA: subject matter jurisdiction between tribal and state court, the timing of expert testimony when proving by clear and convincing evidence that the child would likely suffer serious emotional or physical damage if the child remained in her parent's custody, and whether ICWA allows for the cessation of "active efforts" to reunify an Indian family prior to a TPR. Noting that the last two issues are issues of first impression in North Carolina, the court of appeals addressed all three issues in the interests of expediting review.

**Held:** vacated and remanded

1) Subject Matter Jurisdiction

- Under 25 U.S.C. A. 1911, the tribal court had exclusive jurisdiction over the child custody proceeding because the child was domiciled on Indian land. Exceptions are found at 25 U.S.C.A. 1919, and one of those exceptions involves an agreement between the state and tribe. Attached to the GAL's appellee brief was a Memorandum of Agreement (MOA) between the Eastern Band of Cherokee Indians and the state Department of Health and Human Services and four county dss agencies in judicial district 30 that deferred jurisdiction from the tribal court to the state court in child

- protective cases under G.S. Chapter 7B. The GAL requested the court of appeals take judicial notice of the MOA.
- Judicial notice of adjudicatory facts can be requested at any time; however, the court of appeals could not take judicial notice of the MOA because (1) the MOA is a legislative, not adjudicatory, fact, (2) the attached MOA was unable to be validated since it was uncertified and without a reference source, and (3) nothing exists in the trial court record to determine the state of the general knowledge of MOA within the county of the trial court.
  - Remanded to determine subject matter jurisdiction.
- 2) A determination under 25 U.S.C.A. 1912(e) that continued custody of the child to the parent is likely to result in serious emotional or physical damage to the child must be made contemporaneously with the placement, and the expert must testify at the permanency planning hearing where order for placement is made.
- 3) The provision of 25 U.S.C.A. 1912(d) requires a party seeking foster care placement of or the TPR over an Indian child to prove that “active efforts” were made to provide remedial services and rehabilitative programs and that those efforts were unsuccessful. Although “active efforts,” as opposed to “reasonable efforts” as set forth in G.S. 7B-507(b)(1), are required for ICWA cases, the court may order a cease reunification if it finds such efforts would clearly be futile.
- Remanded for the trial court to make findings that support the conclusion that further efforts would be futile.

### **UCCJEA: Findings and Procedure**

#### **Review and Permanency Hearings: Findings**

- *A court may not relinquish jurisdiction and transfer case to another state when no other action is pending or has been commenced in that other state*
- *Court must make specific findings of fact that support conclusions of law regarding placement of juvenile outside of a parent’s home and an order of no further reviews*
- *Visitation plan in court order must contain a minimum outline of time, place and conditions*

**In Re M.M, \_\_\_ N.C. App. \_\_\_ (November 5, 2013)**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy02MDAtMS5wZGY=>

**Facts:** Child was adjudicated dependent in 2008. In 2013, a permanency planning order awarded legal custody and guardianship of the child to her paternal grandparents, with whom the child had been living since 2010. The child, respondent father, and paternal grandparents reside in Michigan. Respondent mother was awarded supervised visitation one day per month not to exceed four hours at Safe Place in Michigan with travel costs to be shared between respondent mother and respondent father. The trial court relinquished its jurisdiction and transferred the case to Michigan. Respondent mother appeals.

**Held:** reversed and remanded

- The UCCJEA requires that if a court determines its state is an inconvenient forum, it must make findings of fact and conclusions of law regarding the relevant factors enumerated at G.S. 50A-207(b).
- A court may not transfer jurisdiction to another state when no action is pending or commenced in that other state. The court must stay its proceeding and condition that stay upon the commencement of a child custody proceeding in that other state.
- Recitation of testimony and the incorporation of admitted reports are not findings of fact.
- Incorporating findings from prior orders without specifying portions of the order that identify the prior findings does not allow for proper appellate review.
- The court must make findings of fact and conclusions of law under G.S. 7B-907(b)\* regarding a child's continued placement outside of her parents' home and -906(b)\* regarding an order of no further reviews.
- A visitation plan must specify time, place and conditions and cannot be left to the discretion of a custodian.

\* Note: G.S. 7B-906 and -907 were repealed by S.L. 2013-129 and replaced with G.S. 7B-906.1.

### **Findings**

- *Findings of fact must be supported by competent evidence in the record.*

**In the Matter of C.M.** \_\_\_ N.C. App. \_\_ (November 5, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy01NDYtMS5wZGY=>

**Facts:** Child was adjudicated neglected in 2010 and placed in DSS custody. In January 2013, the permanent plan changed from reunification with respondent mother to guardianship with court approved caretakers. In March 2013, the court ordered legal guardianship to non-relatives and found no further reviews were required under the former G.S. 7B-906. Respondent father appealed.

**Held:** Reversed and remanded

- There was no competent evidence in the record to support the court's findings and conclusions. No testimony was taken, no evidence was admitted, and no judicial notice was taken at the hearing.
- On remand, court of appeals cautioned trial court to ensure respondent father's due process rights regarding appearing at the hearing and his right to effective assistance of counsel were protected.