IN THE COURT OF APPEALS OF IOWA

No. 8-629 / 08-0439
Filed December 17, 2008

IN THE INTEREST OF A.P. and S.T.,
Minor Children,

SAC AND FOX TRIBE OF THE
MISSISSIPPI IN IOWA,
Appellant.

Appeal from the Iowa District Court for Linn County, Susan Flaherty, Associate Juvenile Judge.

A Native American tribe appeals from the juvenile court's denial of its motion to intervene in children in need of assistance proceedings. **AFFIRMED.**

Jeffrey S. Rasmussen of Olson, Allen & Rasmussen, Bloomington, Minnesota, and John G. Daufeldt of the Daufeldt Law Firm, P.L.C., Conroy, for appellant.

David Fiester, Waterloo, for mother.

Michael Lindeman, Cedar Rapids, for father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Harold Denton, County Attorney, and Lance Heeren, Assistant County Attorney, for appellee State.

Robert Kimm, Cedar Rapids, for minor children.

Heard by Eisenhauer, P.J., Doyle, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

DOYLE, J.

The Sac and Fox Tribe of the Mississippi in Iowa (Tribe) appeals from the juvenile court's denial of its motion to intervene in children in need of assistance (CINA) proceedings that involve two children it alleges are Indian children within the meaning of Iowa's Indian Child Welfare Act (Iowa ICWA), Iowa Code chapter 232B (2007). Upon our review, we affirm the judgment of the juvenile court.

***I. Background Facts and Proceedings*.**

A.P. and S.T. are the children of A.M.P., an enrolled member of the Tribe. It is undisputed that neither child is a member of the Tribe, nor are their fathers members of the Tribe.

The State filed a CINA petition as to A.P. and S.T. in November 2007. Upon receiving notice of the proceedings, the Tribe filed motions to intervene on November 29, 2007, asserting the children were members of the Tribe's community and the children's mother was an enrolled member of tribe. *See* Iowa Code § 232B.3(6) (defining "Indian child" in part as a "child who is under eighteen years of age that an Indian tribe identifies as a child of the tribe's community").

After the Tribe filed its motion, our supreme court decided *In re A.W.*, 741 N.W.2d 793, 812 (Iowa 2007), in which it determined Iowa Code section 232B.3(6) "as applied in this case . . . violates the Equal Protection Clause of the United States Constitution" because it included ethnic Indians who were not eligible for tribal membership thus constituting an impermissible racial classification. Based upon the court's decision in *A.W.*, the State filed a resistance to the Tribe's motion to intervene, asserting that "[a]bsent evidence that the . . . children are either members of the . . . Tribe . . . or eligible for

membership in the Tribe, neither the Iowa nor Federal [ICWA] is applicable" to these proceedings. The Tribe responded by filing a motion to strike the State's resistance, contending (1) "the filing [did] not state the position of the Department of Human Services," (2) the Linn County Attorney lacked standing to challenge the constitutionality of an Iowa statute, and (3) because no parent had objected to the transfer, the Linn County Attorney's objection was insufficient pursuant to Iowa Code section 232B.5(10). The Linn County Attorney then filed a "Motion for Hearing on the Applicability of the Federal and Iowa [ICWA]."

At the hearing on the motions, the juvenile court denied the Tribe's motion to strike. The court's ruling was based upon testimony from employees of the Iowa Department of Human Services (Department) stating that the State's resistance to the Tribe's motion to intervene did, in fact, state the position of the Department.[1] The court proceeded to hear testimony regarding whether the children were "Indian children" as defined by the Federal and Iowa ICWA. During her testimony, Tamara Beall-Thomas, Meskwaki Family Services Director/ICWA Specialist for the Tribe, asserted for the first time that the children were also "Indian children" because they were eligible for enrollment in the Tribe (in addition to being identified as children of the Tribe's community). During the hearing, the mother made a motion requesting that jurisdiction of the matter be

[1] From the record before us, it appears the juvenile court never expressly addressed the Tribe's remaining arguments in its motion to strike. The record before us reveals no Iowa Rule of Civil Procedure 1.904(2) motion by the Tribe to amend or enlarge the court's findings to rule upon those issues. Consequently, we find the Tribe has failed to preserve error on this issue. *See In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003) (holding that issues must be both presented to and ruled upon by the juvenile court in order to preserve error for appeal). Nevertheless, because we ultimately find the ICWA is inapplicable to this case, we need not and do not address this claim urged by the Tribe for reversal of the juvenile court's ruling.

transferred to the Tribal Court. Following the hearing, the court issued a ruling finding the children were not Indian children and thus determining that neither the Federal nor Iowa ICWA was applicable to the case. The court accordingly denied the Tribe's motion to intervene and the mother's motion to transfer.[2]

The Tribe appeals.

***II. Scope and Standards of Review*.**

Although the standard of review in juvenile proceedings is ordinarily de novo, *In re N.N.E.*, 752 N.W.2d 1, 6 (Iowa 2008), we review the denial of a motion to intervene for the correction of errors at law. *In re H.N.B.*, 619 N.W.2d 340, 342 (Iowa 2000). We likewise review the juvenile court's denial of a motion to transfer for the correction of errors at law. *In re N.V.*, 744 N.W.2d 634, 636 (Iowa 2008). However, constitutional challenges are reviewed de novo. *N.N.E.*, 752 N.W.2d at 6.

