STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
August 12, 2010

In the Matter of PLANCK Minors.

No. 296888
Luce Circuit Court
Family Division
LC No. 2009-005117-NA

Before: M.J. KELLY, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Respondent appeals by right the trial court's order terminating his parental rights to the minor children, under MCL 712A.19b(3)(c)(*i*). There is no dispute that the trial court failed to comply with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. But this error was harmless because the pertinent Indian tribe subsequently determined that the children were not eligible for enrollment. Because no other asserted error warrants reversal, we affirm.

Respondent does not challenge the existence of the statutory grounds under which the trial court terminated his parental rights. Rather, he argues that when the trial court issued its opinion from the bench, it failed to cite any legal authority in support of its findings of fact. To issue an order terminating parental rights, the trial court must make findings of fact, state conclusions of law, and specify the statutory basis for the order. MCL 712A.19b(1); MCR 3.977(I); *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). Although the trial court did not explicitly identify MCL 712A.19b(3)(c)(*i*), the trial court quoted and paraphrased language from this statutory subsection making it clear that the court relied on it.

Moreover, clear and convincing evidence was presented warranting termination pursuant to MCL 712A.19b(3)(c)(*i*) and warranting a finding that termination was in the children's best interests. MCL 712A.19b(5). Under the circumstances of respondent's longstanding substance abuse problems and failure to benefit from treatment, the trial court was unlikely to rule in any way other than terminating his parental rights. The trial court's action was consistent with substantial justice. Thus, any omission the trial court made was harmless error that would not be grounds for disturbing the trial court's order. MCR 2.613(A).

Respondent also argues that the notice provisions of ICWA were not satisfied. Under the ICWA, an Indian child's tribe is entitled to notice of termination of parental rights hearings where the court knows or has reason to know that an Indian child is involved. 25 USC 1912(a). An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 USC 1903(4); see also MCR 3.002(5) and

MCR 3.903(F).[1] The question whether a person is a member of a tribe is for the tribe itself to answer. *In re NEGP*, 245 Mich App 126, 133; 626 NW2d 921 (2001). Further, both the ICWA and MCR 3.965(B)(9)—now MCR 3.965(B)(2)—require that a trial court directly inquire about the tribal status of the parents and the minor child at the time of the preliminary hearing. *In the Matter of TM (After Remand)*, 245 Mich App 181, 187; 628 NW2d 570 (2001). If it is determined that a child may be an Indian child, the trial court must give notice of the proceedings to the Indian tribe. See *In re IEM*, 233 Mich App 438, 446-447; 592 NW2d 751 (1999).

In this case, the children's mother indicated to the trial court that she was a member of an American Indian tribe. She also stated her belief that her children were ineligible for membership. However, the children's mother's statements about her own tribal affiliation were sufficient to trigger the notice requirements of the ICWA and MCR 3.965(B)(9) because the trial court had reason to know that the children might qualify as "Indian children." Even though the children's mother consistently stated that her children were not eligible for tribal membership, Indian tribes are in a better position to determine questions involving the membership of children who may have some relationship to the tribe, and courts should defer to the tribe's expertise. *IEM*, 233 Mich App at 447. Whether the minor child is an Indian child subject to the ICWA is a question for the tribe to decide. See *In re Fried*, 266 Mich App 535, 540; 702 NW2d 192 (2005); *TM*, 245 Mich App at 191-192.

In this case, the children's status as possible tribal members had not been definitively determined by the time of the termination hearing. Petitioner did not contact the tribe in question to ascertain whether the children were eligible for tribal enrollment until after the conclusion of the termination hearing. Thus, the response petitioner received to its untimely inquiry was not admitted into evidence.

Where a respondent's parental rights have otherwise been properly terminated under Michigan law, but the petitioner and the trial court failed to comply with the ICWA's notice provisions, reversal is not necessarily required. *IEM*, 233 Mich App at 449-450. Instead, the proper remedy is to "conditionally affirm the [trial] court's termination order" but remand the matter so that the court and the petitioner may provide proper notice to the interested tribe. *Id.* In this case, because the pertinent Indian tribe has already responded to the tardy notice, and confirmed the testimony of the children's mother that the children were not eligible for enrollment in the Tribe, we conclude that harmless error has occurred. MCR 2.613(A).

We affirm.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Donald S. Owens

[1] Our Supreme Court adopted these and several other amendments to the Michigan Court Rules, effective May 1, 2010, incorporating the provisions of the ICWA. See 485 Mich, Part 1, cixvi *et seq*. (ADM File No. 2008-43).