STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ALEXANDER RUSE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MICHAEL RUSE,

Respondent-Appellant.

UNPUBLISHED
August 10, 1999

No. 213504
Arenac Circuit Court
Family Division
LC No. 00-001056 NA

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

Respondent appeals by delayed leave granted from a family court order terminating his parental rights to the minor child under MCL 712A.19b(3)(b)(i); MSA 27.3178(598.19b)(3)(b)(i). We conditionally affirm the termination order and remand to the family court so that proper notice of the proceedings can be provided to the interested Indian tribe as required by the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*.

Regarding respondent's claim that the family court erred in terminating his parental rights under state law, we conclude that respondent has not established any basis for relief. Respondent's claim that the family court erred in terminating his parental rights under § 19b(3)(c)(i) is misplaced because the record indicates that termination was actually ordered pursuant to § 19b(3)(b)(i). Respondent's failure to address the proper statutory ground for termination precludes appellate relief. Cf. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). In any event, we are satisfied from our review of the record that the family court did not clearly err in finding that subsection § 19b(3)(b)(i) was established by clear and convincing evidence. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).[1]

Respondent also claims that the family court erred in proceeding with the termination hearing after being informed that the Michigan Indian Child Welfare Agency was still investigating the possibility

of the child having Indian heritage. However, only the attorney for the child's mother raised the issue of the child's possible Indian heritage at the termination hearing. No request for an adjournment was made by respondent. Hence, respondent failed to preserve for appeal his claim that an adjournment should have ordered. Cf. *People v Poindexter*, 138 Mich App 322, 331; 361 NW2d 346 (1984). Further, although respondent presented claims regarding the ICWA to the family court in his motion for rehearing, the specific question raised in this appeal, i.e., whether there was compliance with the notice provision of § 1912(a) of the ICWA, 25 USC 1912(a), was not raised in that motion, but rather, is based on this Court's recent decision in *In re IEM*, 233 Mich App 438, 448; 592 NW2d 751 (1999). Nonetheless, because an issue of law has been presented for which all the necessary facts are present, we will address respondent's claim. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

As a threshold matter, we reject respondent's challenge to the family court's jurisdiction over this case. As this Court observed in *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992), there is "a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void, although it may be subject to direct attack on appeal." The question presented here, whether proper notice was given in accordance with § 1912(a) of the ICWA, implicates only a mistake in the exercise of undoubted jurisdiction. Hence, any error in this regard would not provide a basis for voiding the termination order.

We agree, however, that petitioner did not give the requisite notice prescribed by § 1912(a) to the Indian tribe. Because of the suggestion in the record that the mother and, thus, the child, were potentially tribal members, the family court had a duty to ensure that petitioner complied with the ICWA's requirement in § 1912(a) that the interested Indian tribe receive proper notice. Petitioner's correspondence with the Michigan Indian Child Welfare Agency to request a determination of the child's possible affiliation with the Cherokee tribe does not satisfy the ICWA's notice requirements. *In re IEM, supra* at 448. Further, we do not find that the Cherokee Nation's April 1998, qualified response to the Michigan Indian Child Welfare' Agency's inquiry, based on the information provided to it, obviates the need for proper notice. Error on the side of giving notice is preferable in order to maintain the child in a stable placement. *In re IEM, supra* at 447.

Thus, we conclude that respondent has demonstrated an error of law, namely, that the ICWA was violated because proper notice was not provided to the interested Indian tribe under § 1912(a). In accordance with *In re IEM, supra*, we hold that the proper remedy is to conditionally affirm the termination order and remand this case to the family court so that proper notice can be provided under § 1912(a). We have considered the other arguments presented by respondent regarding the ICWA, but conclude that they establish no basis for relief. The mere fact that the child might have Indian heritage did not qualify him as an Indian child under 25 USC 1903(4), *In re Johanson*, 156 Mich App 608, 613; 402 NW2d 13 (1986), and, absent such a determination, it was not necessary to apply the dual burden of proof described in *In re Elliot*, 218 Mich App 196, 209; 554 NW2d 32 (1996).

The order terminating parental rights is conditionally affirmed and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Michael J. Kelly
/s/ Mark J. Cavanagh

[1] Respondent does not claim that termination of his parental rights was clearly not in the child's best interests. See MCL 712A.19b(5); MSA 27.3178(598.19b)(5).