IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

TOHONO O'ODHAM NATION, *Petitioner*,

v.

THE HONORABLE ELAINE FRIDLUND-HORNE, Judge
of the SUPERIOR COURT OF THE STATE OF ARIZONA,
in and for the County of COCONINO, *Respondent Judge*,

S.Q., *Real Party in Interest*.

No. 1 CA-SA 22-0076
FILED 9-15-2022

Petition for Special Action from the Superior Court in Coconino County
No. SV2021-00045
The Honorable Elaine Fridlund-Horne, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Tohono O'odham Nation Office of Attorney General, Sells
By Howard M. Shanker, Hue T. Le
Counsel for Petitioner

McCarthy Weston, PLLC, Flagstaff
By Phillip (Jay) McCarthy Jr.
Counsel for Real Party in Interest

OPINION

Judge D. Steven Williams delivered the opinion of the court, in which Presiding Judge Cynthia J. Bailey and Chief Judge Kent E. Cattani joined.

W I L L I A M S, Judge:

¶1 In this special action, we examine whether an Indian tribe has a right to notice or intervention in a *voluntary* parental termination proceeding involving an Indian child. Because A.R.S. § 8-535 requires notice to the tribe of any Indian child involved in parental termination proceedings, without differentiating between a voluntary or involuntary termination, we accept special action jurisdiction, grant the relief sought in part, and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

¶2 Mother is a member of the Tohono O'odham Nation ("Nation"), a federally recognized Indian tribe. The Nation's reservation land stretches across portions of southern Arizona. Mother resides in Arizona but does not live on the reservation. Although not born on the reservation, the child is an Indian child subject to the Indian Child Welfare Act ("ICWA" or the "Act"). 25 U.S.C. §§ 1901-1963.

¶3 Within days of the child's birth, Mother petitioned the superior court to terminate her parental rights to facilitate the child's adoption by a non-Indian adoptive placement Mother selected. Mother invoked her right to anonymity and confidentiality under 25 U.S.C. § 1915(c), requesting the child's adoption remain confidential.

¶4 Mother alleges she informed the child's putative Father of the initial termination hearing and that Father stated he would appear and consent to the termination. Regardless, when Father failed to appear for the hearing, Mother formally served Father with the petition along with a notice of his rights. Father failed to timely exercise his rights or respond to the petition, and the superior court terminated both parents' rights to the child.

¶5 The same day the superior court issued the parental termination order, Father petitioned the Nation's tribal court to establish his paternity of the child. Father withdrew his petition at the tribal court's

initial hearing. Once aware of the parental termination order, the Nation moved the superior court to allow it to intervene and asked the court to vacate the termination order. The superior court denied both requests following oral argument. The Nation now seeks special action relief from this court.

DISCUSSION

¶6 Special action jurisdiction is discretionary and is proper when a petitioner has no "equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a). Special action jurisdiction is particularly appropriate in cases "rais[ing] questions of law that are of statewide importance, apparently of first impression, and likely to recur." *O'Brien v. Escher*, 204 Ariz. 459, 460, ¶ 3 (App. 2003). We accept jurisdiction because this case presents an issue of first impression that is of statewide importance, and the Nation has no adequate remedy by appeal.

¶7 Whether the Nation has a right to notice of and intervention in a voluntary parental termination proceeding is a question of statutory interpretation, which we review de novo. *See Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, 156, ¶ 7 (App. 2000).

¶8 The provisions of ICWA provide context but do not resolve the notice issue. Congress enacted ICWA in 1978 in response to "an alarmingly high percentage" of Indian families being broken up by the removal of children, who were then placed with "non-Indian foster and adoptive homes." ICWA is intended to:

> protect the best interests of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. . .

25 U.S.C. §§ 1901(4) and -1902. The Act provides that "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, . . . the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. § 1911(C). The Act requires that notice be provided to an Indian child's tribe in an involuntary proceeding for termination of parental rights, 25 U.S.C. § 1912(a), but is silent about tribal notice when a parent voluntarily terminates his or her parental rights. 25 U.S.C. § 1913.

¶9 There is a split of authority regarding whether ICWA requires tribal notice in voluntary parental termination proceedings. *Compare Cath. Soc. Serv., Inc. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989), *cert. denied* (1990); *Navajo Nation v. Superior Court of the State of Wash. For Yakima Cnty.*, 47 F.Supp.2d 1233, 1237-39 (E.D. Wash. 1999); *Berry Creek Rancheria of Maidu Indians of Cal. v. Buckmeier*, 2010 WL 761218 *2 (N.D. Iowa 2010), *with In re Baby Girl Doe*, 865 P.2d 1090, 1094 (Mont. 1993). But we need not reach that issue here because under Arizona law, neither a tribe's right to notice of a parental termination proceeding nor its right to intervene in that proceeding is limited to involuntary termination proceedings.

¶10 Arizona Revised Statutes § 8-535(A) provides that after a petition for termination of the parent-child relationship has been filed, "notice of the initial hearing and a copy of the petition shall be given to . . . the tribe of any Indian child as defined by [ICWA]." The statute does not limit the notice requirement to involuntary proceedings. And though Mother argues the reference to 25 U.S.C. § 1912 (the involuntary termination section of ICWA) in the very next sentence of § 8-535(A) suggests such a limitation, that ICWA provision addresses how notice must be served – not what types of parental termination cases require tribal notice altogether. *Id.* ("In addition to the service of process requirements in civil actions, . . . the tribe of an Indian child shall be notified of the initial hearing by registered mail, return receipt requested, as required by [25 U.S.C. § 1912]").

¶11 If the legislature had intended to limit tribal notice requirements only to involuntary parental termination proceedings, it could have so stated. *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106 (1976) (noting that our interpretation of a statute is guided by the "presumption that what the [l]egislature means, it will say"); *Town of Scottsdale v. State ex rel. Pickrell*, 98 Ariz. 382, 386 (1965) ("It is a basic principle that courts will not read into a statute something which is not within the manifest intention of the legislature as indicated by the statute itself.").

¶12 Similarly, the Arizona Rules of Procedure for the Juvenile Court contain no limiting language regarding a tribe's right to notice. When the termination proceedings were underway in this case, Rule 64(D) provided that if "the court has reason to [] know the child at issue is an Indian child as defined by ICWA . . . notification shall be given to . . . the child's tribe." The rule also required that "[t]he notice shall advise . . . the tribe of their right to intervene." The rule did not differentiate between involuntary and voluntary proceedings. Since then, our supreme court has amended and renumbered the Arizona Rules of Procedure for the Juvenile

Court, but its effect remains unchanged.[1] *See* Ariz. Sup. Ct. No. R-20-0044 (effective July 1, 2022).

¶13 Because neither A.R.S. § 8-535 nor the Arizona Rules of Juvenile Procedure limit an Indian tribe's right to notice or intervention solely to involuntary parental terminations, those tribal rights extend to voluntary termination proceedings. Since the Nation was not provided notice of the initial termination proceeding, nor was it allowed to intervene, we vacate the parental termination order, grant the Nation's motion to intervene, and remand to the superior court for further proceedings consistent with this opinion.

CONCLUSION

¶14 For the foregoing reasons, we accept special action jurisdiction, grant the relief sought in part, by vacating the parental termination order and granting the Nation's motion to intervene, and remand for further proceedings.

AMY M. WOOD • Clerk of the Court
FILED: AA

[1] Juvenile Rule 351(d)(2) now provides that "if the court has reason to know the child is an Indian child . . . the notice [of hearing] must advise the . . . tribe of the right to intervene."