STATE OF MICHIGAN

COURT OF APPEALS

In re J. R. SMITH, Minor.

UNPUBLISHED
May 10, 2016

No. 328883
Kalamazoo Circuit Court
Family Division
LC No. 2012-000502-NA

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

Respondent mother appeals by right the July 13, 2015 order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(a)(*ii*) (deserted minor child for 91 or more days), (c)(*i*) (failure to rectify conditions of adjudication), (c)(*ii*) (other conditions exist that could have caused the child to come within the court's jurisdiction and they have not been rectified), (g) (failure to provide proper care and custody), and (j) (child will be harmed if returned to parent). We affirm.

Respondent's only argument on appeal is that the trial court failed to properly comply with the notice provisions of the federal Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. Respondent specifically claims that the trial court erroneously terminated her parental rights and accepted a plea of admission from the child's father, who is not a party to this proceeding, before notification was made pursuant to ICWA. Because this issue is raised for the first time on appeal, our review is limited to plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In child protective proceedings, an "Indian child" is afforded certain protections under ICWA and MIFPA. *In re Morris*, 491 Mich 81, 99; 815 NW2d 62 (2012); *In re Spears*, 309 Mich App 658, 64, 669; 872 NW2d 852 (2015). An "Indian child" is defined by ICWA 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). The child's membership or eligibility for tribal membership may only be determined by the Indian tribe. *Morris*, 491 Mich at 100. Thus, if the trial court has "sufficient indications that the child may be an Indian child," the appropriate tribe must be given notice of the proceeding so the trial court may be advised of the child's membership status. *Id.* The notice provision in ICWA states, in relevant part, the following:

> 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 . . . of the pending proceedings and of their right of intervention. . . . [25 USC 1912(a); see also MCL 712B.9(1) (the corresponding notice provision in MIFPA).]

Importantly, "the mere triggering of the notice requirement does not strip the trial court of jurisdiction over the child[] and does not mandate automatic reversal of all proceedings occurring after the notice requirement was trigged." *Morris*, 491 Mich at 119. The proper remedy for a notice violation under ICWA "is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue." *Id.* at 89, 122.

We find no plain error with respect to the provision of notice under ICWA in this case. Respondent incorrectly claims that notification was not made before her parental rights were terminated.[1] The record establishes that the trial court ordered that notice be sent after the minor child's father, who may have had Indian heritage, was located and he established legal paternity. Based on the tribes' responses to that notice, it was determined and expressly stated on the record that the minor child was not an Indian child. Only after this compliance with ICWA did the trial court complete the termination hearing. Therefore, we find no plain error, and respondent is not entitled to a conditional reversal of the termination order pending a determination of eligibility as requested.

Additionally, respondent argues that there should have been notice after she informed the trial court at the preliminary hearing that one of the identified putative fathers possibly had Native American heritage. Although the trial court learned of the father's possibile Native American heritage at the preliminary hearing, it was not until later in the proceeding that the father was located and established paternity. At that point, the trial court was again advised of the father's possible Native American heritage, and it then entered an order that notification and a determination of eligibility be made under the ICWA. Even if we accepted respondent's argument that the notification under the ICWA was untimely, once it is determined that a child is not an Indian child, "any notice violation is harmless." *Morris*, 491 Mich at 120-121.

We affirm.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey

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[1] Respondent also claims that notification was not made before the father entered a plea of admission to the petition and was adjudicated. Respondent's argument in this regard misconstrues the record. Although the minor child's father entered a plea of admission before notification was made, the trial court only accepted the plea *under advisement* until it had made a determination of the minor child's eligibility under ICWA.