STATE OF MICHIGAN

COURT OF APPEALS

FOR PUBLICATION
March 21, 2013
9:10 a.m.

In the Matter of C. I. MORRIS, Minor.

No. 312248
Wayne Circuit Court
Family Division
LC No. 08-483987-NA

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Respondent appeals by right the trial court's order terminating his parental rights to the minor child. Because the trial court correctly determined that proper notice was given as required by the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and that the ICWA does not apply to this child-custody proceeding, we affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case has a rather extensive history in the appellate system. In July 2010, following a termination hearing, the trial court terminated respondent's parental rights as well as the rights of the minor child's mother. On February 17, 2011, this Court issued a per curiam opinion affirming the trial court's order terminating parental rights. *In re Morris*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2011 (Docket Nos. 299470, 299471).

Acting in propria persona, respondent filed an application for leave to appeal to the Michigan Supreme Court. On April 22, 2011, the Supreme Court vacated the part of this Court's judgment resolving respondent's appeal and remanded the case to this Court for reconsideration of respondent's appeal in light petitioner's confession of error regarding the failure of petitioner and the trial court to comply with the notice requirements of ICWA. *In re Mason*, 489 Mich 877; 796 NW2d 51 (2011).

On May 19, 2011, this Court readopted, but conditionally affirmed, the order terminating respondent's parental rights and remanded to the trial court for proper notice consistent with ICWA and for further proceedings as necessary and consistent with the opinion. *In re Morris (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued May 19, 2011 (Docket Nos. 299470, 299471).

On June 22, 2011, the Supreme Court, noting that it had retained jurisdiction in its April 22, 2011, order, issued an order granting respondent's application for leave to appeal, "limited to the issue whether the Court of Appeals 'conditional affirmance' remedy is an appropriate method of resolving an ICWA violation." *In re Morris*, 489 Mich 957; 798 NW2d 510 (2011). On May 4, 2012, the Supreme Court determined that a conditional reversal was more consistent with the text of the ICWA than conditional affirmance and more deferential to tribal interests. *In re Morris*, 491 Mich 81, 121; 815 NW2d 62 (2012). Overruling *In re IEM*, 233 Mich App 438; 592 NW2d 751 (1999), and its progeny, the Court adopted the conditional-reversal remedy for violations of the ICWA notice requirements. *Id*. The Court reversed this Court's judgment, conditionally reversed the trial court's termination of respondent's parental rights, and remanded to the trial court for resolution of the ICWA notice matter. *Id*. at 122. The Court directed the trial court to ensure that the appropriate tribal entities receive notice of the proceedings in compliance with the ICWA.[1] *Id*. at 123. The Court emphasized that the trial court's order terminating parental rights would be reinstated if the trial court found that the ICWA does not apply because (1) the minor child is not Indian or (2) the properly noticed tribes do not respond within the allotted time. *Id*.

On June 4, 2012, the trial-court referee held a hearing to comply with the Supreme Court's directives. Petitioner produced and admitted into evidence copies of notices it intended to send to three federally recognized Cherokee Indian tribes (United Keetoowah Band of Cherokee Indians in Oklahoma, Eastern Band of Cherokee Indians, and Cherokee Nation) and the Department of Interior's Bureau of Indian Affairs (BIA) Midwest Regional Office.[2] Emiline Reyst, the adoption caseworker tasked with issuing the notices, advised the court that the notices contained all of the genealogical information she had been able to obtain from respondent and

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[1] Both respondent and the minor child's mother informed the trial court at the December 11, 2008, preliminary hearing that they had Cherokee Indian Heritage, which the Supreme Court deemed sufficient to trigger the tribal-notice requirement of the ICWA. *In re Morris*, 491 Mich at 109.

[2] The notices contain genealogical information including the minor child's full name, date and place of birth, and claimed heritage as a Cherokee Indian; respondent's full name, date and place of birth, address, and claimed heritage as a Cherokee Indian; the mother's full name, date of birth, place of birth, address, and claimed heritage as a Cherokee Indian; the paternal grandfather's full name, date and place of birth, date and place of death, and claimed heritage as a Cherokee Indian; the paternal grandmother's name, date and place of birth, the fact that she is deceased, her place of death, and an acknowledgement that she was not a Native American; the maternal grandfather's full name, date of birth, city and state of residence, and claimed heritage as a Cherokee Indian; the maternal grandmother's name, including her maiden name, and an acknowledgment that she is not a Native American; the paternal great grandfather's name, place of birth, place of death, and claimed heritage as a Native American; The paternal great grandmother's name, place of birth, place of death, and acknowledgement that she was not a Native American; and the maternal great grandmother's name, place of death, and claimed heritage as a Native American.

the minor child's mother.[3] The referee continued the hearing for six weeks and directed petitioner to continue to make efforts to comply with the ICWA.

On July 16, 2012, the trial court reconvened for a continued hearing on the ICWA conditional reversal. Petitioner produced and admitted into evidence "a thick stack of documents" that included copies of the notices that were sent to the tribes, registered-mail return receipts and other proof of service to show that all of the notices were mailed on June 4, 2012, and received by the recipients by June 8, responses received from the tribe, and other correspondence between the caseworker and the tribes.

The records submitted by petitioner reveal that the BIA responded to the notice and indicated that it would take no further action because the appropriate tribe was notified. The United Keetoowah Band of Cherokee Indians in Oklahoma also responded and indicated that it did not intend to intervene in the case because it found no evidence that the child was a descendant of its band. The Eastern Band of Cherokee Indians received the notice but did not initially respond. The Cherokee Nation responded in a June 14, 2012, letter, indicating that the information provided was "not complete" and did not meet the BIA guidelines. It requested further information in order to verify Cherokee heritage, including the middle names of the paternal relatives, birth dates of everyone involved and their relationship to the child, and the maiden names of the women listed. Reyst attempted to obtain the requested information from respondent, but respondent had no further information.[4] On June 22, 2012, Reyst sent an email response to the Cherokee Nation explaining her efforts to obtain the additional information sought and indicating that she was not able to provide it, other than the fact that the minor child's paternal great-grandfather had no middle name. In her email, Reyst asked the Cherokee Nation to let her know if it needed anything else; she did not receive a response.

At the July 16, 2012, hearing, the referee confirmed with respondent that he had no further information to provide. The referee noted that more than ten days had passed since Reyst's last communication with the Cherokee Nation and, thus, deemed petitioner to have complied with the notice requirements of ICWA.

Respondent's attorney indicated that he had just received the Cherokee Nation's letter that day and, if given more time, he could conduct an investigation to see if he could obtain the requested information. Respondent's counsel argued that more time should be given to protect

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[3] Respondent and his attorney attended the hearing. The attorney for the minor child's mother also attended; however, the mother did not. Reyst advised the court that she had sent out 16 letters to as many addresses trying to find the mother and finally connected with her by telephone on May 30, 2012, at which point the mother gave Reyst "everything she knew" about the child's Indian heritage.

[4] Reyst indicated to the court that she received the Cherokee Nation's letter on June 21, 2012, and called respondent that day to obtain the requested information. Respondent returned her call the same day and left a message indicating that he could not get the information because he had no one to get it from and had no knowledge of it.

the respondent's due-process rights. The referee concluded that proper notice had been given and resulted in "absolutely no indication today, after ample notice and full compliance with the ICWA notice requirements, that [the minor child] is a member or eligible for membership in any Native American tribe to which ICWA would apply." The trial court agreed with the referee's recommendation and entered an order on August 9, 2012, reinstating its earlier order terminating respondent's parental rights.

On August 14, 2012, the trial court held a hearing where it admitted into evidence a letter from the Eastern Band of Cherokee Indians.[5] The letter states that, given the information provided, the band does not intend to intervene because it does not consider the minor child to be an "Indian child" under the ICWA.

II. STANDARD OF REVIEW

This Court reviews de novo questions of law involving the interpretation and application of the ICWA. *In re JL*, 483 Mich 300, 318; 770 NW2d 853 (2009). This Court reviews for clear error a trial court's factual findings underlying the application of legal issues. *In re Morris*, 491 Mich at 97.

III. ANALYSIS

As the Supreme Court previously noted in this matter, "before a state court can determine whether ICWA applies to the proceedings, the court must first make the critical determination whether the child is an 'Indian child.'" *Id*. at 99-100; see also MCR 3.965(B)(2). "[I]t is well established that only an Indian tribe can determine its membership. Therefore, when there are sufficient indications that the child may be an Indian child, the ultimate determination requires that the tribe receive notice of the child custody proceedings, so that the tribe may advise the court of the child's membership status." *In re Morris*, 491 Mich at 100 (citation omitted). Here, both respondent and the minor child's mother informed the trial court at the December 11, 2008, preliminary hearing that they had Cherokee Indian heritage, which the Supreme Court deemed sufficient to trigger the tribal-notice requirement of the ICWA. *Id*. at 109.

The notice provision of ICWA provides:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the

[5] This Court does not have a transcript of the hearing because, apparently, no transcript has been created. Nevertheless, the parties do not contend that the hearing is pertinent to this appeal.

> tribe cannot be determined, such notice shall be given to the Secretary[6] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. *No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary*: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding. [25 USC § 1912(a) (emphasis added).]

In his brief on appeal, respondent claims, for the first time, that petitioner failed to make diligent efforts to obtain the information about his family that was requested by the Cherokee Nation so that the tribe could determine the minor child's tribal eligibility or status. Respondent argues that the ancestry information provided by petitioner did not meet the BIA guidelines or the requirements of ICWA. These contentions are unsupported by the law. There is no requirement under ICWA, BIA's regulations, or Michigan case law that petitioner conduct independent research to obtain a parent's detailed genealogical information. There is nothing in the guidelines addressing genealogical information that should be included in the notice. The BIA adopted regulations requiring notice to include ancestry information *if known*. 25 CFR 23.11(a), (d). Similarly, the Supreme Court in this case noted that the trial court may direct the petitioner "to compose and send notice containing as much information as is *reasonably available*." *In re Morris*, 491 Mich at 124 (emphasis added).

The record reveals that petitioner gathered all of the information that was reasonably available by interviewing both respondent and the child's mother after they were given an opportunity to confer with relatives. Reyst interviewed respondent several times about his ancestry, and respondent confirmed to the court that that he had no further information to provide other than what had already been submitted to the tribes. Respondent did not move the trial court for reconsideration to present additional information. And, now on appeal, respondent neither claims to have any additional information to provide to the tribes nor identifies where he can get more information. Because all known information was provided to the tribes and respondent has not shown that any new information is available or would result in a different tribal determination, respondent has not shown error requiring reversal.

Respondent's argument that petitioner is responsible for locating information that he has been unable to find is unpersuasive. The notice requirement of 25 USC 1912(a) does not require that a detailed family tree be provided. There is nothing in the record to indicate that the minor child is eligible for membership in an Indian tribe, and both petitioner and the trial court satisfied their obligations under the ICWA. The burden then shifted to respondent to prove that the

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[6] "'Secretary' is defined as 'the Secretary of the Interior.' 25 USC 1903(11). Pursuant to 25 CFR 23.11(b) and (c)(2), when notice to the Secretary of the Interior is required under 25 USC 1912(a) for proceedings in Michigan, it is actually sent to the Minneapolis Area Director, Bureau of Indian Affairs." [*In re Morris*, 491 Mich at 104 n 14.]

ICWA still applied, which he failed to do. See *In re TM*, 245 Mich App 181, 187; 628 NW2d 570 (2001) ("If proper notice is provided and a tribe fails to either respond or intervene in the matter, the burden shifts to the parties (i.e., the parents) to show that the ICWA still applies."), overruled on other grounds by *In re Morris*, 491 Mich 81 (2012); see also *In re IEM*, 233 Mich App at 449 ("'Only after notice has been provided and a tribe has failed to respond or has intervened but is unable to determine the child's eligibility for membership does the burden shift to the parties to show that the ICWA still applies.'"), overruled on other grounds by *In re Morris*, 491 Mich 81 (2012). Since respondent could not obtain any additional information regarding his relatives, it would be unreasonable to expect petitioner to find it. Imposing this burden on petitioner would also encourage parents, who can best research their own ancestry, to delay the proceedings by providing limited information. Because it would often take a long time to uncover ancestry details, a requirement that ICWA tribal notices include every detail of a child's ancestry would undermine ICWA's 10-day provision, which prevents unreasonable delays. It would also jeopardize concepts of permanency and finality. The trial court did not err by finding that there was compliance with the ICWA's notification requirements.

Respondent also argues that it was not in the child's best interests to terminate respondent's parental rights under MCL 712A.19b(5). He claims that because the ICWA notice violation delayed the child's permanency, such delay is contrary to the child's best interests. Respondent asserts that the ICWA's remedy provisions permit him to petition for invalidation of court orders entered in violation of ICWA's notice requirement; thus, he requests that the case be remanded to determine whether the minor child is an Indian child. However, respondent has not established that ICWA's notice requirement was violated on remand or that ICWA actually applies to the minor child. Moreover, the issue of the minor child's best interests is not properly before this Court because it is outside the scope of the Supreme Court's limited remand. This Court already determined that the trial court did not err by finding that termination of respondent's parental rights was in the child's best interests, and the Michigan Supreme Court agreed. Thus, there was no error in the trial court's best-interest determination. A remand to ensure proper notice under ICWA that does not lead to any evidence that ICWA applies does not unravel a best-interest determination.

Finally, respondent argues that his due-process rights were violated when he was unable to obtain an adjournment at the July 16, 2012, hearing in order to obtain additional information. Respondent's argument lacks merit. Due process is about fundamental fairness. *In re Beck*, 287 Mich App 400, 401-402; 788 NW2d 697 (2010). Due process in civil cases requires that a party have the chance to know and respond to the evidence. *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). Here, respondent was able to participate in the proceedings and was informed that the Cherokee Nation requested more information about his family history on June 21, 2012 (the same day the caseworker received the request for information), well in advance of the July 16, 2012, hearing. Respondent has never claimed to have had any new information to provide the tribe, and he does not present any on appeal. Furthermore, Reyst responded to the Cherokee Nation's request for more information on June 22 and clarified that she had nothing more to provide, at which time the Cherokee Nation took no further action. Notice under ICWA does not require the court or petitioner to demand a response from the tribes notified. Notice to the tribes was properly provided under ICWA, no tribe sought a request for more time to prepare for the proceedings, and respondent was given ample time to investigate,

uncover, and provide any family information that he could. Thus, there was no due-process violation.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Jane M. Beckering