***III. Discussion*.**

The Tribe contends, among other things, that the Iowa ICWA applies to A.P. and S.T. because they are "Indian children" as defined in Iowa Code section 232B.3(6), and that the juvenile court incorrectly interpreted the Iowa Supreme Court's holding in *A.W.* as striking down section 232B.3(6) on its face. In response, the State maintains that the court correctly applied *A.W.* in this case, and because the Tribe failed to prove the children were, in fact, Indian children,

[2] At the hearing, the mother agreed that if the juvenile court determined the children were not "Indian children," her motion to transfer the proceedings would fail. The mother has not appealed from the ruling or joined in the Tribe's appeal. Consequently, we confine our review to the issues presented on appeal.

the ICWA did not apply in the case. Because we agree that the children were not "Indian children" under the facts of this case, we affirm.

"Congress passed the [Federal ICWA] in 1978," establishing "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which . . . reflect the unique values of Indian culture." *N.N.E.*, 752 N.W.2d at 6-7 (citing 25 U.S.C. §§ 1901-63 (2006)). Thereafter, in 2003, the Iowa General Assembly enacted the Iowa ICWA to "clarify state policies and procedures regarding implementation" of the Federal ICWA. *A.W.*, 741 N.W.2d at 798; Iowa Code § 232B.2 (2007); *see also* Jerry R. Foxhoven, *The Iowa Indian Child Welfare Act: Clarification and Enhancement of the Federal Act*, 54 Drake L. Rev. 53 (2005). "The provisions of the Iowa ICWA are to be strictly construed and applied." *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005). However, "[t]he provisions of the Iowa ICWA do not apply until the court determines the children are 'Indian' as defined in the Iowa ICWA." *Id.* at 151.

Under Federal law, an "Indian child" is defined as an "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 U.S.C. § 1903(4); *see also N.N.E.*, 752 N.W.2d at 7. The Iowa ICWA defines an "Indian child" more broadly, providing that an "Indian child" is "an unmarried Indian person who is under eighteen years of age or a child who is under eighteen years of age that an *Indian tribe identifies as a child of the tribe's community*." Iowa Code § 232B.3(6); *see also A.W.*, 741 N.W.2d at 798-99 (emphasis added). However, in *A.W.*, the Iowa Supreme Court concluded

that the Iowa ICWA's expansion of the definition of "Indian child" to include ethnic Indians not eligible for membership in a federally recognized tribe was unconstitutional, explaining:

> By including children who are ineligible for tribal membership, section 232B.3(6) clearly exceeds the limits of federal power over Indian affairs upon which the federal ICWA is based and from which the Iowa ICWA is derived. In its classification of ethnic Indian children with tribal Indian children, section 232B.3(6) provides "hardly more than a pretense that this classification is political, rather than racial." We conclude the race-based classification of A.W. and S.W. as "Indian children" is not justified by a compelling state interest. Accordingly, section 232B.3(6), as applied in this case to A.W. and S.W., violates the Equal Protection Clause of the United States Constitution.

A.W., 741 N.W.2d at 812 (citations omitted).

The Tribe argues that in *A.W.* our supreme court did not declare section 232B.3(6) to be unconstitutional on its face. Rather, the Tribe maintains the court's holding was limited in its application to the facts of that case. We disagree.

After its decision in *A.W.*, the Iowa Supreme Court has twice summarized its holding in *A.W*. in other cases concerning the Federal and Iowa ICWA. In *N.V.*, the court explained in a footnote that in *A.W.*, it "held section 232B.3(6) to be unconstitutional as applied to children who were not members of a tribe or eligible for membership in a tribe." *N.V.*, 744 N.W.2d at 635 n.1. Furthermore, in *N.N.E.*, after setting forth the definition of "Indian child" as delineated in the Federal ICWA, the court noted in an explanatory parenthetical that in *A.W.* it held the "Iowa ICWA's definition of 'Indian child' found in Iowa Code [section] 232B.3(6) was unconstitutional because it included ethnic Indians who were not eligible for tribal membership." *N.N.E.*, 752 N.W.2d at 7. Given the court's use

of the Federal ICWA's definition of "Indian child" in *N.N.E.* instead of the Iowa ICWA's definition, its descriptions of its holding in *A.W.*, and its overall reasoning in *A.W.*, we conclude the Iowa Supreme Court in *A.W.* determined section 232B.3(6) was unconstitutional on its face. Consequently, as in *N.N.E.*, we must apply the Federal definition of "Indian child" to determine whether the Federal or Iowa ICWA applies to this case.

Here, the children were not members of the Tribe. The children are not eligible for membership in the Tribe.[3] Consequently, we conclude the juvenile court did not err in determining the protections of the Federal and Iowa ICWA are inapplicable to this case because the children are not "Indian children." Therefore, we affirm the judgment of the juvenile court denying the Tribe's motion to intervene.[4]

***IV. Conclusion*.**

Based upon the foregoing reasons, we affirm the judgment of the juvenile court.

AFFIRMED.

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[3] The juvenile court concluded, based on the evidence presented, the children were not eligible for enrollment with the Tribe. Tamara Beall-Thomas, Director and ICWA Specialist for the Meskwaki Family Services for the Tribe, testified the Tribe determines whether a child is eligible for enrollment in the Tribe. She further testified that Meskwaki Family Services does not determine whether a child is eligible or is actually enrolled in the Tribe. This case is unlike *In re S.N.R.*, 617 N.W.2d 77 (Minn. Ct. App. 2000). In *S.N.R.*, a delegation of membership determinations had been made by a reservation tribal counsel for purposes of implementing the ICWA. *Id.* at 84. Here, no evidence was presented that the Tribe made any determination that these children were eligible for membership in the Tribe. Further, it is noted that the children's mother, a member of the Tribe, testified that the Tribe requires enrollment through the father. Beall-Thomas confirmed the enrollment system for the Tribe was patrilineal. It was undisputed that neither of the children's fathers were members of the Tribe.

[4] Because we conclude the ICWA is inapplicable to this case and the juvenile court correctly denied the Tribe's motion to intervene, we need not and do not address the remaining grounds urged by the Tribe for reversal of the court's ruling.