STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JUSTINE RAMIREZ and JAYDEN RAMIREZ, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TARA PANNILL,

Respondent-Appellant.

UNPUBLISHED
April 27, 2004

No. 251956
Kent Circuit Court
Family Division
LC No. 03-006500-NA

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to the minor children under MCL 712A.19b(3)(b)(*ii*) and (j). We conditionally affirm the trial court's order and remand the matter for the purpose of complying with the provisions of the Indian Child Welfare Act (ICWA).

Respondent first argues that the trial court clearly erred in finding that the statutory grounds for termination were established. We disagree. The evidence established that one of the minor children suffered multiple skull fractures when respondent, who had been drinking, left her children unattended in a running motor vehicle. Respondent had several opportunities to avoid the injuries to her child. Further, there was evidence to support a finding that there was a reasonable likelihood that the children would suffer injury in the foreseeable future if placed with respondent. Respondent's neglect of her children was directly related to her alcohol dependency. Respondent required intensive and prolonged treatment to address this dependency. Respondent refused to seek and benefit from alcohol abuse treatment. Because respondent had failed to overcome her alcohol addiction, the children would continue to be put at risk in her care. Based upon the evidence, the trial court did not clearly err in finding that MCL 712A.19b(3)(b)(*ii*) and (j) were established by clear and convincing evidence.

Further, the evidence did not show that termination of respondent's parental rights was clearly not in the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Pursuant to MCL 712A.19b(5), if the court finds that there are grounds for terminating parental rights, termination shall be ordered, unless the court finds that

termination of parental rights is not in the child's best interests. The only evidence that respondent relies upon in support of her contention that termination would not be in the children's best interests is her claim that she loved her children and that a bond existed between them. This maternal love and familial bond should not be elevated to such significance that it compels one to ignore the significant and likely risk of injury should the children be returned to their mother's care. Such a result would completely nullify the protection afforded by the statutory provisions permitting termination of parental rights. Moreover, this love and the bond that respondent clings to were not so strong that they motivated respondent to address and overcome her alcohol abuse and take on the responsibility of parenting her children safely.

Next, respondent argues the trial court applied the wrong legal standard when considering the best interests of the children. Clearly, the trial court improperly stated that the burden of production falls upon the respondent to establish that termination would not be in the children's best interests. Indeed, the trial court relied upon language from *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997), that was specifically rejected by our Supreme Court in *In re Trejo*, 462 Mich 341, 343; 612 NW2d 407 (2000). However, although the trial court misstated the law, reversal is not warranted because such error was harmless. It is apparent from the trial court's own language that its decision did not turn on which party had the burden of producing evidence, but rather on a determination that there was no evidence in the entire record establishing that termination of respondent's parental rights was clearly not in the children's best interests. Because the error was harmless, the refusal to reverse based on this error is not inconsistent with substantial justice. See MCR 3.902(A) and MCR 2.613(A).

Next, respondent argues that the prosecutor's in-chambers reference to alleged cocaine use by respondent, for which evidence was not presented at the hearing, constituted prosecutorial misconduct and required that the trial court recuse itself. We disagree.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court decides issues of prosecutorial misconduct on a case-by-case basis, reviewing the pertinent portion of the record and examining the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Moreover, a judge will not be disqualified based on a claim of bias or prejudice absent actual personal bias or prejudice against a party or the party's attorney. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). In this case, there is nothing to support a finding that respondent was denied a fair or impartial trial or that the trial court was personally biased because of the statements. Indeed, the primary basis on which the trial court terminated parental rights was respondent's alcohol dependency.

Finally, respondent contends that the trial court failed to properly address the issue of the children's eligibility for membership in an Indian tribe. 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).[1] An "Indian child" is defined

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[1] 25 USC 1912(a) provides:

> 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

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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 any Indian tribe." 25 USC 1903(4). 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, MCR 3.965(B)(9) requires that a 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*, 245 Mich App 181, 187; 628 NW2d 570 (2001). If the court determines that the child or parent meets the criteria, the court must comply with the procedures set forth in MCR 3.980. This court rule provides, among other things, that the petitioner comply with the notice requirements of the ICWA. MCR 3.980(A)(2).

In this case, the record is insufficient to determine whether the trial court complied with the statutory requirements. At the hearing on July 8, 2003, FIA worker Amy Cyrus testified that respondent represented that her grandfather was Native American. Then Cyrus testified that letters had been sent to MICWA and that she received a response from MICWA that "they have not heard from the Little River Band of Potawatomi Indians." Because the issue of tribal membership had been raised, the hearing on July 8, 2003, did not go beyond adjudication but was adjourned until July 14, 2003. Then, on July 14, 2003, the hearing did not go forward because the issue of tribal membership had yet to be resolved. The prosecutor stated that "we have not received a determination from the Michigan Indian Child Welfare Agency as to whether or not they wish to be involved in the proceedings." Finally, on September 23, 2003, the termination hearing went forward. At that time, no specific reference was made to the ICWA. Based upon the existing record, it does not appear that FIA letters to the MICWA were sufficient to comply with the ICWA.

In *In the Matter of IEM*, 233 Mich App 438, 448; 592 NW2d 751 (1999), this Court deemed efforts by the FIA, *similar to those made in this case*, to be insufficient:

> Because the probate court had reason to believe IEM had some unspecified Indian heritage, the FIA was required to send notice of the probate court proceedings and of the applicable tribe's right of intervention through registered mail, return receipt requested to the Secretary of the Interior. 25 USC 1912(a); MCR 5.980(A)(2). *The lower court record, however, does not reflect that the FIA subsequently pursued the matter. The FIA includes in its brief on appeal a document requesting a determination regarding IEM's possible tribal affiliation that it allegedly sent to the Michigan Indian Child Welfare Agency, and*

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> placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identify or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe.

> *notes that it made a telephone call to the local Odawa Indian Tribe. These efforts by the FIA fall far short of satisfying the ICWA's notice requirements. First, no indication exists that the FIA sent the document by registered mail, return receipt requested. 25 USC 1912(a). Second, the document was not correctly addressed to the Secretary of the Interior.* [Emphasis added.]

Because it does not appear that petitioner complied with the ICWA's notice requirements, a remedy must now be fashioned. Since, as we discussed above, the trial court properly terminated respondent's parental rights according to Michigan law, we conclude that we need not reverse the trial court's order of termination. This Court has held that 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. *In re IEM,* 233 Mich App 438, 450; 592 NW2d 751 (1999). Instead, the remedy adopted in *IEM* was to "conditionally affirm the [trial] court's termination order" but remand the matter so that the court and the FIA may provide proper notice to the interested tribe." *Id.* We will follow the remedy fashioned in *IEM, supra,* in this case.

Accordingly, if after proper notice, pursuant to 25 USC 1912(a) and MCR 3.980, the tribe does not seek to intervene, or, after intervention, the trial court concludes that the ICWA does not apply, the original order will stand. If the ICWA applies, further proceedings consistent with the ICWA will be necessary.

We conditionally affirm the order terminating respondent's parental rights, but remand for the purpose of providing proper notice to any interested Indian tribe pursuant to the ICWA. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens