STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JADYN ELLISABETH KELLY, Minor.

ICA JESSICA KELLY,

Petitioner-Appellee,

v

STEVEN FLOYD THOMAS,

Respondent-Appellant.

UNPUBLISHED
July 1, 2008

No. 279919
Kent Circuit Court
Family Division
LC No. 07-022357-AD

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating his parental rights to his minor child under MCL 710.39(1). We conditionally affirm but remand for the reasons discussed below.

Respondent first argues that the lower court erred when it denied his motion for change of venue. Respondent's only argument in his motion was that the child was born in a different county. However, venue was proper in Kent County, where the child resided after she was placed for adoption at birth. See MCR 3.926(B); MCL 712A.2(b). The lower court did not err when it denied respondent's change of venue motion.

Respondent also argues that the lower court erred when it held that it was against the child's best interests to grant respondent custody and terminated respondent's parental rights. The child's mother petitioned for termination of respondent's rights so the child could be adopted. Respondent conceded that he did not establish a custodial relationship or provide substantial and regular support under MCL 710.39(2); therefore, the lower court was required to terminate his rights if custody was not in the child's best interests, MCL 710.39(1).

As respondent argues on appeal, it is this state's policy to keep children with their biological parents whenever possible, MCL 712A.1(3); *In re Brown*, 139 Mich App 17, 20; 360 NW2d 327 (1984), and a parent's right to the custody of his child is an element of liberty protected by due process guarantees, *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); see also *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). However, MCL 710.39(1) is constitutional, even if the putative father did not provide support because he

had reason to doubt his paternity. *In re BKD*, 246 Mich App 212, 222-226; 631 NW2d 353 (2001).

It was proper to consider, among other factors, respondent's lack of bond with the child and the stability of the child's adoptive home, even though respondent opposed the placement. See *In re BKD*, *supra* at 219-220. On the other hand, respondent's efforts to see and support the child were also relevant to his disposition to provide affection and financial support. However, respondent did not assist petitioner during her pregnancy and provided little support after the birth. Respondent claimed he believed petitioner was not really pregnant and that he offered assistance when he learned she was. However, we must consider the lower court's special opportunity to judge witness credibility. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re BKD*, *supra* at 220. The lower court also found that respondent did not provide sufficient information about the care he provided for his sons. His testimony indicated that he worked long hours, often in different cities. Further, although the affidavit of indigency petitioner cites on appeal was filed after the lower court terminated respondent's rights, the court had other reasons to doubt respondent's unsupported testimony regarding home and financial stability.

We also defer to the lower court's ability to judge respondent's credibility regarding why he was convicted of child cruelty. Respondent denied responsibility for that offense, as well as his conviction for possessing marijuana and a ticket for failing to seat belt his child. This failure to acknowledge any mistakes reflected on his fitness as a parent. Respondent argues that his ability to foster the child's Native American culture should have weighed heavily in his favor. However, respondent offered no evidence of this in the lower court.

The lower court did not err when it held that it was not in the child's best interests to grant respondent custody and terminated respondent's parental rights.

Finally, respondent argues that the lower court was required to comply with the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, because he indicated on a guardianship petition that the child was a member of, or eligible for membership in, the Saint Regis Mohawk tribe. Under 25 USC 1912(a), when a state court knows or has reason to know that an Indian child is involved, a party seeking to terminate parental rights must notify the Indian tribe or the Secretary of the Interior if the tribe cannot be located. See also MCR 3.980(A)(2). The court may not terminate parental rights to an Indian child unless there is evidence beyond a reasonable doubt, including expert witness testimony, that continued custody is likely to result in serious physical or emotional damage. 25 USC 1912(f); see also MCR 3.980(D); *In re Morgan*, 140 Mich App 594, 603-604; 364 NW2d 754 (1985).

Circumstances that give a court reason to believe the child is an Indian child include (1) any party, tribe, or agency informs the court that the child is an Indian child; (2) any public or state-licensed agency involved in child protective services or family support has information suggesting the child is an Indian child; or (3) an officer of the court has knowledge that the child may be an Indian child. *In re IEM*, 233 Mich App 438, 446-447; 592 NW2d 751 (1999), citing the Bureau of Indian Affairs guidelines. It is best to err on the side of granting notice and defer to the tribes' greater ability to determine membership eligibility. *Id.* at 447. Therefore, respondent's guardianship petition filed in the lower court was sufficient to trigger the notice

requirement, regardless whether it was served on opposing counsel, because the court had reason to know the child might qualify as an "Indian child."

When a trial court fails to comply with the ICWA notice requirement, but this Court determines that the termination of parental rights was appropriate under state law, the proper remedy is to conditionally affirm the trial court's decision but remand for notice and opportunity to establish that the child is an Indian child. *In re IEM*, *supra* at 449-450. If it is established in the trial court that the child meets the definition of an Indian child, the court's termination decision is reversed and the trial court must comply with the requirements of the ICWA, including the higher burden of proof and expert witness requirement, 25 USC 1912(f). *In re IEM*, *supra* at 450. If it is established that the ICWA does not apply, the trial court's original order will stand. *Id.*

Petitioner and the minor child offer evidence on appeal that the child was not eligible for tribal membership. However, our review is limited to the lower court record, and the parties cannot expand the record by attaching new documents to an appellate brief. See *Kent County Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000), aff'd sub nom *Bryne v State*, 463 Mich 652 (2001).

We conditionally affirm and remand for the reasons discussed above. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette