IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

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SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUN - 8 2022

Clerk

THE PEOPLE OF THE STATE OF SOUTH DAKOTA IN THE INTEREST OF T.P. AND A.P., MINOR CHILDREN AND CONCERNING S.P., J.V. AND Z.W., RESPONDENTS.	**ORDER DIRECTING ISSUANCE OF JUDGMENT OF REVERSAL** **#29869**

The Court considered all the briefs filed in the above-entitled matter, together with the appeal record, and concluded pursuant to SDCL 15-26A-87.1(C)(2) that the order from which the appeal is taken should be reversed on the ground that the order is clearly contrary to settled South Dakota law or federal law binding upon the states.

In 2016, regulations were adopted to "promote[]the uniform application of Federal law designed to protect Indian children, their parents, and Indian Tribes." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778-779 (June 14, 2016) (codified at 25 C.F.R. pt. 23). Those regulations, at 25 C.F.R. §23.107(a) (2016), specify that "State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child." A court has "reason to know" that a child is an Indian Child if "[a]ny

participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child[.]" 25 C.F.R. § 23.107(c)(2). Under the same federal regulation, if the court has "reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an 'Indian child,' the court must: (1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and (2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child' in this part." 25 C.F.R. 23.107(b)(2).

On November 30, 2021, the circuit court entered an order granting the Cheyenne River Sioux Tribe's motion to intervene as a party. The order contains language indicating that the Tribe "submitted proof" to the circuit court that A.P. is an Indian Child as defined by the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C.

§ 1903(4). However, our review of the record reveals no such proof. Nevertheless, based on the circuit court's order granting the Tribe's motion to intervene, the court had "reason to know" that A.P. was an Indian Child. Therefore, the circuit court was required to "[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child' in this part." 25 C.F.R. 23.107(b)(2).

On December 21, 2021, the circuit court issued a Final Dispositional Order that did not treat A.P. as an Indian child or otherwise determine, after the Cheyenne River Sioux Tribe's motion to intervene, whether A.P. did or did not meet the definition of an "Indian child." Because the circuit court's December 2021 order was not consistent with the requirements for termination of parental rights of an Indian child under ICWA, that order is reversed.

The circuit court also found that a guardianship is not an available option "when the final disposition of an Abuse and Neglect action is contested." The court's oral finding in this regard cited SDCL 26-8A-26, and its written finding cited SDCL 26-8A-21. We are uncertain if the court was suggesting it lacked specific statutory authority to order a guardianship in the absence of universal consensus among the parties and the guardian or whether, instead, the court was indicating that a guardianship is never an alternative in a

contested case. We wish to clarify for purposes of remand that a guardianship, by consent or otherwise, is a less restrictive alternative the court is obligated to consider where it is presented during a dispositional hearing.

On remand, the circuit court is directed to determine whether A.P. is an Indian child. If A.P. is determined to be an Indian child, the court is to conduct further proceedings consistent with applicable state and Federal law, which, among other things, requires the testimony of a qualified ICWA expert. Further, the court is directed to re-examine whether termination of Father's parental rights is the least restrictive alternative available commensurate with the best interests of A.P., as required by SDCL 26-8A-27.

Now, therefore, it is

ORDERED that a judgment reversing the Order of the lower court and remanding for further proceedings be entered forthwith.

DATED at Pierre, South Dakota, this 8th day of June, 2022.

BY THE COURT:

Steven R. Jensen, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

PARTICIPATING: Chief Justice Steven R. Jensen and Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney, and Scott P. Myren.